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CASES ARGUED AND DETERMINED

IN THE

CIRCUIT COURTS OF APPEALS AND CIRCUIT  
AND DISTRICT COURTS OF THE  
UNITED STATES.

PERMANENT EDITION

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MAY—AUGUST, 1892.

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JURISPRUDENCE

# AMENDMENTS TO RULES.

## SUPREME COURT OF THE UNITED STATES.

Ordered, that all parts of rule 67 of the rules of practice for the courts of equity of the United States, as now existing, be, and the same are hereby, superseded, and the following rule is promulgated as such rule 67:

67. After the cause is at issue, commissions to take testimony may be taken out in vacation as well as in term, jointly by both parties, or severally by either party, upon interrogatories filed by the party taking out the same in the clerk's office, ten days' notice thereof being given to the adverse party to file cross interrogatories before the issuing of the commission; and, if no cross interrogatories are filed at the expiration of the time, the commission may issue *ex parte*. In all cases the commissioner or commissioners may be named by the court or by a judge thereof; and the presiding judge of the court exercising jurisdiction may, either in term time or in vacation, vest in the clerk of the court general power to name commissioners to take testimony.

Either party may give notice to the other that he desires the evidence to be adduced in the cause to be taken orally, and thereupon all the witnesses to be examined shall be examined before one of the examiners of the court, or before an examiner to be specially appointed by the court. The examiner, if he so request, shall be furnished with a copy of the pleadings.

Such examination shall take place in the presence of the parties or their agents, by their counsel or solicitors, and the witnesses shall be subject to cross-examination and re-examination, all of which shall be conducted as near as may be in the mode now used in common-law courts.

The depositions taken upon such oral examination shall be reduced to writing by the examiner, in the form of question put and answer given: provided, that by consent of parties the examiner may take down the testimony of any witness in the form of narrative.

At the request of either party, with reasonable notice, the deposition of any witness shall, under the direction of the examiner, be taken down either by a skillful stenographer or by a skillful typewriter, as the examiner may elect, and, when taken stenographically, shall be put into typewriting or other writing: provided, that such stenographer or typewriter has been appointed by the court, or is approved by both parties.

The testimony of each witness, after such reduction to writing, shall be read over to him, and signed by him in the presence of the examiner and of such of the parties or counsel as may attend: provided that, if the witness shall refuse to sign his deposition so taken, then the examiner shall sign the same, stating upon the record the reasons, if any, assigned by the witness for such refusal.

The examiner may, upon all examinations, state any special matters to the court as he shall think fit; and any question or questions which may be objected to shall be noted by the examiner upon the deposition, but he shall not have power to decide on the competency, materiality, or relevancy of the questions; and the court shall have power to deal with the costs of incompetent, immaterial, or irrelevant depositions, or parts of them, as may be just.

In case of refusal of witnesses to attend, to be sworn, or to answer any question put by the examiner, or by counsel or solicitor, the same practice

shall be adopted as is now practiced with respect to witnesses to be produced on examination before an examiner of said court on written interrogatories.

Notice shall be given by the respective counsel or solicitors to the opposite counsel or solicitors or parties of the time and place of the examination, for such reasonable time as the examiner may fix by order in each cause.

When the examination of witnesses before the examiner is concluded, the original depositions, authenticated by the signature of the examiner, shall be transmitted by him to the clerk of the court, to be there filed of record, in the same mode as prescribed in section 865 of the Revised Statutes.

Testimony may be taken on commission in the usual way, by written interrogatories and cross interrogatories, on motion to the court in term time, or to a judge in vacation, for special reasons, satisfactory to the court or judge.

Where the evidence to be adduced in a cause is to be taken orally, as before provided, the court may, on motion of either party, assign a time within which the complainant shall take his evidence in support of the bill, and a time thereafter within which the defendant shall take his evidence in defense, and a time thereafter within which the complainant shall take his evidence in reply; and no further evidence shall be taken in the cause, unless by agreement of the parties, or by leave of court first obtained, on motion for cause shown.

The expense of the taking down of depositions by a stenographer and of putting them into typewriting or other writing shall be paid in the first instance by the party calling the witness, and shall be imposed by the court, as part of the costs, upon such party as the court shall adjudge should ultimately bear them.

Promulgated May 2, 1892.

# COURT RULES.

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## CIRCUIT COURT OF APPEALS.

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### First Circuit.

#### PRINTED COPIES OF ORDERS, ETC., TO BE SENT TO JUDGES.

Ordered, that whenever any rule or order of a general nature is entered, or an opinion filed, the clerk shall forthwith forward a printed copy thereof to the justice of the supreme court assigned to the first circuit, and to each of the circuit and district judges therein.

### Second Circuit.

It is hereby ordered that rule 23 of this court be amended so as to read as follows:

On the filing of the transcript, in every case, the clerk shall forthwith cause 15 copies of the same to be printed, and shall furnish 3 copies thereof to each party, at least 30 days before the argument, and shall file 9 copies thereof in his office. The parties may stipulate in writing that parts only of the record shall be printed, and the case may be heard on the parts so printed, but the court may direct the printing of other parts of the record. The clerk shall be entitled to demand of the appellant, or plaintiff in error, the cost of printing the record, before ordering the same to be done. If the record shall not have been printed when the case is reached for argument, for failure of a party to advance the costs of printing the case may be dismissed. In case of reversal, affirmance, or dismissal, with costs, the amount paid for printing the record shall be taxed against the party against whom costs are given.

It is further ordered that section 1 of rule 24 be amended so as to read as follows:

1. The counsel for the plaintiff in error, or appellant, shall file with the clerk of this court, at least 20 days before the case is called for argument, 10 copies of a printed brief, one of which shall, on application, be furnished to each of the counsel engaged upon the opposite side.

It is further ordered that section 3 of rule 24 be amended so as to read as follows:

3. The counsel for a defendant in error, or an appellee, shall file with the clerk, at least 10 days before the case is called for hearing, 10 copies of his printed brief, one of which shall, on application, be furnished to each of the counsel on the opposite side. His brief shall be of a like character with that required of the plaintiff in error, or appellant, except that no specification of errors shall be required, and no statement of the case, unless that presented by the plaintiff in error, or appellant, is controverted.

October 19, 1891.

v.50F.

(vii)

The following are the rules in admiralty adopted on July 1, 1892:

### Rule I.

#### APPEALS AND NEW PLEADINGS.

An appeal to the circuit court of appeals shall be taken by filing in the office of the clerk of the district court, and serving on the proctor of the adverse party, a notice signed by the appellant or his proctor, that the party appeals to the circuit court of appeals from the decree complained of.

If the appellant desires to make new pleadings, or take new evidence on the appeal, his notice of appeal must so state. If the notice does not so state, the appeal shall be heard on the pleadings and evidence in the district court, unless the appellate court, on motion, otherwise order.

### Rule II.

#### NOTICE AND BOND.

Section 1. When a notice of appeal is served, the appellant shall file in the clerk's office of the district court a bond for costs of the appeal, with sufficient surety in the sum of \$250, conditioned that the appellant shall prosecute his appeal to effect, and pay the costs if the appeal is not sustained. Such security shall be given within ten days after filing the notice, or the appeal shall be deemed abandoned, and the decree of the court below enforced, unless otherwise ordered by a judge of this court.

Sec. 2. And if the appellant desires to stay the execution of the decree of the court below, the bond which he shall give shall be a bond with sufficient surety in such further sum as the judge of the district court or a judge of this court shall order, conditioned that he will abide by and perform whatever decree may be rendered by this court in the cause, or on the mandate of this court by the court below.

Sec. 3. The appellant shall, on filing either of such bonds, give notice of such filing, and of the names and residence of the sureties, and if the appellee, within two days, excepts to the sureties, they shall justify, on notice, within two days after such exception.

### Rule III.

#### REVIEW IN PART ONLY.

The appellant may also, at his option, state in his notice of appeal that he desires only to review one or more questions involved in the cause, which questions must be clearly and succinctly stated; and he shall be concluded in this behalf by such notice, and the review upon such an appeal shall be limited to such question or questions.

### Rule IV.

#### APOSTLES ON APPEAL TO CONTAIN.

Section 1. The apostles, on an appeal to this court, shall, in cases where a general notice of appeal is served, consist of the following:

(1) A caption exhibiting the proper style of the court and the title of the cause, and a statement showing the time of the commencement of the suit; the names of the parties, setting forth the original parties, and those who have become parties before the appeal, if any change has taken place; the several dates when the respective pleadings were filed; whether or not the de-

fendant was arrested, or bail taken, or property attached or arrested, and, if so, an account of the proceedings thereunder; the time when the trial was had, and the name of the judge hearing the same; whether or not any question was referred to a commissioner or commissioners, and, if so, the result of the proceedings and report thereon; the date of the entry of the interlocutory and final decrees; and the date when the notice of appeal was filed.

(2) All the pleadings, with the exhibits annexed thereto.

(3) All the testimony and other proofs adduced in the cause.

(4) The interlocutory decree, and any order of the court which appellant may desire to have reviewed on the appeal.

(5) Any report of a commissioner or commissioners, to which exception may have been taken, with the order or orders of the court respecting the same, and the exceptions to the report, and so much of the testimony taken in the proceeding as may be necessary to a review of the exceptions.

(6) All opinions of the court, whether upon interlocutory questions or finally deciding the cause; and

(7) The final decree, and the notice of appeal.

Sec. 2. All other papers shall be omitted unless otherwise ordered by the judge who heard the cause.

Sec. 3. Where the appellant shall appeal specially, and seek only to review one or more questions involved in the cause, the apostles may, by stipulation between the proctors for the respective parties, contain only such papers and proceedings and evidence as are necessary to review the questions raised by the appeal.

### Rule V.

#### CERTIFYING RECORDS.

The appellants shall, within thirty days after giving notice of appeal, procure to be filed in this court the apostles certified by the clerk of the district court, or, in case of a special appeal, the stipulated record, with the certification by the said clerk of all papers contained therein on file in his office.

### Rule VI.

#### IF APPEARANCE OF APPELLEE NOT ENTERED.

If the appellee does not cause his appearance to be entered in this court within ten days after service on his proctor of notice that the apostles are filed in this court, the appellant may proceed *ex parte* in the cause, and have such decree as the nature of the case may demand.

### Rule VII.

#### NEW ALLEGATIONS, ETC.

Upon sufficient cause shown, this court, or any judge thereof, may allow either appellant or appellee to make new allegations, or pray different relief, or interpose a new defense, or take new proofs. Application for such leave must be made within fifteen days after the filing of the apostles, and upon at least four days' notice to the adverse party.

### Rule VIII.

#### NEW PLEADINGS—NEW TESTIMONY.

If leave be granted to make new allegations, pray different relief, or interpose a new defense, the moving party shall, within ten days thereafter, serve

such new pleading, duly verified, on the adverse party, who shall, if such pleading be a libel, within twenty days answer on oath.

If leave be given to take new testimony, the same may be taken and filed within thirty days after the entry of the order granting such leave, and the adverse party may take and file counter testimony within twenty days after such filing.

#### Rule IX.

##### NEW TESTIMONY—HOW TAKEN.

Such testimony shall be taken by deposition before any United States commissioner or notary public, upon reasonable notice in writing given to the opposite party; or by commission issued out of this court, with interrogatories annexed. Upon proper cause shown, the court may grant an open commission.

#### Rule X.

##### PRINTING NEW PLEADINGS AND TESTIMONY.

If new pleadings are filed or testimony taken in this court, the same shall also be printed and furnished by the clerk, as in the 23d General Rule provided.

#### Rule XI.

##### MOTIONS.

All motions shall be made upon at least four days' notice.

#### Rule XII.

##### WRIT OF INHIBITION.

A writ of inhibition may be awarded by this court on motion of the appellant, to stay proceedings in the court below, when circumstances require.

#### Rule XIII.

##### MANDAMUS.

A *mandamus* may, in like manner, be obtained, to compel a return of the apostles when unreasonably delayed by the clerk or court below.

#### Rule XIV.

##### CASES TO BE PLACED ON DOCKET.

Each case shall be placed on the docket as soon as the printing is completed by the clerk.

#### Rule XV.

##### BRIEFS.

Section 1. Counsel for the appellant shall file with the clerk of this court, at least twenty days before the case is called for argument, ten copies of a printed brief, and shall, at the same time, serve two copies thereof on the proctors of record, or on the counsel engaged upon the opposite side. This brief shall contain, in order here stated:

(1) A statement of the nature of the appeal, the court from which the ap-



peal is taken, and a concise abstract or statement of the case, presenting succinctly the questions involved, and the manner in which they were raised.

(2) If the pleadings have been amended in this court, or new proofs have been taken, it shall be stated what amendments have been made, and in what respect the new proofs have changed, or tended to change, the case as made in the court below.

(3) A brief of the argument, exhibiting a clear statement of the points of law or fact to be discussed, with a reference to the folios of the record or to the numbers of the questions, and the authorities relied upon in support of each point.

Sec. 2. The counsel for the appellee shall file with the clerk of the court ten printed copies of his brief, and serve two copies thereof at least ten days before the case is called for argument. His brief shall be of a like character with that required of the appellant, and, in case new proofs are taken on behalf of the appellee, the brief shall so state, and wherein the new proofs have changed the case as made in the court below.

Sec. 3. The reasonable expense of printing briefs shall be an item of taxable costs.

### Rule XVI.

#### MANDATES.

The decrees of this court shall direct that a mandate issue to the court below.

The form of such mandate shall be settled on not less than two days' notice.

### Rule XVII.

#### EXTENSION OF TIME.

The time specified in the foregoing rules for any proceeding may be extended by order of a judge of this court.

### Rule XVIII.

#### WHEN RULES OF DISTRICT COURTS TO APPLY.

In all matters in civil causes of admiralty and maritime jurisdiction, not expressly provided for by the foregoing rules of this court, the rules of practice of the district court of the district in which the cause was decided, being in force at the time, (not being inconsistent with these rules,) will be adopted so far as may seem proper.

### Fourth Circuit.

A circular issued by the clerk of the court relative to the jurisdiction and practice of the court is published below:

CLERK'S OFFICE, UNITED STATES CIRCUIT COURT OF APPEALS—FOURTH CIRCUIT.

RICHMOND, July 1, 1892.

In taking appeals and writs of error, and in making up the transcripts of record to this court, it is necessary that some uniform method shall be followed. Owing to the diverse local practice in the several states of the circuit, there cannot be uniformity while such local practice is adhered to in merely matters of form, and in many respects the federal practice is different from the state practice. Attorneys, clerks, and others are constantly making inquiries concerning these differences, and other matters of practice adopted by this office in carrying out the rules of the court. To perfect and make uniform the practice, as near as may be, I issued (with the sanction of the court) my circular of March 1, 1892. The beneficial results already obtained

have been marked. With the new addition of the rules, which contains all the amendments to date, I have printed, with some slight changes and additions, the matter, information, and directions contained in that circular.

HENRY T. MELONEY, Clerk.

#### JURISDICTION OF THE CIRCUIT COURT OF APPEALS.

All appeals from any of the circuit or district courts must be taken directly to the circuit court of appeals, excepting cases in which the jurisdiction of the court is in issue; of decrees in prize causes; of conviction of a capital or otherwise infamous crime; involving the construction or application of the constitution of the United States; the constitutionality of any law or the validity or construction of any treaty of the United States; or where the constitution or law of a state is claimed to be in contravention of the constitution of the United States. All cases comprised within these exceptions must be appealed directly from the lower court to the supreme court. In all other cases, such as where the jurisdiction of the lower court is dependent upon the opposite parties to the suit being aliens or citizens of different states, cases arising under the patent laws, the revenue laws, the criminal laws, and admiralty cases, the appeal must go directly to the circuit court of appeals, and the decision of that court is final. But the circuit court of appeals may in any case certify to the supreme court any question of law concerning which it desires the instruction of that court for its proper decision, and in such case the supreme court may either give its instruction, which shall be binding, or may require the whole record to be sent up, and decide the whole matter. And it is also competent for the supreme court to require, by *certiorari* or otherwise, any such case to be certified to it for its review. In all cases not above specified as being made final in the circuit court of appeals, the right to an appeal to or writ of error from the supreme court within one year is given where the matter in controversy exceeds \$1,000. Provision is also made for appeals to the circuit court of appeals from interlocutory orders or decrees of the lower courts in equity, where an injunction may be granted or continued; but the appeal must be taken within 30 days, and such an appeal takes precedence in the appellate court. The right of appeal in all cases to the circuit court of appeals is limited to six months after the entry of the judgment or decree, except where a less time is limited by the law existing at the time of the passage of the act.

#### METHOD OF TAKING APPEALS.

Writs of error and citations are no longer made returnable to the term day of the appellate court, but are made returnable not exceeding 30 days from the day of signing the citation, whether that day, which is the return day, fall in vacation or in term time; and the record must be filed in the clerk's office of this court before the return day, unless the time be enlarged as provided in section 1 of rule 16. In that case the order of enlargement must be filed with the clerk of this court. Rule 11, entitled "Assignment of Errors," requires the plaintiff in error, or appellant, to file with the court below with his petition for the writ of error or appeal, an assignment of errors, etc. This practically abolishes the necessity of pursuing the old method of praying appeals in "open court;" and all appeals and writs of error should be prayed for by petition in writing addressed to the court below, or to the judge in vacation, who allows the writ or the appeal, by an order in writing, approves the appeal or *supersedes* bond, and signs the citation. In cases brought up by writ of error, from either the circuit or district courts, the clerk of the circuit court or the clerk of this court issues the writ of error, which writ fixes the return day of the writ to this court, and the citation should bear the same return day. But in cases of appeal (in admiralty or in equity) the citation alone fixes the return day.

All appeals, therefore, whether by writ of error or appeal, should hereafter be taken in the following manner:

(1) Petition in writing for the appeal, or writ of error, addressed to the court below, or the judge thereof in vacation.

(2) The petition must be accompanied with an assignment of errors, and a prayer for reversal.

(3) Appeal or writ of error bond, approval thereof, and the signing of the citation by the judge allowing the appeal or writ.

(4) Order in writing of the judge allowing the writ of error or appeal.

(5) Issuing the writ of error by the clerk of the circuit court or of this court.

(6) In case it is desired to have the writ of error issued by the clerk of this court, a certified copy of the petition and order allowing the writ, under the seal of the court, with a fee of \$5 for issuing it, must be transmitted to the clerk of this court, and the writ will be issued and forwarded to the clerk of the court below.

All of the above papers and proceedings should be filed with the clerk of the lower court, and incorporated into and certified up in the record by him to this court, except the writ of error and the citation, the originals of which, after having been duly served, must be attached to and bound in the record at their respective places. (For service of writ of error, see section 1007, Rev. St.) Rules of this court, blank writs of error, appeal and *supersedeas* bonds, citations, and orders of appearance, may be had of the clerks of the lower courts, or of the clerk of this court, upon application.

#### MAKING UP RECORDS.

In making up a transcript of the record, clerks are requested to make a distinct title or heading to each paper or proceeding copied into the record, with the date of filing the same, or the date of such proceeding, and to write upon but one side of the paper, in a clear, legible hand; and a complete index should be made and attached to the record, at the beginning of it. In order to have uniformity, records should be commenced with the style and the term of the court at which the final judgment or decree is entered, after the following form:

The United States of America, ———,

District of ———, to wit:

At a circuit (or district) court of the United States for the ——— district of ———, begun and held at the courthouse in the city of ——— on the first Monday of ———, being the ——— day of the same month, in the year of our Lord one thousand eight hundred and ninety ———.

Present: The Honorable ———,  
Circuit Judge.  
or  
Judge of the ——— District  
of ———. }

Among other were the following proceedings, to wit:

A. B.	}	In Equity (or)
vs.		In Admiralty (or)
C. D.		At Law.

Bill of Complaint (or)

Libel (or)

Declaration (or Complaint)

Filed, ———, 189—, (date of filing.)

(Copy same, with indorsements, and any accompanying papers and exhibits, and so on with every paper or proceeding in the case.) Every paper or proceeding should have a distinct heading or title of what it is that follows

under it, and the date of the filing of the paper, or of the proceeding. A complete record, as required by rule 14, must be made in all cases, (for record in admiralty cases, see section 6 of that rule;) but as to the general order of making up a record, the following examples are given:

IN EQUITY.	IN ADMIRALTY.	AT LAW.
1. Style of court as above.	1. Style of court.	1. Style of court.
2. Bill of complaint, etc.	2. Libel.	2. Declaration.
3. Process.	3. Process.	3. Process.
4. Marshal's return.	4. Marshal's return.	4. Marshal's return.
5. Answer.	5. Claim.	5. Plea or demurrer, etc.
6. Replication.	6. Stipulation.	6. Joining of issue.
7. Testimony and exhibits for complainant.	7. Answer.	7. Impanelling jury.
8. Testimony and exhibits for defendant.	8. Testimony and exhibits for libellant.	8. Verdict.
9. Testimony and exhibits in rebuttal, (if any.)	9. Testimony and exhibits for respondent.	9. Judgment.
10. Opinion.	10. Testimony and exhibits in rebuttal, (if any.)	10. Bill of exceptions.
11. Decree.	11. Opinion.	11. Petition for writ of error.
12. Petition for appeal.	12. Decree.	12. Assignment of errors.
13. Assignment of errors.	13. Petition for appeal.	13. Bond and approval.
14. Appeal bond and approval.	14. Assignment of errors.	14. Order allowing writ.
15. Order allowing appeal.	15. Appeal bond and approval.	15. Writ of error.
16. Citation.	16. Order allowing appeal.	16. Citation.
17. Clerk's certificate.	17. Citation.	17. Clerk's certificate.
	18. Clerk's certificate.	

The numerical order of the above list of proceedings may be transposed whenever the local practice of the state has a different order. While a full record is necessary, yet it is expected that counsel on both sides will exercise care that no matter not necessary to a full and complete review of the case shall be put into the record. Whenever any agreement shall be entered into by counsel with regard to the making up or the printing of the record under rule 23, the agreement must be copied into the record. All records are transmitted to the appellate court by order of the court below; and if such order is not expressed in writing, it is implied, and the clerk should always enter immediately preceding his certificate the following order:

"And thereupon it is ordered by the court here that a transcript of the record and proceedings in the cause aforesaid, together with all things thereunto relating, be transmitted to the said United States circuit court of appeals for the fourth circuit; and the same is transmitted accordingly.

"Teste: \_\_\_\_\_, Clerk."

Then comes the general certificate of the clerk, with the seal of the court in the usual form, that the foregoing is a full and true record, etc. Of course, it is impossible to give information and directions to cover the details of every case, for there are not two cases alike; but the above does cover the substantial parts of every case.

#### DOCKETING CASES AND PRINTING RECORDS.

Upon a record being filed, the case is docketed and put upon the calendar for argument at the next term or adjourned term occurring thereafter, provided the record has been or can be printed 20 days before the said term or adjourned term. Counsel transmitting a record to this court must accompany the same with an order for their appearance for the appellant or plaintiff in error, and also with a deposit of \$25 for account of costs of this court. The clerk of this court will, immediately upon a record being filed without having been printed under rule 23, send to the counsel an estimate of the cost of printing, the amount of which must be deposited before the record will be printed. In case records are printed by counsel before filing the same, they should be printed strictly in accordance with rule 26. A headline at the top of each page, containing the title of the case, should also be printed in the

records, so that, when bound in volumes, there shall be, not only uniformity in appearance and style, but the eye will be enabled to catch the particular case at once upon opening the volume. It is also important that the records should be made up and forwarded to this office as promptly as possible after the appeal or writ is allowed, and not held until the near approach of the next term; especially so when the records are to be printed after filing. It will enable the printer to give more time and attention to the printing, and insure the cases being ready, and the work more correctly done. No record, when once filed, can be withdrawn for the purpose of having it printed elsewhere.

### **Fifth Circuit.**

In the circuit court of appeals for the fifth circuit the following order has been made:

#### **ASSIGNMENT OF CASES FOR HEARING.**

Thirty days prior to the opening of the regular session of the court the clerk is directed to assign cases for hearing during the first month of the term at the rate of two cases per day for the first three days of each week.

Any cases entitled by law to preference in hearing shall be first assigned, and thereafter causes shall be grouped by states, and assignments made, so as to permit the hearing of causes from one state before the causes from the next state in order shall be called.

### **Eighth Circuit.**

Ordered, that rule 3 of the rules of this court be, and the same is hereby, amended so that the same shall read as follows:

#### **3.**

#### **TERMS.**

One term of this court shall be held annually at the city of St. Louis, Missouri, on the first Monday in December, and one term of this court shall be held annually at the city of St. Paul, Minnesota, on the first Monday of May; and such terms of said court may be adjourned to such times as the court may, from time to time, designate.

Promulgated June 20, 1892.

Ordered, that rule 7 of this court be, and the same is, amended by adding thereto the following, to wit:

2. And any attorney and counselor admitted to practice in the courts of highest original jurisdiction in the states and territories of this circuit, or in the supreme courts of such states and territories, or in the district or circuit courts of the United States for this circuit, will be admitted to practice and enrolled as an attorney and counselor of this court upon furnishing to the clerk of this court a certificate of a clerk or judge of any one of the courts named that the applicant is an attorney of any one of said courts, and upon subscribing and forwarding to the clerk the following oath: "I do solemnly swear (or affirm) that I will demean myself as an attorney and counselor of

the circuit court of appeals for the eighth circuit, uprightly and according to law, and that I will support the constitution of the United States. So help me God."

Promulgated June 27, 1892.

Ordered, that rule 23 of the rules of this court be, and the same is hereby, amended so as to read as follows:

## 23.

### PRINTING RECORDS.

1. The plaintiff in error or appellant may, within 20 days after the allowance of any writ of error or appeal, serve on the adverse party a copy of a statement of the parts of the record which he thinks necessary for the consideration of the errors assigned, and file the same, with proof of service thereof, with the clerk of this court. The adverse party, within 20 days thereafter, may designate in writing, and file with the clerk, additional parts of the record which he thinks material; and if he shall not do so, he shall be held to have consented to a hearing on the parts designated by the plaintiff in error or appellant. If parts of the record shall be so designated by one or both of the parties, the clerk shall print those parts only, and the court will consider nothing but those parts of the record in determining the questions raised by the errors assigned. If at the hearing it shall appear that any material part of the record has not been printed, the writ of error or appeal may be dismissed, or such other order made as the circumstances may appear to the court to require. If the defendant in error or appellee shall have caused unnecessary parts of the record to be printed, such order as to costs may be made as the court shall think proper.

2. On the filing of the transcript in every case the clerk shall cause the same, or the parts thereof designated under this rule, to be printed, and shall furnish three copies of the record so printed to each party at least 30 days before the argument.

3. The clerk shall be entitled to demand of the appellant or plaintiff in error the cost of printing the record before ordering the same to be done.

4. If the record shall not have been printed when the case is reached for argument, for failure of a party to advance the costs of printing, the case may be dismissed.

5. In case of reversal, affirmance, or dismissal with costs, the amount paid for printing the record shall be taxed against the party against whom costs are given.

Promulgated June 20, 1892.

## Ninth Circuit.

July 29, 1892, the following amendments, etc., to the rules were made:

Rule 24. Strike out the word "six," in subdivision 1, and insert the word "fifteen" in lieu thereof. Strike out the word "three," in subdivision 3, and insert the word "five" in lieu thereof.

Rule 26. All records, arguments, and briefs printed for the use of the court must be printed on unruled, white writing paper, nine and one quarter inches long and six and one quarter inches wide. The printed page, exclusive of any marginal note, reference, or running head, must be seven and

one quarter inches long and four and three-eighths inches (26 ems) wide, and the record must be properly indexed. Pica solid is the only mode of composition allowed.

Rule 17. The clerk shall, upon payment to him by the appellant or plaintiff in error of a deposit fee of twenty-five dollars in each case, enter upon the docket all cases brought, etc. (See rule 17.)

Rule 35, (adopted:)

#### ASSIGNMENT OF CAUSES FOR HEARING.

Thirty days prior to the opening of any session or meeting of the court, the clerk is directed to assign causes for hearing, at the rate of one case per day for the first five days of each week. Causes shall be grouped by states, and assignments made so as to permit the hearing of causes from one state before the causes from the next state in order shall be called; causes from the northern district of California shall be assigned for hearing last. Any causes entitled by law to preference in hearing shall be first assigned, and take precedence over other causes from the same state.

For rules 1-33 of the supreme court, see 3 Sup. Ct. Rep. v.-xvii.; for rule 8, subd. 5, and rule 9, subds. 1, 2, 4, see 44 Fed. Rep. iii.; for rule 10, § 9, see 7 Sup. Ct. Rep. iii.; for rule 23, subd. 4, see 10 Sup. Ct. Rep. iii.; for rule 26, § 2, see 9 Sup. Ct. Rep. iii.; for rule 32, see 10 Sup. Ct. Rep. iii.; for rules 33, 34, see 6 Sup. Ct. Rep. iii.; for rules 35-38, see 46 Fed. Rep. iii., iv.; for rules 1-34 of each of the nine circuit courts of appeals, see 47 Fed. Rep. iii.-xiv.; for rules 3, 23, 24, 26, of the circuit court of appeals, fourth circuit, see 48 Fed. Rep. iii., iv.; for rules 35, 36, of the circuit court of appeals, seventh circuit, see 48 Fed. Rep. iv., v.; for rule 1 in reference to appeals from court of claims, see 2 Sup. Ct. Rep. vi.; for rule 54 of the rules of admiralty practice, see 45 Fed. Rep. iii.; for rule 57 of the rules of admiralty practice, see 9 Sup. Ct. Rep. iii.

v.50F.—b

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FEDERAL REPORTER, VOLUME 50.

## JUDGES

OF THE

### UNITED STATES CIRCUIT COURTS OF APPEALS AND THE CIRCUIT AND DISTRICT COURTS.

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#### FIRST CIRCUIT.

HON. HORACE GRAY, CIRCUIT JUSTICE.  
HON. LE BARON B. COLT, CIRCUIT JUDGE.  
HON. WILLIAM L. PUTNAM, CIRCUIT JUDGE.<sup>1</sup>  
HON. NATHAN WEBB, DISTRICT JUDGE, MAINE.  
HON. EDGAR ALDRICH, DISTRICT JUDGE, NEW HAMPSHIRE.  
HON. THOMAS L. NELSON, DISTRICT JUDGE, MASSACHUSETTS.  
HON. GEORGE M. CARPENTER, DISTRICT JUDGE, RHODE ISLAND.

#### SECOND CIRCUIT.

HON. SAMUEL BLATCHFORD, CIRCUIT JUSTICE.  
HON. WILLIAM J. WALLACE, SENIOR CIRCUIT JUDGE.  
HON. E. HENRY LACOMBE, JUNIOR CIRCUIT JUDGE.  
HON. NATHANIEL SHIPMAN, CIRCUIT JUDGE.<sup>1</sup>  
HON. WILLIAM K. TOWNSEND, DISTRICT JUDGE, CONNECTICUT.  
HON. ALFRED C. COXE, DISTRICT JUDGE, N. D. NEW YORK.  
HON. ADDISON BROWN, DISTRICT JUDGE, S. D. NEW YORK.  
HON. CHARLES L. BENEDICT, DISTRICT JUDGE, E. D. NEW YORK.  
HON. HOYT H. WHEELER, DISTRICT JUDGE, VERMONT.

#### THIRD CIRCUIT.

HON. JOSEPH P. BRADLEY, CIRCUIT JUSTICE.<sup>2</sup>  
HON. MARCUS W. ACHESON, CIRCUIT JUDGE.  
HON. GEORGE M. DALLAS, CIRCUIT JUDGE.<sup>1</sup>  
HON. LEONARD E. WALES, DISTRICT JUDGE, DELAWARE.  
HON. EDWARD T. GREEN, DISTRICT JUDGE, NEW JERSEY.  
HON. WILLIAM BUTLER, DISTRICT JUDGE, E. D. PENNSYLVANIA.  
HON. JOSEPH BUFFINGTON, DISTRICT JUDGE, W. D. PENNSYLVANIA.

<sup>1</sup> Appointed March 17, 1892.

<sup>2</sup> Died Jan. 22, 1892.

## FOURTH CIRCUIT.

HON. MELVILLE W. FULLER, CIRCUIT JUSTICE.  
HON. HUGH L. BOND, CIRCUIT JUDGE.  
HON. NATHAN GOFF, CIRCUIT JUDGE.<sup>1</sup>  
HON. THOMAS J. MORRIS, DISTRICT JUDGE, MARYLAND.  
HON. AUGUSTUS S. SEYMOUR, DISTRICT JUDGE, E. D. NORTH CAROLINA.  
HON. ROBERT P. DICK, DISTRICT JUDGE, W. D. NORTH CAROLINA.  
HON. CHARLES H. SIMONTON, DISTRICT JUDGE, SOUTH CAROLINA.  
HON. ROBERT W. HUGHES, DISTRICT JUDGE, E. D. VIRGINIA.  
HON. JOHN PAUL, DISTRICT JUDGE, W. D. VIRGINIA.  
HON. JOHN J. JACKSON, JR., DISTRICT JUDGE, WEST VIRGINIA.

## FIFTH CIRCUIT.

HON. LUCIUS Q. C. LAMAR, CIRCUIT JUSTICE.  
HON. DON A. PARDEE, CIRCUIT JUDGE.  
HON. A. P. MCCORMICK, CIRCUIT JUDGE.<sup>1</sup>  
HON. JOHN BRUCE, DISTRICT JUDGE, M. AND N. D. ALABAMA.  
HON. HARRY T. TOULMIN, DISTRICT JUDGE, S. D. ALABAMA.  
HON. CHARLES SWAYNE, DISTRICT JUDGE, N. D. FLORIDA.  
HON. JAMES W. LOCKE, DISTRICT JUDGE, S. D. FLORIDA.  
HON. WILLIAM T. NEWMAN, DISTRICT JUDGE, N. D. GEORGIA.  
HON. EMORY SPEER, DISTRICT JUDGE, S. D. GEORGIA.  
HON. EDWARD C. BILLINGS, DISTRICT JUDGE, E. D. LOUISIANA.  
HON. ALECK BOARMAN, DISTRICT JUDGE, W. D. LOUISIANA.  
HON. HENRY C. NILES, DISTRICT JUDGE, N. AND S. D. MISSISSIPPI.  
HON. DAVID E. BRYANT, DISTRICT JUDGE, E. D. TEXAS.  
HON. JOHN B. RECTOR, DISTRICT JUDGE, N. D. TEXAS.  
HON. THOMAS S. MAXEY, DISTRICT JUDGE, W. D. TEXAS.

## SIXTH CIRCUIT.

HON. HENRY B. BROWN, CIRCUIT JUSTICE.  
HON. HOWELL E. JACKSON, CIRCUIT JUDGE.  
HON. WILLIAM H. TAFT, CIRCUIT JUDGE.<sup>1</sup>  
HON. JOHN WATSON BARR, DISTRICT JUDGE, KENTUCKY.  
HON. HENRY H. SWAN, DISTRICT JUDGE, E. D. MICHIGAN.  
HON. HENRY F. SEVERENS, DISTRICT JUDGE, W. D. MICHIGAN.  
HON. AUGUSTUS J. RICKS, DISTRICT JUDGE, N. D. OHIO.  
HON. GEORGE R. SAGE, DISTRICT JUDGE, S. D. OHIO.  
HON. D. M. KEY, DISTRICT JUDGE, E. AND M. D. TENNESSEE.  
HON. ELI S. HAMMOND, DISTRICT JUDGE, W. D. TENNESSEE.

<sup>1</sup> Appointed March 17, 1892.

## SEVENTH CIRCUIT.

HON. JOHN M. HARLAN, CIRCUIT JUSTICE.  
HON. WALTER Q. GRESHAM, CIRCUIT JUDGE.  
HON. WILLIAM A. WOODS, CIRCUIT JUDGE.<sup>1</sup>  
HON. HENRY W. BLODGETT, DISTRICT JUDGE, N. D. ILLINOIS.  
HON. WILLIAM J. ALLEN, DISTRICT JUDGE, S. D. ILLINOIS.  
HON. JOHN H. BAKER, DISTRICT JUDGE, INDIANA.  
HON. JAMES G. JENKINS, DISTRICT JUDGE, E. D. WISCONSIN.  
HON. ROMANZO BUNN, DISTRICT JUDGE, W. D. WISCONSIN.

## EIGHTH CIRCUIT.

HON. DAVID J. BREWER, CIRCUIT JUSTICE.  
HON. HENRY C. CALDWELL, CIRCUIT JUDGE.  
HON. WALTER H. SANBORN, CIRCUIT JUDGE.<sup>1</sup>  
HON. JOHN A. WILLIAMS, DISTRICT JUDGE, E. D. ARKANSAS.  
HON. ISAAC C. PARKER, DISTRICT JUDGE, W. D. ARKANSAS.  
HON. MOSES HALLETT, DISTRICT JUDGE, COLORADO.  
HON. OLIVER P. SHIRAS, DISTRICT JUDGE, N. D. IOWA.  
HON. JOHN S. WOOLSON, DISTRICT JUDGE, S. D. IOWA.  
HON. CASSIUS G. FOSTER, DISTRICT JUDGE, KANSAS.  
HON. RENSSELAER R. NELSON, DISTRICT JUDGE, MINNESOTA.  
HON. AMOS M. THAYER, DISTRICT JUDGE, E. D. MISSOURI.  
HON. JOHN F. PHILIPS, DISTRICT JUDGE, W. D. MISSOURI.  
HON. ELMER S. DUNDY, DISTRICT JUDGE, NEBRASKA.  
HON. ALFRED D. THOMAS, DISTRICT JUDGE, NORTH DAKOTA.  
HON. ALONZO J. EDGERTON, DISTRICT JUDGE, SOUTH DAKOTA.  
HON. JOHN A. RINER, DISTRICT JUDGE, WYOMING.

## NINTH CIRCUIT.

HON. STEPHEN J. FIELD, CIRCUIT JUSTICE.  
HON. JOSEPH McKENNA, CIRCUIT JUDGE.<sup>1</sup>  
HON. WILLIAM B. GILBERT, CIRCUIT JUDGE.<sup>2</sup>  
HON. WM. W. MORROW, DISTRICT JUDGE, N. D. CALIFORNIA.  
HON. ERSKINE M. ROSS, DISTRICT JUDGE, S. D. CALIFORNIA.  
HON. HIRAM KNOWLES, DISTRICT JUDGE, MONTANA.  
HON. CORNELIUS H. HANFORD, DISTRICT JUDGE, WASHINGTON.  
HON. THOMAS P. HAWLEY, DISTRICT JUDGE, NEVADA.  
HON. MATTHEW P. DEADY, DISTRICT JUDGE, OREGON.  
HON. JAMES H. BEATTY, DISTRICT JUDGE, IDAHO.  
HON. WARREN TRUITT, DISTRICT JUDGE, ALASKA.

<sup>1</sup> Appointed March 17, 1892.

<sup>2</sup> Appointed March 18, 1892.



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# CASES

ARGUED AND DETERMINED

IN THE

## UNITED STATES CIRCUIT COURTS OF APPEALS AND THE CIRCUIT AND DISTRICT COURTS.

MINNEAPOLIS, ST. P. & S. S. M. RY. CO. v. NESTOR.

(Circuit Court, D. North Dakota. March 15, 1892.)

### REMOVAL OF CAUSES—CONDEMNATION PROCEEDINGS—TIME FOR FILING PETITION.

Code Civil. Proc. N. D. § 3000, provides that in railroad condemnation proceedings either party may demand a jury trial within 80 days from the filing of the commissioner's report, but requires no further pleadings for such trial. *Held*, that for the purpose of removal to a federal court the demand for a trial by jury is equivalent to the filing of an answer in ordinary suits, and under Act Cong. March 8, 1887, § 8, the case will be remanded to the state court where the petition for removal was filed after the expiration of the 80 days thus allowed.

In Equity. Proceedings begun in state court by the Minneapolis, St. Paul & Sault Ste. Marie Railway Company against Samuel K. Nestor for the condemnation of land, and removed to United States circuit court by defendant. Heard on motion to remand. Granted.

*A. H. Bright* and *George K. Andrus*, for plaintiff.

*S. L. Glaspell* and *Winterer & Winterer*, for defendant.

THOMAS, District Judge. On the 3d day of July, 1891, the judge of the district court in and for Barnes county, N. D., upon a petition of plaintiff railway company, appointed commissioners to assess the damages that defendant land-owner might sustain by reason of the right of way granted to plaintiff over defendant's land in Barnes county, N. D., as provided in section 3000 of the Compiled Laws of North Dakota. August 22, 1891, the commissioners appointed filed their report in the office of the clerk of court, from which it appears that the damages of defendant were assessed at \$1,186. September 14, 1891, defendant filed with said clerk a written demand for a trial by jury. On the first day of the term of court thereafter, to-wit, on the 8th day of December, 1891, the defendant presented to said court a petition and bond in due form for removal of the case to this court, which was granted. The petition shows

that the amount in dispute, exclusive of interest and costs, exceeds the sum of \$2,000, and that the plaintiff and defendant are and were at and prior to that time citizens of different states. A transcript of the record having been filed in this court, the plaintiff now moves therein to remand the case to this court upon the following grounds: (1) That this court has no jurisdiction of the subject of this action; (2) that the petition for the removal of this action from the state court to this court was made too late; (3) that S. K. Nestor waived his right for removal of said cause from the state court by not making his petition for removal on or prior to the time when issue was joined in said cause; (4) that S. K. Nestor is the plaintiff in said cause; (5) that the said cause is not a removable cause, within the provisions and meaning of the act of congress of the 3d of March, 1887; (6) that the said circuit court has not original jurisdiction of the controversy, and it is not, therefore, removable. The statute providing for the condemnation of real property for railroad purposes, so far as it is necessary to refer to the same in the consideration of this motion, reads as follows:

"If the owner of any real property over which said railroad corporation may desire to locate its road shall refuse to grant the right of way through and over his premises, the district judge of the county or subdivision in which said real property may be situated, as provided in this article, shall, upon the application or petition of either party, and after ten days' notice to the opposite party, either by personal service or by leaving a copy thereof at his usual place of residence, or, in case of his non-residence in the territory, by such publication in a newspaper as the judge may order, direct the sheriff of said county to summon three disinterested freeholders of said county or subdivision (or, if there be none such, then of the territory) as commissioners, who shall be selected by said judge, and who must not be interested in a like question. The commissioners shall be duly sworn to perform their duties impartially and justly; and they shall inspect said real property, and consider the injury which such owner may sustain by reason of such railroad; and they shall assess the damages which said owner will sustain by such appropriation of his land."

This statute has been, with others, adopted by the state of North Dakota as far as applicable.

It then provides for the making of the report of the commissioners to the clerk of the district court, and, among other things, provides that the railroad company may pay to the clerk, for the use of the owner of the land, the sum assessed by the commissioners, and then proceed to construct and maintain its road over and across the premises appropriated. It is then further provided that the report of the commissioners may be reviewed by the district court on written exceptions filed by either party in the clerk's office, or "either party may, within thirty days after the filing of such report, file with the clerk a written demand for a trial by jury; in which case the amount of damages shall be assessed by a jury, and the trial shall be conducted and judgment entered on the verdict in the same manner as civil actions in the district court." Provision is made for appeal to the supreme court, and the money deposited with the clerk upon the report of the commissioners by the railroad company is to remain subject to the final decision of the court. This statute, in



some respects, differs from every other statute on the question to which it relates, and to which my attention has been called; but upon the authority of *Boom Co. v. Patterson*, 98 U. S. 403, at and from the filing of the written demand for a trial by jury the controversy takes the form of an action at law of a civil nature, in which the sole question for determination is the amount of compensation that must be paid for the land appropriated by the railroad company. Whether or not the proceeding is a suit from the filing of the petition for the appointment of the commissioners, and the giving of the notice to the owner as required, is not determined on this motion. Assuming that this case is removable under the removal act of March 3, 1887, (which is not decided,) it must be remanded, for the reason that the petition for removal to this court was made too late. The act of March 3, 1887, has definitely fixed the time within which a case may be removed. The act is restrictive in its nature, as is manifest from the recent decision of the supreme court of the United States, *Fisk v. Henarie*, 12 Sup. Ct. Rep. 207, and many other cases construing this act. By section 3 of the removal act it is provided that the petition must be made and filed in the state court at the time or at any time before the defendant is required by the laws of the state or the rules of the state court in which the suit is brought to answer or plead to the declaration or complaint. By the Code of this state the defendant is required to answer in ordinary actions of a civil nature within 30 days after the service of the summons, when the complaint is served with it, or within 30 days after the service of the complaint, upon demand, when the summons is served alone. Comp. Laws, c. 9, Code Civil Proc. How is issue joined in this class of actions, under section 3000, above quoted, and when must that issue be joined? The statute provides that "either party may, within thirty days after the filing of the report of the commissioners, file with the clerk a written demand for a trial by jury, in which case the amount of damages shall be assessed by the jury, and the trial shall be conducted, and judgment entered on the verdict, in the same manner as civil actions in the district court." There is no further provision of statute in this state relating to any further pleadings or issue in this class of actions. When the demand for a jury trial is filed, the case stands for trial like any ordinary action of ejectment; the railroad company seeking the appropriation of the land described in the petition, on the one side, as plaintiff, except that it must pay the just compensation, and the owner of the land, on the other side, as defendant, insisting upon his just compensation; that being the only question for trial and determination. By operation of law in this state the issue is joined by the filing of a written demand for a jury trial by either party. No other or further pleading is required by the statute, and there is no rule of court requiring further pleadings, so far as I am advised. The case stands substantially the same as if the statute provided that, upon filing a demand for a trial by jury, formal pleading must on the same day, or some subsequent day, be filed. It was competent for the legislature to so provide. It could not be successfully contended that the right of removal existed under the act of

March 3, 1887, after the answer had been filed and issue thus joined in the statute so providing. It must be conceded that under such a statute the petition for removal must be made and presented before the time for answering had expired. But the statute has in effect provided that the filing of a written demand for jury trial is equivalent to that. Each party is fully advised by the terms of the statute that a demand for a jury trial must be made within 30 days after the filing of the report of the commissioners. If it is filed before the end of the 30 days, the defendant has till the last day to make and file his petition for removal. If not filed till the last day, he must remove on that day, or his right so to do is lost. In other words, the defendant, the land-owner, who alone is entitled to remove the case to the federal court, must do so after the proceeding has taken on the form of a suit at law of a civil nature, and within 30 days after the filing of the report of the commissioners. It seems to me that this view is in harmony with the decisions of the court under the statute of 1887. It is unnecessary to pass on any other question on this motion. The case must be remanded, and it is accordingly so ordered.

### LLOYD v. PENNIE *et al.*

(District Court, N. D. California. March 29, 1892.)

#### 1. PRIVILEGED COMMUNICATIONS—HUSBAND AND WIFE—LETTERS IN POSSESSION OF ADMINISTRATOR.

Code Civil Proc. Cal. § 1881, prohibiting the examination of a husband or wife, during or after marriage, as to communications between them during marriage, does not extend its protection to letters from one to the other found in the possession of the wife's administrator after both are dead. *People v. Mullings*, 28 Pac. Rep. 229, 83 Cal. 183, distinguished.

#### 2. SAME—EXAMINERS IN EQUITY.

Where the evidence is being taken before an examiner, the letters, even if privileged, should be produced before him and made part of the record, under the rule of equity practice which requires that evidence objected to and ruled out shall be incorporated in the record, in order that the court may pass upon the ruling.

#### 3. SAME.

Compliance with the rule is especially necessary where the letters constitute the primary evidence of a fact in issue, since, if presented to the court and rejected, the foundation would then be laid for secondary evidence.

In Equity. Bill by John Lloyd, as assignee of James Linforth, John Bensley, and L. B. Benchley, copartners, against James C. Pennie, as administrator of John Bensley, and James C. Pennie, as administrator of Marian L. J. M. Bensley, deceased. Heard on an order upon defendant, as administrator of Marian L. J. M. Bensley, deceased, to show cause why he should not be required to produce in evidence certain letters written by John Bensley to said Marian, his wife. Order made to produce the letters.

*Henry C. Hyde*, (*W. C. Belcher*, of counsel,) for complainant.

*Naphthaly, Freidenrich & Ackerman*, (*Myrick & Deering*, of counsel,) for defendants.

MORROW, District Judge. The defendant James C. Pennie, administrator of the estate of John Bensley, deceased, and administrator of the estate of Marian L. J. M. Bensley, deceased, having been subpoenaed to appear before the examiner as a witness on the part of the complainant, and ordered to produce before such examiner certain letters written by John Bensley to his wife, Marian L. J. M. Bensley, appeared, and, on the advice of his attorneys, declined to produce said letters, on the ground that they are confidential and privileged communications from husband to wife. The order to show cause why the defendant should not be punished for contempt in refusing to produce such letters brings before the court the question as to whether such letters are privileged communications. To understand the position of the parties and the question involved, it is necessary to refer to the allegations of the bill in equity, in support of which these letters are demanded as evidence.

The bill was filed in this court February 25, 1890, by John Lloyd, as assignee of James Linforth, John Bensley, and L. B. Benchley, copartners under the firm name of Linforth, Kellogg & Co., against James C. Pennie, administrator of the estate of John Bensley, deceased, and James C. Pennie, administrator of the estate of Marian L. J. M. Bensley, deceased. It appears from the bill that for several years prior to the 15th day of February, 1877, John Bensley, L. B. Benchley, and James Linforth were engaged in business in San Francisco under the firm name of Linforth, Kellogg & Co.; that on the date last named certain creditors of the firm presented and filed in this court a petition praying that the firm, and the individual members thereof, be adjudged bankrupts; that on the 27th day of February, 1877, the said firm of Linforth, Kellogg & Co., and each of the copartners, were declared and adjudged to be bankrupts, within the meaning and subject to the provisions of the Revised Statutes of the United States; that on the 26th day of March, 1877, James C. Patrick and A. L. Tubbs were appointed assignees; that they took charge of the estate of said bankrupts, so far as then known, and entered upon the performance of their duties; that the said assignees proceeded with the administration and distribution of said estate according to law, and declared and paid dividends to the creditors of the estate amounting to 47½ per centum; that in 1887 Patrick died, and soon after Tubbs resigned, and thereupon John Lloyd, the complainant herein, became assignee of the estate by appointment; that John Bensley, one of the copartners of the firm, died intestate on the 14th day of June, 1889, and James C. Pennie was appointed administrator of his estate; that on the 30th day of December, 1889, Marian L. J. M. Bensley, the widow of John Bensley, also died intestate, and James C. Pennie became the administrator of her estate. The bill alleges—

"That John Bensley and his wife, the said Marian L. J. M. Bensley, both well knowing the financial embarrassment and condition of the said firm, and of the members thereof, as aforesaid, and well knowing and anticipating that the said firm and its members would be forced into insolvency, planned a fraudulent scheme and device, perpetrated and carried out in the manner

hereinafter stated, to prevent the individual property of the said John Bensley from coming into the hands of the assignees of the said bankrupts, and to prevent the same from being distributed under said act of congress, and to defeat the object of, and to impair and hinder and impede and delay the operation and effect of, and to evade the provisions of, said act of congress, and to hinder and delay and defraud and cheat the creditors of said John Bensley and of said Linforth, Kellogg & Co."

For the purpose of carrying out this fraudulent scheme, the bill further alleges, in substance, that, on the 30th day of December, A. D. 1876, and within six months before the filing of the petition against said bankrupts, and with a view of preventing the individual property of the said John Bensley from coming to the hands of the assignees of the said bankrupts, and to prevent the said property from being distributed under said act of congress, and to defeat the object of, and to impair and to hinder and impede and delay the operation and effect of, and to evade the provisions of, the said act of congress, and to hinder, delay, defeat, defraud, and cheat the said creditors, said John Bensley assigned, transferred, and conveyed to one Orrin Curry certain valuable pieces of real property located in the city of San Francisco, and that the conveyance of this property was without consideration, and was accepted and received by the grantee with full knowledge of the fraud, intent, scheme, and device of the Bensleys. It is also alleged that, after the adjudication in bankruptcy of the said John Bensley and of the said firm of Linforth, Kellogg & Co., Bensley and his wife, fraudulently intending to deceive and defraud his creditors and the said assignees in bankruptcy, and to secure a restoration to Bensley of his individual property, which had vested in said assignees by virtue of the bankruptcy proceedings, induced the assignees and creditors to enter into an agreement with him for a release to him by said assignees of all his individual property, and for his discharge from all his debts; that such an agreement was entered into July 11, 1877, by the terms of which Bensley covenanted and agreed to pay any deficiency which might arise on the claims of the creditors after the firm assets of Linforth, Kellogg & Co. and the individual assets of James Linforth and L. B. Benchley had been applied to the payment of such claims; that this agreement was ratified and confirmed by this court, and Bensley discharged from his individual and copartnership debts, and thereafter the assignees reassigned, transferred, and conveyed to Bensley all of his said property and estate which had become vested in the assignees by virtue of the bankruptcy proceedings; that, at the date of the adjudication of bankruptcy, Bensley was seized and possessed of an estate of the value of \$500,000; that after said property had been restored to Bensley, instead of managing it, and appropriating the proceeds, or so much thereof as might be necessary to the payment of the balance due the creditors of Linforth, Kellogg & Co., in accordance with his agreement with the assignee and creditors, he proceeded to carry out the fraudulent scheme devised by himself and wife, and conveyed all his property to his wife and others, without consideration, leaving no assets standing in his name at the time of his

death, June 14, 1889; and that Marian L. J. M. Bensley was privy and party to this fraudulent scheme. It is also alleged that from the time Bensley was adjudicated a bankrupt, February 27, 1877, until the day of his death, June 14, 1889, he was a non-resident of, and absent from, the state of California; that during that period he secreted himself from his creditors, and intentionally avoided coming within the state of California, well knowing that, if his residence were known, his creditors and his assignees would commence proceedings against him; that there is a deficiency due the creditors of the bankrupts of 52½ per centum of their demands, amounting, with interest, to \$275,000. The bill asks that a decree may be entered declaring the agreement and contract of the creditors, the order of this court ratifying said contract, and authorizing the assignees to transfer the said property to Bensley, and the conveyance and assignment of the assignees in pursuance of said order, to be void and of no effect, and declaring the present assignee to be the real owner of the said property, and entitled to the same; that the defendant be ordered and directed to make, execute, and deliver to the said assignee a good and sufficient conveyance of the lands and premises described in the bill, and deliver over to the said assignee the said property, or the proceeds thereof heretofore collected and received. It is claimed that, during the period covered by the alleged fraudulent transactions mentioned in the bill, Marian L. J. M. Bensley resided in California, and was acting as the agent of her husband, John Bensley, and that the letters written to her by her husband, and now demanded as evidence, establish the agency and prove the fraudulent transactions.

Section 858 of the Revised Statutes provides:

"In the courts of the United States no witness shall be excluded in any action on account of color, or, in any civil action, because he is a party to or interested in the issue tried: provided, that in actions by or against executors, administrators, or guardians, in which judgment may be rendered for or against them, neither party shall be allowed to testify against the other as to any transaction with or statement by the testator, intestate, or ward, unless called to testify thereto by the opposite party, or required to testify thereto by the court. In all other respects the law of the state in which the court is held shall be rules of decision as to competency of witnesses in the courts of the United States in trials at common law and in equity and admiralty."

The defendant James C. Pennie, as administrator of the estate of Marian L. J. M. Bensley, is a competent witness in this case under this statute; but, under the last clause of the section just quoted, we must look to the law of this state to ascertain whether his competency as a witness is limited with respect to the matter under consideration.

Section 1881 of the Code of Civil Procedure of this state provides:

"There are particular relations in which it is the policy of the law to encourage confidence and to preserve it inviolate; therefore a person cannot be examined as a witness in the following cases: (1) A husband cannot be examined for or against his wife without her consent, nor a wife for or against her husband without his consent; nor can either, during the marriage or afterwards, be, without the consent of the other, examined as to any com-

munication made by one to the other during the marriage; but this exception does not apply to a civil action or proceeding by one against the other, nor to a criminal action or proceeding for a crime committed by one against the other. \* \* \*

It is clear that the language of this provision of the Code does not limit the competency of the defendant as a witness. The limitation is upon the husband and wife. Neither can testify for or against the other without the consent of the other, nor can either, without the consent of the other, be examined as to any communication made one to the other during marriage. Moreover, section 1879 of the Code of Civil Procedure provides that "all persons, without exception, otherwise than specified in the next two sections, who, having organs of sense, can perceive, and, perceiving, can make known their perceptions to others, may be witnesses." The provision concerning husband and wife just cited is contained in one of these sections designated as containing the only exceptions to the general rule providing that all persons may be witnesses. But there is no exception in either section under which the defendant may be excluded or his testimony rejected. He is not privileged from testifying because of anything contained in section 1881 of the Code of Civil Procedure, because he does not come within the description therein contained of the persons who cannot be examined as witnesses.

It is, however, contended that the exception relating to communications between husband and wife extends to the communications themselves, and makes them privileged in the hands of the defendant, as administrator of the estate of the wife, to whom the letters were addressed. The case of *People v. Mullings*, 83 Cal. 138, 23 Pac. Rep. 229, is cited as declaring the law to that effect. In that case the defendant was charged with murder. He went upon the witness stand in his own behalf. Upon cross-examination, he was asked questions about conversations between himself and his wife, to which his counsel objected, on the ground that they were not proper questions in cross-examination, and on the additional ground that they called for privileged communications, about which he could not be examined. The court, in commenting upon the privilege claimed for the defendant, said:

"The provisions of our Codes on the subject of privileged communications between husband and wife are little more than a declaration of the common-law rule upon the subject, except in this respect: The privilege at common law did not extend to communications which were not in their nature confidential; and, although such communications were generally held to be confidential, yet some very difficult questions did occasionally arise as to the character of the communications; but our Code sweeps away that embarrassing distinction by extending the privilege to any communication made by one to the other during the marriage."

The court then reviewed the decisions in a number of cases relating to privileged communications, and said:

"All along the line of the cases about communications between client and attorney it was steadily argued on the one side that the statute only prevented the attorney from testifying, and that when the client was on the witness

stand he could be forced to disclose; and the constant answer of the other side, sustained by the courts, was, 'The privilege applies to the communication,' and it cannot be forced from either party to the confidential relation. It is clear to us, therefore, that a defendant in a criminal case, who has offered himself as a witness in his own behalf, and who has not testified in chief to any communications between his wife and himself, cannot, without his consent, be examined by the state as to any such communications."

It needs no argument to show that this case does not support the claim of the defendant that the letters are privileged in his hands. The statement of the court that the privilege applies to the communication was not necessary to the determination of the case. The point decided was that the questions concerning conversations between the defendant and his wife were not proper cross-examination.

In *Bowman v. Patrick*, in the circuit court of the United States for the eastern district of Missouri, (32 Fed. Rep. 368.) a motion was made to strike out certain exhibits, filed in the master's report of the testimony in the case. These exhibits were letters written by one of the defendants to his wife, and the ground of the motion to suppress them was that they were "such communications as were protected by the principle which the law throws around communications between husband and wife." The wife had died pending proceedings for a divorce, and the man who professed to be the executor or administrator of her estate got hold of these letters, and, without any requirement of his office, but in a spirit of hostility to the husband, delivered them to the other side. He was not a party to the action, but was acting as a volunteer in the production of the letters. Mr. Justice MILLER, in passing upon the motion, said:

"What might be the rule of law if this administrator had filed these letters in due course of administration for any useful purpose in a public office, and they had been obtained and copied by a third party, or if they had got into the hands of the party who now seeks to use them in any appropriate and innocent manner, I am not prepared to say; but I do rule that, under the circumstances in which these letters got into other hands, they ought not to be used as evidence."

The learned judge expressly places his decision upon the circumstances of that case, which, differing materially from the case at bar, cannot be considered as authority in determining the question involved in this controversy.

In *Stein v. Bowman*, 13 Pet. 220, the plaintiff having read in evidence the deposition of a deceased witness, the defendant called the wife of the deceased to prove that her husband has been bribed to give evidence in that case, and also to prove that he had frequently told her he knew nothing of the plaintiff or of another party. To this testimony an objection was interposed, and the court held that the wife could not "either voluntarily be permitted, or by force of authority be compelled, to state facts in evidence which render infamous the character of her husband."

In *Lucas v. Brooks*, 18 Wall. 436, the defendant offered the deposition of his wife to prove a part of his case. The court below excluded the deposition, and the supreme court held that, under the statute of West

Virginia, where the case arose, the wife could not be examined for or against her husband.

The law as stated in these last two cases, as, indeed, in all the cases cited by counsel for defendant, is not disputed. They simply state the law as declared by the Code of Civil Procedure of this state, and as construed by the supreme court in *People v. Mullings, supra*, to the effect that communications between husband and wife "cannot be forced from either party to the confidential relation." They do not sustain the position that the policy of the law, as declared by the courts, places the seal of secrecy absolutely and forever upon the communications between husband and wife. The law, in fact, appears to be otherwise. Such communications are received in evidence when produced by parties who do not occupy the confidential relation. In *State v. Buffington*, 20 Kan. 599, the defendant was being prosecuted criminally. On the trial the prosecution introduced in evidence a letter from the defendant to his wife. The defendant claimed that this letter was a confidential communication from himself to his wife, and therefore that it was not competent evidence against him. The letter was in the hands and custody of the prosecuting witness at the time it was introduced. It had been previously sent through the post-office and by mail from the defendant to his wife. The prosecuting witness received it from the post-office, properly directed to the defendant's wife. He delivered it to her, and she, after reading it, returned it to him, and he furnished it to the prosecution, to be read in evidence. It did not appear that either the defendant or his wife had at that time any control over the letter. The court, in passing upon the admissibility of the letter observed:

"It is certainly true that a communication between husband and wife is a privileged communication. But it is privileged only while it remains within their custody and control, or while it remains within the custody and control of their agents or representatives, and just so far as it remains within the custody and control of themselves or their agents or representatives."

A number of cases are cited by the court in support of this rule, and the statute of the state of Kansas is quoted, as follows:

"In no case shall either [the husband or wife] be permitted to testify concerning any communication made by one to the other during the marriage, whether called while that relation existed or afterwards." Civil Code, § 323.

The court, referring to this statute, in connection with another, relating to witnesses in criminal cases, says:

"It will be seen that these statutes do not go to the extent of excluding said letter as evidence. While the Civil Code provides that neither the husband nor wife shall, as a witness, furnish evidence concerning confidential communications, yet it does not provide that others who may happen to be possessed of such communications shall not do so."

In *State v. Hoyt*, 47 Conn. 518, the defendant was on trial for murder. The state offered in evidence sundry letters written by the defendant to his wife, which the state claimed contained admissions inconsistent with



the claim of the defendant as to his unconsciousness at the time of the homicide and as to his unsoundness of mind. To the introduction of the letters the defendant objected, on the ground that the letters were confidential communications between husband and wife, and as such could not be used in evidence against the husband. It was not shown how the state obtained the letters, but the court overruled the objection and admitted the letters. The supreme court, in passing upon this ruling of the lower court, said:

"In this ruling the court violated no rule of evidence. The question was not whether the husband or wife could have been compelled to produce this evidence, but whether, when the letters fell into the hands of a third person, the sacred shield of privilege went with them. We think not. 1 Greenl. Ev. § 254a. The fact that the communications in this case were written places them on no higher ground than if they were merely oral. And, as to the latter, it is well settled that conversations between husband and wife are not privileged so as to prevent a third person, who overheard them, from testifying."

It will not be necessary to discuss all the cases cited as bearing on this question. For the present, it is enough to say that I do not think they establish the rule that communications between husband and wife are privileged in the hands of third persons; certainly not under a statute declaring the privilege in the language of the Code of this state. Moreover, the tendency of the privilege is to prevent the full disclosure of the truth, and it is therefore to be strictly construed. *Satterlee v. Bliss*, 36 Cal. 508; *Foster v. Hall*, 12 Pick. 89; *Gower v. Emery*, 18 Me. 82; *Nias v. Railway Co.*, 2 Keen, 76.

It is to be observed, further, that these letters should be produced by the defendant whether admitted in evidence or not. This is a bill of equity, seeking to set aside certain conveyances in fraud of creditors. It is part of complainant's case here that Mrs. Bensley was acting as the agent of her husband in the execution of this fraudulent scheme, and that these letters establish the fact of the agency, and disclose the character of the transactions. They appear to be primary evidence of the facts alleged, and ought, therefore, to be produced to the court for inspection. If then rejected, on account of their privileged character, the foundation will have been laid for secondary evidence. But, further than this, as a rule of practice, the defendant should produce the letters to the examiner, that they may be made a part of the record. In *Blease v. Garlington*, 92 U. S. 8, the supreme court declared the rule with respect to the necessity of incorporating into the record testimony in equity cases objected to and ruled out. The court said:

"If testimony is objected to and ruled out, it must be sent here with the record, subject to the objection, or the ruling will not be considered by us. A case will not be sent back to have the rejected testimony taken, even though we might, on examination, be of the opinion that the objection to it ought not to have been sustained. Ample provision having been made by the rules for taking the testimony and saving exceptions, parties, if they prefer to adopt some other mode of presenting their case, must be careful to see that it conforms in other respects to the established practice of the court."

As the present case may be reviewed on appeal, it is the duty of the court, in accordance with the practice in equity, as stated by the supreme court, to direct that the defendant produce the letters, as demanded. The order will be made, however, without prejudice to the right of the defendant to renew the claim of privilege hereafter, by a motion to suppress the letters, at the proper stage of the proceedings.

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STINSON *v.* DOOLITTLE *et al.*

(Circuit Court, D. Minnesota. April 14, 1892.)

1. DEEDS—TWICE RECORDED—PRESUMPTIONS—EVIDENCE.

When the records of a deed in two deed-books differ only in two material points in the description of the property, and the date, grantors, grantee, consideration, acknowledgment, and signature of the notary are the same in each, the presumption is, not that the first book contains the correct record and the other the record of some other deed or of the original deed after a change in the description has been made, but that they are records of the same deed, with mistakes in one of them; and in seeking to determine in which of the two the mistakes are, the original deed being lost, the court will consider the evidence afforded by the records themselves as to which has been more carefully registered, the situation of the property as described in each, and the conduct of the parties in reference to the property in dispute.

2. SAME—EFFECT OF RECORDING.

Gen. St. Minn. 1878, p. 537, § 21, and Id. p. 805, § 96, do not limit the effect of the register's record of a deed as evidence to the first record of it, but give at least equal weight as evidence to later records properly made.

In Equity. Suit by James Stinson against Ormus H. Doolittle, Charles J. Doolittle, and others to correct a mistake in the record of a deed. Decree for complainant.

This is a suit in equity, and the complainant seeks a decree declaring that a certain deed made by one Benjamin F. Hoyt and wife to David Schellenbarger, dated June 21, 1850, described and conveyed "fifteen and two one-hundredths acres off the south side of the north-west quarter of the north-west quarter of section number thirty, (30,) in township number twenty-nine (29) north, of range number twenty-two (22) west of the fourth principal meridian;" that this deed was by mistake so recorded in Book A of Deeds, pages 492 and 493, of the Ramsey county records, that the same read "fifteen and two one-hundredths acres off the north side" of the quarter quarter mentioned above; that such deed did not in fact describe this north 15.02 acres of the quarter quarter mentioned above; that, so far as the same relates to this tract of land, this deed was correctly recorded in Book K of the Ramsey county records, at pages 129 and 130, on October 6, 1854; that the defendants Ormus H. Doolittle and Charles J. Doolittle, who derive their title to the 15.02 acres off the north side of said 40-acre tract through a quitclaim deed from David Schellenbarger and wife to Charles J. Doolittle, dated September 10, 1888, and recorded August 22, 1889, in Book 227 of Deeds, at page 543, be declared to have no title to this

tract as against the complainant, who derives his title from Benjamin F. Hoyt; and that the conveyances in the chain of title from Schellenbarger to Ormus H. Doolittle, and the records thereof, be decreed to be void as against the complainant. The bill alleges that Benjamin F. Hoyt, being the owner of the W.  $\frac{1}{4}$  of the N. W.  $\frac{1}{4}$  of section 30, on June 21, 1850, conveyed the S. W.  $\frac{1}{4}$  of the N. W.  $\frac{1}{4}$  of said section, which contained 34.98 acres, and 15.02 acres off the south side of the N. W.  $\frac{1}{4}$  of the N. W.  $\frac{1}{4}$  of said section, to David Schellenbarger, making a tract of 50 acres in one body; that this conveyance was so recorded in Book A of Deeds, pp. 492, 493; that the 15.02 acres was erroneously described therein as off the north side instead of off the south side of said N. W.  $\frac{1}{4}$  of the N. W.  $\frac{1}{4}$  of said section; that on the 6th day of October, A. D. 1854, this deed was again recorded in Book K of Deeds, on page 129, and that in this second record the 15.02 acres was properly described as off the south side of said quarter quarter; that the title of Benjamin F. Hoyt to this 15.02 acres off the north side of the N. W.  $\frac{1}{4}$  of the N. W.  $\frac{1}{4}$  passed by mesne conveyances to, and in November, 1856, vested in, the complainant, James Stinson, who, on or prior to October 24, 1884, had also become the owner of the balance of this quarter quarter, and that the deeds evidencing his chain of title from Hoyt to the entire quarter quarter were prior to that time duly recorded; that in October, 1884, the complainant platted the entire tract last mentioned as "Stinson's Rice-Street Addition to St. Paul," duly recorded his plat, and sold and conveyed by deeds, with covenants of warranty, to divers persons, lots situated upon said north 15.02 acres, and some of his grantees were in open possession of their lots on said tract prior to September 10, 1888, under his deeds; that complainant still owns lot 4, block 4, and blocks 2 and 3, of said addition, which are a part of said north 15.02 acres, and are worth \$18,000; that on September 10, 1888, defendant Charles J. Doolittle, with intent to cloud the title of and injure the complainant, obtained from Mr. Schellenbarger a quitclaim deed of said north 15.02 acres to himself; that in August, 1889, he made a deed of this tract to defendant Ormus H. Doolittle, who in turn made a mortgage to Charles J. on said tract for \$2,700, and this mortgage and these two deeds were recorded in August, 1889, and that the defendants had full knowledge of the facts alleged in the bill when they obtained their respective deeds; that the tract which these deeds describe is worth \$60,000, and the defendant Ormus H. Doolittle claims title to it under these deeds, and defendant Charles J. Doolittle claims a lien to the amount of the mortgage thereon, and these deeds, records, and claims cloud his title and prevent the sale of his lands. The answer admits that Benjamin F. Hoyt, on June 21, 1850, owned the W.  $\frac{1}{4}$  of the N. W.  $\frac{1}{4}$  of section 30; that on that day he made the deed in question to David Schellenbarger, but denies that that deed conveyed the south 15.02 acres of the N. W.  $\frac{1}{4}$  of the N. W.  $\frac{1}{4}$  of section 30, or that it was erroneously recorded in Book A of Deeds, but avers that said deed described and conveyed the north 15.02 acres of this quarter quarter; and that the record in Book A, at pages 492, 493, is a true record of the deed. The answer

admits the execution and record of the deeds from Schellenbarger and wife to Charles J. Doolittle and from Charles J. Doolittle to Ormus H. Doolittle, and of the mortgage from Ormus H. to Charles J., alleged in the bill, but denies all fraud and evil intent; avers that Schellenbarger was the owner of the tract in question, and that defendants were *bona fide* purchasers for value, without notice of any defects in Schellenbarger's title or claims of complainant or his grantees; and denies all the other material allegations of the bill.

*Thompson & Taylor and George B. Young*, for complainant.

*John W. Pinch and Samuel Whaley*, for defendants.

Before SANBORN, Circuit Judge, and NELSON, District Judge.

SANBORN, Circuit Judge. The first question in this case is whether Hoyt and wife, by their deed of June 21, 1850, described and conveyed to Schellenbarger 15.02 acres off the north side or off the south side of the N. W.  $\frac{1}{4}$  of the N. W.  $\frac{1}{4}$  of section 30, and if it is found that the deed in question did not describe and convey the north 15.02 acres, that finding is decisive of the case; for, if Hoyt never conveyed this tract to Schellenbarger, his deed to defendant Doolittle conveyed nothing, and none of the defendants have any title to this property. It is established by the proofs that whatever title remained in Hoyt after he made this deed to Schellenbarger passed to and was vested in complainant in A. D. 1856, that the deeds by which this title so passed were all recorded as early as the close of that year, and that whatever title Schellenbarger had after the delivery of the Hoyt deed to him has passed to defendant Ormus H. Doolittle under the deeds in evidence. The original deed from Hoyt to Schellenbarger is not produced, nor is there among the proofs the testimony of any witness who has read this deed as to its contents. It does appear that Schellenbarger caused this deed to be recorded in Book A, and after its record it was returned to him; that he did not cause it to be recorded in Book K of Deeds, in 1854; and that after that record the instrument there recorded was delivered to one S. Walker. The record in Book K of Deeds varies from that in Book A in 19 particulars, 2 of which are material variances and 17 are immaterial. One of these material variances is that the 15.02 acres is described in Book A as off the north side, while in Book K it is described as off the south side, of the quarter quarter. Defendants' counsel claim that under this proof the presumption is that the record in Book A is the only correct record of the original deed, and that the record in Book K must be presumed to be the record of some other deed, or of the original deed after it had been changed and made to describe other property than that which it really conveyed.

We have been forced to a different conclusion. Each of these records discloses a deed bearing the same date, having the same grantors, the same grantee, the same consideration, the same long descriptions with but two material variances, and an acknowledgment dated the same day and signed by the same notary public. Mr. Schellenbarger testifies that he never obtained but one deed from Mr. Hoyt, and it seems to us that

the presumption that both of these records are records of the same deed, but that there are mistakes in one of them, is in itself much less violent than it is to presume that the later record is of another deed procured by some third party, or that it is the record of the original deed, unlawfully mutilated and changed to convey other property than that originally described in it, and that the register, in 1854, recorded such a spurious instrument as the record of an original and valid deed. Hence we conclude that these two records are records of the same instrument, and, as in the description, which is material in this case, we find the word "north" written in Book A where the word "south" is written in Book K, one of these records must be erroneous in this particular, and we come to consider which it is.

Defendants' counsel contend that the statute authorizes one record of a deed, and no more, and hence that the record in Book A of Deeds is the only record of this deed that is entitled to weigh as evidence of its contents. We do not so understand the law. We think the statute does not limit the effect of the register's record of a deed as evidence to the first record thereof, but gives at least equal weight as evidence to later records, properly made. Gen. St. Minn. 1878, p. 537, § 21; Id. p. 805, § 96. We have, then, two records of this deed, each evidence of its contents, and possibly, in the first instance, equally entitled to credence.

An examination of the two records, however, inclines the mind to the conclusion that the scribe who made the record in Book K was more careful and painstaking than he who made the record in Book A. There are eight instances where a written word, expressing a number, is followed by the figures expressing the same number in brackets in K, while these figures and brackets do not appear at all in A. The repetition of these numbers makes no change in the meaning or legal effect of the instrument, and it is inconceivable that any one would have interpolated these figures after the first record. The only rational inference is that they were in the original deed, and the more careful scribe recorded them, while the less careful omitted them; so that a comparison of the two records leads to the conclusion that the later record is more likely to be correct. Again, if the deed read as does the record in K, it conveyed 50 acres in one body; if as in A, the 15.02 acres were separated by an intervening tract from the 34.98 acres there described; and Mr. Schellenbarger testifies that he bought this 50 acres of Hoyt in one body; that in the succeeding year he sold the same 50 acres he bought of him back to Mr. Hoyt; and the deeds he made to carry out this resale to Mr. Hoyt were plainly intended to describe, and the later one does describe, the south 15.02 acres, and neither of them describes the north 15.02 acres. From 1856 to 1887 Mr. Stinson, the complainant, paid all the taxes and about \$3,000 of assessments on the property here in controversy for grading streets through it, and Mr. Schellenbarger, who for years resided within 10 miles of this land, never exercised any acts of ownership over or claimed any title or interest in any of this north 15.02 acres. These facts, which are proved by this record, have forced us to the conclusion that the deed from Hoyt to Schellenbarger

never in fact described or conveyed the north 15.02 acres of the N. W.  $\frac{1}{4}$  of the N. W.  $\frac{1}{4}$  of this section 30. This disposes of this case, and the question of the *bona fides* of the defendants becomes immaterial; but we are satisfied from the evidence that, before either of the defendants obtained any conveyance of this land, at least four of the complainant's grantees were occupying houses standing upon this north 15.02 acres, claiming title under the complainant and Hoyt. This was notice of complainant's rights and title. *Morrison v. March*, 4 Minn. 429, (Gil. 325;) *New v. Wheaton*, 24 Minn. 409. The proofs also establish the fact that this 15-acre tract was worth at least \$50,000 in 1888; that defendant Charles J. Doolittle discovered the condition of the title to this tract by examining the title to the south 15 acres of the quarter quarter, as he was negotiating a loan upon it; that he examined all the general indexes in the register's office under the letter S to see if Schellenbarger had conveyed this northerly 15 acres. And he testifies "he did not know how much interest he [Schellenbarger] might have there, but at any rate he thought he would go into it for a speculation, and risk a little money in it, and there might be something in it." He then obtained a quitclaim deed of Schellenbarger and wife, for which he paid \$30. About a year afterwards, in August, 1889, he conveyed to his brother, Ormus, for \$3,200, (\$500 cash and the \$2,700 mortgage on the land,) and then first recorded his deed from Schellenbarger. Ormus never saw the land, although he lives within 75 miles of it, and knew nothing of its value, but bought it solely on his brother's representations to him. Under this proof the defendants have no better title in equity or at law than Schellenbarger had, in any event, and Schellenbarger's testimony shows that he had none in equity, and we have found he had none at law. The complainant is entitled to the relief prayed for in the bill. Let a decree be entered accordingly.

NELSON, District Judge, concurs.

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### RHEA *et al.* v. NEWPORT N. & M. V. R. Co.

(Circuit Court, D. Kentucky. April 7, 1892.)

#### 1. NAVIGABLE WATERS—OBSTRUCTION—ERECTION OF BRIDGES—LIABILITIES.

A railroad company, empowered by its charter to erect and maintain a bridge across the Cumberland river, in Kentucky, "so as not unreasonably to obstruct navigation," while rebuilding a portion of the bridge which had been blown down, erected a temporary bridge, which interfered with navigation, but arranged with all the packet companies plying the river for the transfer of all freight without extra charge to shippers. The amount of traffic of the railroad largely exceeded that on the river, and public convenience was in fact subserved by the plan pursued by the railroad company. *Held*, that this was not an unreasonable obstruction of navigation, and a shipper who refused to send his grain by water under the arrangement was not entitled to recover the extra freight paid for transporting it by rail.

### 2. INTERSTATE COMMERCE—STATE REGULATIONS.

The commercial power of congress is exclusive of state authority only where the subjects upon which it is exerted are national in their character, and admit and require uniformity of regulations affecting alike all the states; and when the subjects within that power are local in their nature or operation, or constitute mere aids to commerce, the states may provide for their regulation and management until congress intervenes and supersedes their action. *Cardwell v. Bridge Co.*, 5 Sup. Ct. Rep. 428, 118 U. S. 205, followed.

### 3. SAME—BRIDGES.

The erection of a bridge entirely within a state across a navigable river running partly within and partly without the state is not a matter so intimately connected with interstate commerce as to be under the exclusive control of congress; and, in the absence of congressional action, the state has authority to regulate the same. *Railway Co. v. Backus*, 46 Fed. Rep. 216, distinguished.

In Equity. Bill by B. S. Rhea & Son against the Newport News & Mississippi Valley Railroad Company to restrain the obstruction of navigation in the Cumberland river, and to recover damages alleged to have been sustained on account of the obstruction. Bill dismissed.

*Frazier & Dickinson* and *Dodd & Dodd*, for complainants.

*Holmes Cummins*, *Bullitt & Shield*, and *Humphrey & Davie*, for defendants.

JACKSON, Circuit Judge. This cause is now before the court upon exceptions on the part of both complainants and defendants to the report of the special master, filed herein February 15, 1892, and for final hearing upon the merits. The conclusions reached by the court upon the whole case render it unnecessary to notice and consider the master's report and the exceptions thereto in detail. The bill was filed April 9, 1890, to restrain the defendant from obstructing the navigation of the Cumberland river, and to recover the special damage sustained by complainants because of such obstruction. The defendant is a Connecticut corporation, engaged in operating a line of railway from the city of Louisville, Ky., to and through the city of Paducah, Ky., to the city of Memphis, Tenn. This line of railroad, originally chartered by the state of Kentucky under the name of the Chesapeake, Ohio & Southwestern Railroad Company, and to whose rights and franchises the defendant has succeeded, crosses the Cumberland river at a point near Kuttawa, in Lyon county, Ky., on a bridge consisting of a draw-span and adjacent fixed spans. The original railroad company, to whose rights and franchises the defendant has succeeded, was fully authorized by the legislature of Kentucky to erect and maintain a bridge at said point, "so as not unreasonably to obstruct the navigation of any navigable stream." The bridge, the river, and both banks thereof, at the place of crossing, are situated wholly within the limits or territory of the state of Kentucky. The bridge over the river, as constructed and maintained prior to March 27, 1890, constituted no unlawful obstruction or interference with the free navigation of the Cumberland river, which rises in Kentucky, flows southward into and through Tennessee, and then back again into Kentucky; and, after crossing the latter state, empties into the Ohio river. On March 27, 1890, the draw-span and one adjacent fixed span of said bridge were blown down by a tornado of great violence.

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The defendant took prompt steps to rebuild its bridge, and in doing so erected, or caused to be erected, temporary false work on piles across the river, under the draw-span, upon which its line was continued, while the bridge was being rebuilt or repaired. The piles and false work obstructed and interrupted the ordinary navigation of the river from about the 8th to the 23d of April, 1890. On and after the latter date, boats which had been cut down for the purpose could and did pass under the other fixed and uninjured span of the bridge, and were of sufficient capacity to carry all of complainants' freight to Nashville, Tenn. Before closing the channel of the river, the defendant arranged with the captain and superintendent of the only regular line of steamers or packet companies navigating the river, to place one or more boats below, and another or others above, the bridge, so as to continue regular trips, and transfer freight and passengers at the point of obstruction, by means of a barge anchored under the bridge, which means and method of transfer was continued during the entire time the channel was closed. The agreement between the defendant and the said packet companies plying the river was to the effect that the former should pay the latter \$600 per week, and that the latter should transfer all freight without extra charge to shippers; the intent of the agreement being to protect shippers against any increased charge or rate of freights because of the temporary obstruction to the ordinary navigation of the river. Under and in pursuance of this agreement with defendants, the steamers or packet companies maintained the usual and ordinary freight rate; and on the 23d of April, 1890, notified complainants that they were prepared and ready to carry or transport all their freight (chiefly corn in sacks) from the lower Cumberland and Ohio river to Nashville, without even transferring the same at the bridge; but complainants declined to ship that way, as they had previously declined to ship by boat, and allow this freight to be transferred at the bridge by means of the anchored barge. But from the 9th of April to some time in May, 1890, they had their freight carried or brought to Nashville by railroad, at an extra cost of 4 cents per 100 pounds. The additional freight rate thus paid by them on these shipments of grain, over and above the river rate, amounted to \$1,800.41. Complainants furthermore intimate that they had paid out \$500 for traveling expenses and extra labor, and sustained damage to grain in the sum of \$242.64, on account of said obstruction of the river by defendant. These three amounts, aggregating the sum of \$2,543.05, the special master has reported as the loss sustained by complainants, and which they are entitled to recover of the defendant, on account of its temporary interruption of the ordinary navigation of the river in rebuilding or repairing its bridge, as aforesaid.

The special master finds and reports that—

“Defendant could have rebuilt its draw-span by erecting its false work up and down the stream, thus leaving the span open while the work was in progress; but this would have severed its line much more completely than the mode actually pursued severed the line of navigation, inasmuch as its passengers and freight would have had to be ferried over the river; an operation



attended with far more danger, delay, and expense than the transfer from one boat to another over the deck of a barge. The traffic of defendant's road also largely exceeds the traffic on the river, and the public convenience was therefore subserved by the mode of construction which was pursued."

The master's conclusion that the defendant is liable for the special loss or damage sustained by complainants, amounting, as reported, to \$2,543.05, is based upon the theory "that, under the doctrine of the *Wheeling Bridge Case*, 13 How. 518, the state of Kentucky has no constitutional right to authorize an obstruction of the navigation of the Cumberland river," for the reason that said river was not wholly or throughout its entire length within the state of Kentucky, but traversed and bore the commerce of another state, (Tennessee,) which rendered it a navigable stream, subject to the exclusive jurisdiction of congress, under the commerce clause of the constitution, and that the building of a bridge across it could only be authorized or sanctioned by the general government, acting and speaking for the whole country. The master reached the conclusion, as the result of the supreme court's decisions on the subject, that in respect to navigable streams lying wholly and entirely within its limits, a state could authorize the building and continuance of bridges across the same until congress should act upon the subject; but that in respect to navigable water not wholly or entirely within the limits of a single state, but extending through or traversing two or more states, the absence of any action or regulation by congress was a declaration that such water should be and remain free from any and all control or obstruction by the state or states over the same, or any portion thereof. Applying this latter rule to the Cumberland river, the master reported that the state of Kentucky had no constitutional right or power to authorize the defendant to erect or maintain a bridge across the Cumberland river, although that portion of the river where the bridge crosses the same was wholly within the state; that the obstruction created in repairing or rebuilding the bridge was unlawful, and created a public nuisance; and that complainants were entitled to recover from defendant the special damage sustained in consequence thereof.

If these propositions and conclusions of the master are sustained by the authorities, the complainants are entitled to a decree for the special injury suffered by them in consequence of the temporary obstruction to the ordinary navigation of the Cumberland river.

The *Wheeling Bridge Case*, 13 How. 518, specially relied on to support the master's conclusion, does not control the present case. It will be seen, by reference to the leading opinion in the *Wheeling Bridge Case*, that the law of Virginia which authorized the erection of the bridge thus complained of was held to be inoperative chiefly on two grounds—*First*, because it impaired the obligation of the compact between Virginia and Kentucky that the use and navigation of the Ohio, so far as the territory of said states was concerned, should be free and common to the citizens of the United States; and, *second*, because it was in conflict with the legislation of congress, which has expressly sanctioned said compact, and thereby made it "a law of the Union." In the present case there is no

such compact between Tennessee and Kentucky in respect to the Cumberland river, nor has congress, under its constitutional authority, legislated on the subject. The Wheeling bridge was in itself a permanent obstruction to navigation, while defendant's structure or false work was only a temporary and partial interruption to the usual course of navigation, with provision and arrangement made for the transfer of freight and passengers without extra charge to either, and without serious delay, risk, or danger.

The question as to whether the state of Kentucky had the constitutional right to authorize the erection of a bridge across the Cumberland river within its jurisdiction, and the consequent lawfulness or unlawfulness of defendant's temporary obstruction to navigation in rebuilding said bridge in order to restore its severed line, must, in the opinion of the court, be settled and determined by the principles announced in the cases of *Willson v. Creek Marsh Co.*, 2 Pet. 245; *Palmer v. Commissioners*, 3 McLean, 226; *Railroad Co. v. Ward*, 2 Black, 494; *Gilman v. Philadelphia*, 3 Wall. 721; *Pound v. Turck*, 95 U. S. 462; *Transportation Co. v. Chicago*, 99 U. S. 643; *Mobile v. Kimball*, 102 U. S. 691; *Transportation Co. v. Chicago*, 107 U. S. 687, 2 Sup. Ct. Rep. 185; *Miller v. Mayor, etc.*, 109 U. S. 385, 3 Sup. Ct. Rep. 228; *Cardwell v. Bridge Co.*, 113 U. S. 205, 5 Sup. Ct. Rep. 423; *Hamilton v. Railroad Co.*, 119 U. S. 281, 7 Sup. Ct. Rep. 206; *Huse v. Glover*, 119 U. S. 543, 7 Sup. Ct. Rep. 313; *Sands v. Improvement Co.*, 123 U. S. 293, 8 Sup. Ct. Rep. 113; and *Bridge Co. v. Hatch*, 125 U. S. 1, 8, 9, 8 Sup. Ct. Rep. 811.

It is not necessary to review these decisions. While they establish beyond all question the paramount authority of congress, under the commerce clause of the constitution, over all navigable waters of the United States, they also settle the proposition that, until congress exercises its superior right of control and regulation, the states or state within whose territorial limits such waters or streams are located may directly, or through delegated authority, authorize the erection of bridges across the same, and that such structures are not unlawful until so declared by congress. In respect to such structures over navigable waters within the limits of a state, non-action by congress is not a declaration that such waters must remain free and unobstructed, but that the state's authority over the same may be exercised to the extent, at least, of permitting and authorizing the establishment of ferries and the building of bridges over the same, necessary or convenient for either its local or interstate commerce. Navigable waters lying within the limits of a state are both state and national in their character, with the paramount right of control or regulation in the general government when congress chooses to exercise the authority over the same; but, until such authority is exercised, the jurisdiction and power of the state to authorize the erection or construction of bridges over the same is clearly established. But it is urged by counsel for complainants that such authority of the state is confined, as reported by the special master, to cases in which the navigable stream or water is located wholly, throughout its entire length, within the limits of the state. It is true that in

most of the cases above cited the public or navigable waters were wholly within the limits of the state authorizing the erection of bridges or obstructions in or over the same, and that expressions are found in one or more of the opinions which apparently attach some importance to that fact. The decisions did not, however, proceed or rest upon that ground, but upon the principle that such portion of navigable waters as lay or were embraced within the limits or territorial jurisdiction of the state were subject to state authority, in respect to bridges over the same, until congress exercised its superior and paramount authority of regulation and control. Navigable waters entirely within the limits of a state stand upon the same footing and are subject to the same controlling authority of congress as those extending through or reaching beyond the state. The right of the state, in the absence of congressional regulation to the contrary, to authorize the erection of bridges over such portion of navigable waters as may be embraced within its limits, does not depend upon the length of such waters, nor is the state's authority restricted or affected by the fact that some portion of the stream may extend beyond its territorial jurisdiction. The commerce clause of the constitution includes control of all navigable waters of the United States, so far as may be necessary to insure their free navigation. By navigable waters are meant such as are navigable in fact, and which by themselves, or by their connections with other waters, form a continuous channel with foreign countries or among the states. *The Daniel Ball*, 10 Wall. 568; *Transportation Co. v. Chicago*, 107 U. S. 682, 683, 2 Sup. Ct. Rep. 185; *Miller v. Mayor, etc.*, 109 U. S. 395, 3 Sup. Ct. Rep. 228.

There is no distinction, under the commerce clause of the constitution, or in principle, between a navigable stream running through two or more states, and such a stream located wholly in one state, and connecting with other navigable waters, so as to form a continuous channel of communication with foreign nations or among the states. The decisions of the supreme court proceed upon no such distinction, nor do they, in our opinion, sanction or support the position contended for, that in the latter class of cases the state may authorize the construction of a bridge over the stream within its limits, but that in the former class the state has no such authority. The theory upon which this contention is based is that navigable waters wholly within the limits of a state, but connecting with other waters, forming continuous channels of communication with foreign nations or among the states, are not so "national" in their character as navigable streams extending through two or more states. This position is not correct, neither is it supported by the authorities. On the contrary, the adjudged cases recognize no such distinction in respect to bridges and other structures erected over navigable waters under state authority. While the decisions of the supreme court establish the general doctrine, as stated by Mr. Justice FIELD in *Cardwell v. Bridge Co.*, 113 U. S. 210, 5 Sup. Ct. Rep. 423,—

"That the commercial power of congress is exclusive of state authority only when the subjects upon which it is exerted are national in their character, and admit and require uniformity of regulations affecting alike all the states;

and that when the subjects within that power are local in their nature or operation, or constitute mere aids to commerce, the states may provide for their regulation and management until congress intervenes and supersedes their action,"

—they also establish that bridges over navigable waters are not of such national character as to exclude state action in respect thereto, but are, on the contrary, of such local, limited, and special character, as aids to commerce, as to come within the management and authority of the states "until congress intervenes and supersedes this action." This is clearly pointed out in *County of Mobile v. Kimball*, 102 U. S. 698, 699, and *Railway Co. v. Illinois*, 118 U. S. 585, 7 Sup. Ct. Rep. 4, and recognized in all subsequent cases, down to and including *Bridge Co. v. Hatch*, 125 U. S. 1-17, 8 Sup. Ct. Rep. 811.

The subjects which have been considered of such national character as to require uniformity of regulation, and to exclude all state action and control, are those relating to interstate and foreign commerce, and the instrumentalities employed therein,—such as the imposition of taxes or other restrictions upon or interference with such commerce. In respect to all such subjects, non-action by congress is tantamount to a declaration that they shall remain free and unobstructed by state action. The cases of *Welton v. Missouri*, 91 U. S. 275-280; *Ferry Co. v. Pennsylvania*, 114 U. S. 196-204, 5 Sup. Ct. Rep. 826; *Pickard v. Car Co.*, 117 U. S. 34, 6 Sup. Ct. Rep. 635; and *Railway Co. v. Illinois*, 118 U. S. 557-575, 7 Sup. Ct. Rep. 4,—furnish illustrations of the subjects considered of national importance, and requiring such uniformity of regulation as to exclude state action and regulation. But the principle of these cases has never been extended to local structures, such as bridges erected by state authority on or over navigable waters which lie wholly within the limits of the state at the point or locality where such structures are erected. But for the commerce clause of the constitution, the state of Kentucky would have exclusive jurisdiction and authority over that portion of the Cumberland river situated within her territorial limits. Her power over it would be as full, complete, and extensive as though the river, throughout its entire length, lay wholly within her borders. As a member of the Union, her sovereign right over the river, as a navigable stream of the United States, is limited by the power conferred upon the general government to regulate commerce among the states. The delegated and paramount authority of congress is confined to regulation of such waters as highways of commerce, leaving the sovereignty of the state over the same otherwise intact and unimpaired. See *Pollard v. Hagan*, 3 How. 223; *Bridge Co. v. Hatch*, 125 U. S. 1-12, 8 Sup. Ct. Rep. 811. But subject to this power of regulation, and until it is called into exercise by congress, the state of Kentucky had the right to sanction and authorize the building of bridges across the stream to aid and facilitate her local and interstate commerce. The bridge, as originally constructed, and after being restored in June, 1890, was not an unlawful interference with navigation. The method employed to restore or rebuild it was not an unreasonable obstruction or interruption of navigation, under the authority

lawfully conferred to build and maintain it. The line of road of which it formed an essential part was and is both a state and national highway, just as the Cumberland river is. The traffic over the road, as reported by the master, exceeds that on the river. The public convenience and benefit were subserved by the mode of rebuilding the bridge which defendant adopted. In rebuilding its bridge, in pursuance of authority conferred by law for the benefit of the public, and without unreasonably or unnecessarily obstructing navigation of the river, it cannot be held that defendant created a public nuisance such as will entitle complainants to recover of it the special damages which they claim to have sustained. This conclusion is clearly and fully supported by the cases of *Transportation Co. v. Chicago*, 99 U. S. 635; *Hamilton v. Railroad Co.*, 119 U. S. 280-285, 7 Sup. Ct. Rep. 206; and *Green & B. R. Nav. Co. v. Chesapeake, O. & S. W. R. Co.*, 88 Ky. 1-12, 10 S. W. Rep. 6.

What was said and ruled by this court in *Railway Co. v. Backus*, 46 Fed. Rep. 216, in nowise conflicts with the views herein expressed and conclusions reached. The proposed structure there complained of came directly within the act of congress approved September 19, 1890. The temporary obstruction here complained of was erected and removed before that legislation of congress was enacted.

It may be proper to state that, if complainants could recover at all, they could not be allowed the amount reported by the master in their favor. The two items of \$500 for traveling expenses and extra labor, and \$242.64 for damage to grain, are not shown to have been occasioned by, or to have been the direct, necessary, and proximate result of, the defendant's temporary or partial obstruction of the usual navigation. In respect to the item of \$1,800.41 for extra freight paid by them, the proof shows that this was largely, if not wholly, self-imposed. No valid reason is given for not transferring their freight over or across the barge provided for the purpose, under the arrangement made between the defendant and the superintendent of the packet companies plying the river. Such transfer would have cost them nothing, would have been attended with but little delay, and would have involved little, if any, more risk or exposure of the freight than the method of shipment adopted by them. On and after the 23d of April, 1890, complainants could have shipped their freight by the river, and were offered transportation that way, without extra charge. It does not appear that they had previously made and entered into any binding contracts to ship by other route or routes, such as would have prevented their acceptance of Capt. Rymin's proposition to carry this freight by the Cumberland river, as usual. But, without further reference to the matter or question of actual damage sustained, the court is clearly of the opinion that, upon well-settled principles, the complainants are not entitled to recover anything under the facts and circumstances of this case. It follows that their exceptions to the report of the special master should be overruled, that defendant's 2d, 3d, 4th, and 5th exceptions be sustained, and that complainants' bill should be dismissed, with costs to be taxed, including an allowance to the special master. It is accordingly so ordered and adjudged.

## CHICAGO, M. &amp; ST. P. RY. CO. v. PULLMAN PALACE-CAR CO.

(Circuit Court, N. D. Illinois. March 28, 1892.)

## EQUITY PRACTICE—OBJECTIONS TO BILL—WAIVER—ACCOUNTING.

A bill for an accounting charged that complainant and defendant entered into a contract, in the nature of a partnership agreement, that the defendant was to keep the books and render monthly accounts to the complainant, and that the defendant fraudulently misstated such accounts. The defendant answered, denying the charges, but averring that it did not object to an accounting. *Held*, that it was too late, on motion for a reference, for the defendant to insist that the charges in the bill were not sufficiently specific.

In Equity. Bill by the Chicago, Milwaukee & St. Paul Railway Company against the Pullman Palace-Car Company for an accounting.

*John W. Cary and Edwin Walker*, for complainant.

*Isham, Lincoln & Beale and J. L. Kunnels*, for defendant.

GRESHAM, Circuit Judge. This is a suit by the St. Paul Company against the Pullman Company for an accounting. On September 22, 1882, the parties entered into a written agreement for the operation of sleeping-cars, parlor and dining cars, by the defendant on the lines of the complainant, for joint account. The complainant had previously operated its own sleeping, parlor, and dining-room equipment, and, by the terms of the agreement, the defendant acquired a one-fourth interest in the cars on the lines. It was contemplated that additional equipment would be needed, and that it should be acquired and owned jointly, upon the same terms. It was made the duty of the defendant "to keep full and complete books of account, showing all the expenses, receipts, losses, and profits arising from the operation" of the cars; and so much of the general expenses of the defendant were to be added to the specific expenses of the cars, operated under the contract, as the number of such cars bore to the whole number of cars run by the Pullman Company on all lines operated by it. It was made the duty of the defendant to balance the accounts as often as once a month, and pay to the complainant three-fourths of the profits, thus ascertained, on or before the end of the month following. Losses were to be borne, one-fourth by the defendant and three-fourths by the complainant. The complainant was given the option to terminate the partnership relation on six months' written notice to the defendant before three stated periods, which right was exercised by giving the necessary notice that the agreement would terminate on September 30, 1890. The parties thereupon agreed that the fair cash value of the defendant's one-fourth interest in the equipment was worth \$105,000, which the complainant refused to pay, for the alleged reason that an accounting would show it was entitled to a much larger sum from the defendant.

After setting out the terms of the agreement, the bill, on information and belief, avers that, although the defendant rendered monthly statements purporting to show the earnings and expenses, in gross, for each of the sleeping-cars operated for joint benefit, the charges for expenses

were grossly excessive and fraudulent; that the defendant retained out of the joint earnings \$70,452.96 for cost of cleaning cars, and \$49,289.89 for laundry work, for the entire term of the contract, which amounts were grossly in excess of actual payments by the defendant for those purposes; that the defendant retained out of the gross earnings \$11,863.16 for money claimed to have been paid for car supplies, which amount was grossly in excess of the actual expenditure for that purpose; that for the month of April, 1890, the defendant retained, for division and district expenses, \$838.72, and for administration expenses, \$524.48; that the amounts retained for such expenses during each of the preceding months were substantially uniform; that the aggregate amount retained on account of division and district expenses for the entire term of the contract was \$100,677.45, and for administration expenses, \$58,806.36, and that such charges were grossly excessive; that the defendant obligated itself, at its own expense, to maintain the equipment of the cars, including carpets, upholstery, bedding, fittings, and other appointments incidental to a sleeping-car, and not essential to an ordinary first-class passenger-car, in good and cleanly condition, and renew the same whenever necessary, and that the defendant wrongfully and fraudulently retained for this purpose, out of the gross earnings, \$73,353.61; that in December, 1888, the defendant constructed and added to the joint equipment five new sleeping-cars, at a uniform charge to the complainant of \$17,180.38, and demanded payment therefor; that this amount is grossly in excess of the actual cost of construction, plus 10 per cent. thereon, which the defendant was entitled to under the terms of the agreement, and that the complainant expended \$25,000 for upholstery and repairs with which it was not chargeable under the contract, no part of which has been refunded by the defendant. The bill also charges that, during the term of the contract, both written and verbal notice was given to the defendant by the complainant that the bills rendered of operating expenses and maintenance of equipment were excessive, and that the complainant repeatedly protested against the correctness of such bills. The charges in the bill, except the last one, are expressly denied by the answer. If this charge is denied, it is only done inferentially. The answer avers that the complainant received monthly statements showing the full amount of earnings and expenses; that monthly settlements were made upon the basis of these statements; and that, with the knowledge of all the facts now known to the complainant, it regularly received its full share of the joint earnings. Other averments in the bill and answer need not here be noticed.

The case is at issue, but the parties are not able to agree as to what questions shall be referred to the master. Although the answer avers that the defendant does not object to an accounting, it now insists that the master should be required to take testimony, and report (1) whether or not the defendant kept books of account as required by the contract, and (2) whether or not the accounts were stated and settled monthly, the complainant all the time knowing the facts relied on in the bill. The bill was not demurred to, and it is now too late for the defendant's

counsel to insist that the charges are not sufficiently specific. If they are true, the complainant has not received its full share of the joint earnings. Even if the books appear to have been properly kept, (and it is not disputed that the defendant kept books of account,) and the complainant received its full share of the joint earnings thus shown, it has the right to establish by competent evidence, if there be such, that the books are not correct, and that the defendant took credit for more money than it expended or was entitled to retain. It was stated at the argument that the complainant would be satisfied with a reference covering the six months prior to the termination of the agreement, and, if unable to establish its charges for that time, it would not ask a reference covering any of the preceding periods. An order will therefore be entered referring the case to Mr. Henry W. Bishop, one of the masters, to take testimony, and report to the court whether, during the months of April, May, June, July, August, September, October, and November, 1890, without the knowledge or consent of the complainant, the defendant deducted from the gross earnings amounts in excess of actual expenses, or in excess of what it was entitled to deduct and retain under the agreement, and, if it did, that the account between the parties be stated, showing the balance due from one to the other for said months.

### SOUTHERN PINE FIBRE CO. v. NORTH AUGUSTA LAND CO.

(Circuit Court, D. South Carolina. April 12, 1892.)

#### SPECIFIC PERFORMANCE—WHEN MAINTAINABLE—CERTAINTY OF AGREEMENT.

A letter from a land company to a manufacturing company promising that, if they will locate a factory upon their property, they will donate to them a certain amount of land, and will promptly build or cause to be built to it a side track, sets forth the agreement in terms sufficiently certain to support a bill for specific performance.

In Equity. Bill by the Southern Pine Fibre Company against the North Augusta Land Company for the specific performance of a contract. Heard on demurrer to the complaint. Demurrer overruled.

*Fleming & Alexander*, for complainant.

*Jackson & Olive*, for defendant.

SIMONTON, District Judge. The case comes up on bill and demurrers. The bill seeks specific performance of a contract. The defendant, owner of a tract of land on or near the Savannah river, opposite the city of Augusta, offered inducements to the plaintiff to erect and put in operation a factory on said land. The bill sets out certain negotiations between the parties, which resulted in a letter by the president of the defendant company to the president of the complainant company in these words:

"NEW YORK, June 20th, 1891.

"J. B. N. Berry, Pres't. Southern Pine Fibre Company—DEAR SIR: The North Augusta Land Company will donate to your company 3 acres of land,





to be selected by it on its property opposite the city of Augusta, and will promptly build or cause to be built to the land so donated a side track, and when your factory is completed and machinery in successful operation, will buy from you (\$2,500) twenty-five hundred dollars' worth of your treasury stock at its par value, payable in cash when your factory is in successful operation as aforesaid.

Yours, truly,

"PAT CALHOUN, Pres't.

"The above is conditioned upon your beginning work at once.

"P. C."

The three acres of land have been donated, and the deed executed and delivered. The factory has been erected and equipped with valuable and costly machinery. The specific performance of that part of the contract is sought which provides that defendant "will promptly build or cause to be built to the land so donated a side track."

Defendant demurs on several grounds, which may be summed up as follows: That there is no equity in the bill; that, the letter being the only contract in writing, no parol evidence of pre-existing negotiations can be admitted, and that all allegations of such negotiations have no place in the bill; that the terms of this letter are vague and uncertain; that it is not alleged what interest complainant will have in the side track when completed, nor how it is to be completed, nor that defendant has the right, power, or authority to complete it; that the damages alleged are remote and consequential; that complainant has an adequate and complete remedy at law.

We now hear the case on demurrer. For the purposes of this decision we confine ourselves to the letter above quoted, without prejudice of the questions arising under the statute of frauds. In that letter the contract distinctly provides for a side track to be built to the land so donated promptly. The term "side track" has a well-known signification. It means connection with some railroad, affording communication with market. Its value to a factory in operation is self-evident. Its absence would cause great injury to the factory, not only increasing expense upon every article needed for or turned out of the factory, but perhaps operating, in this age of competition, fatal results to its business. There is no want of sufficient certainty in the terms of the agreement, and there is sufficient evidence of continuing and increasing damage which cannot be compensated except by a succession of verdicts. Why the side track was not built does not appear. The court will not assume a want of *bona fides* in a contract. On the contrary, the presumption is that when parties contract they honestly believe that they can carry out the promises they have made. For the present we must assume that when the defendant contracted to build the side track it was able to do so. If this hope has been disappointed, and such circumstances exist as make it impossible, these must appear on a full hearing. The demurrers are overruled, with leave to defendant to answer over.

UNITED STATES v. WESTERN UNION TEL. CO. *et al.*

(Circuit Court, D. Nebraska. March 30, 1892.)

## 1. RAILWAY AND TELEGRAPH COMPANIES—GOVERNMENT AID—ALIENATION OF FRANCHISE.

Under the general rule that the grant of a franchise of a public nature is personal to the grantee, and cannot be alienated without the consent of the government, the privilege granted to the Union Pacific Railway Company by the acts of 1862 and 1864 of constructing and operating a telegraph line along its right of way, for public and commercial uses, carried with it a corresponding obligation on the part of the company to itself operate such line, and it had no authority to transfer the franchise to any other corporation.

## 2. SAME.

Nor could such authority be inferred from section 19 of the act of 1862, which authorized the company, in discharge of its obligation, in the first instance to make an arrangement with the companies owning the then existing telegraph line between San Francisco and the Missouri river, whereby that line might be removed and placed upon the railroad right of way, the company having failed to make such an arrangement, and having accepted the whole franchise by constructing a new line of its own.

## 3. SAME—CONSOLIDATION OF COMPANIES.

Act Cong. July 2, 1864, providing "for increased facilities of telegraphic communication," and commonly known as the "Idaho Act," granted to the United States Telegraph Company, a New York corporation, a right to construct a line from the Missouri river to the Pacific, and also authorized the railroad companies to make an arrangement with this company for the construction of its line, like that authorized by section 19 of the act of 1862. Under this act part of the line was constructed in conjunction with the Kansas Pacific Company; and then the United States Telegraph Company consolidated with the Western Union Telegraph Company, and the line was finished under an arrangement between the latter company and the railroad. *Held*, that this franchise was granted for the purpose of constructing an independent line, and, although the consolidation was authorized by the laws of New York, the Western Union Company did not thereby obtain any right to acquire the telegraphic franchises granted by the Union Pacific acts.

## 4. SAME—REGULATION BY GOVERNMENT.

In view of the fact that the telegraphic franchises granted by the Union Pacific acts were inalienable by the grantees, and also of the express reservation therein of the right to "add to, alter, amend, or repeal," congress had full power to pass the act of August 7, 1888, directing the railroad and telegraph companies which received government aid to henceforth operate their telegraph lines by themselves alone, and through their own officers and employees.

## 5. SAME—CONSTRUCTION ACT.

In a proceeding instituted by the United States to annul a contract whereby the telegraphic franchises of the Union Pacific Railway Company were transferred to the Western Union Telegraph Company, the intention and power of congress to prevent such transfer being clear, the court cannot consider any arguments based upon the alleged fact that the contract is beneficial to the pecuniary interests of both the railway company and the public.

## 6. SAME—JURISDICTION OF COURTS.

The government, being the creator of the Union Pacific Railway Company, and a large contributor to its finances, and having a pecuniary interest in its successful management, has full supervisory power over it, and may make and enforce through the courts reasonable regulations not interfering with vested rights.

## 7. SAME—EQUITY JURISDICTION.

Although the main purpose of the act of 1888 is to compel the railroad companies to exercise their telegraphic franchises directly by their own officers and employees, yet, in enforcing this requirement as against the Union Pacific Company, the government may properly proceed by a bill in equity instead of by *mandamus*, since the Western Union Telegraph Company has acquired property along the right of way, and its interests therein can only be properly defined and protected by the flexible procedure of a court of equity.

In Equity. Bill by the United States against the Western Union Telegraph Company and the Union Pacific Railway Company to cancel a contract, whereby the telegraphic franchises of the railroad company

were improperly transferred to the telegraph company, and to compel the railroad company to exercise that franchise directly through its own officers and employes. Decree for complainant.

*Charles H. Aldrich*, for the United States.

*John F. Dillon, J. M. Woolworth, Rush Taggart, and J. I. Wilson*, for defendants.

BREWER, Circuit Justice. On August 7, 1888, congress passed an act, whose title, first and fourth sections, are as follows:

"Chap. 772. An act supplementary to the act of July first, eighteen hundred and sixty-two, entitled 'An act to aid in the construction of a railroad and telegraph line from the Missouri river to the Pacific ocean, and to secure to the government the use of the same for postal, military, and other purposes,' and also of the act of July second, eighteen hundred and sixty-four, and other acts amendatory of said first-named act.

"Be it enacted by the senate and house of representatives of the United States of America in congress assembled, That all railroad and telegraph companies to which the United States has granted any subsidy in lands or bonds or loan of credit for the construction of either railroad or telegraph lines, which, by the acts incorporating them, or by any act amendatory or supplementary thereto, are required to construct, maintain, or operate telegraph lines, and all companies engaged in operating said railroad or telegraph lines, shall forthwith and henceforward, by and through their own respective corporate officers and employes, maintain and operate for railroad, governmental, commercial, and all other purposes, telegraph lines, and exercise by themselves alone all the telegraph franchises conferred upon them, and obligations assumed by them under the acts making the grants as aforesaid.

\* \* \* \* \*

"Sec. 4. That, in order to secure and preserve to the United States the full value and benefit of its liens upon all the telegraph lines required to be constructed by and lawfully belonging to said railroad and telegraph companies referred to in the first section of this act, and to have the same possessed, used, and operated in conformity with the provisions of this act and of the several acts to which this act is supplementary, it is hereby made the duty of the attorney general of the United States, by proper proceedings, to prevent any unlawful interference with the rights and equities of the United States under this act, and under the acts hereinbefore mentioned, and under all acts of congress relating to such railroads and telegraph lines, and to have legally ascertained and finally adjudicated all alleged rights of all persons and corporations whatever claiming in any manner any control or interest of any kind in any telegraph lines or property, or exclusive rights of way upon the lands of said railroad companies, or any of them, and to have all contracts and provisions of contracts set aside and annulled which have been unlawfully and beyond their powers entered into by said railroad or telegraph companies, or any of them, with any other person, company, or corporation." 25 St. p. 382.

Thereafter this bill was filed by the government against the Western Union Telegraph Company and the Union Pacific Railway Company, the object of which, it may be stated in a general way, is to secure a decree canceling and annulling a contract of date July 1, 1881, made by and between the two companies, by which, as claimed, the telegraphic franchises granted to the railway company have been improperly trans-

ferred to the telegraph company, and also compelling the discharge by the former company of all the telegraphic obligations imposed by its charter and the various acts of congress. The hinge of the case is this contract, and the primary question is as to its validity.

I pass, therefore, to an inquiry into its terms and extent. It was made in 1881 by the railway with the telegraph company. To a correct understanding of its terms and an interpretation of its meaning, the prior history of these two companies, and their relations to each other, must be stated. The railway company is a consolidated corporation. It was not named in the Pacific Railroad acts of 1862 and 1864; but was formed, as authorized by those acts, by the consolidation of three companies, beneficiaries thereunder. Of those constituent companies it is enough to say that one—the Union Pacific Railroad Company—was authorized to construct what was afterwards known as the “Main Line,” and which, as finally constructed, extends from Council Bluffs and Omaha, on the Missouri river, to Ogden, in Utah, where it forms a connection with the Central Pacific; another was a corporation created by the legislature of the territory of Kansas, described in the act of 1862 as the “Leavenworth, Pawnee & Western Railroad,” whose name was afterwards changed to “Union Pacific Railroad Company, Eastern Division,” and again to “Kansas Pacific Railway Company,” and which was authorized to build a road from the junction of the Kaw and Missouri rivers, at Kansas City, westward through Kansas, to connect with the main line at the 100th meridian of longitude west from Greenwich, which point of junction was afterwards changed and finally located at Cheyenne, and which company did in fact build the line from Kansas City west to Denver; and the third, the Denver & Pacific Railway & Telegraph Company, which, under the authority of the act of March 3, 1869, (15 St. p. 324,) built and owned the line from Denver to Cheyenne. A consolidation of these companies took place in January, 1880. It secured to the new the rights and continued to it the obligations of the constituent companies. The original Union Pacific Railroad act of July 1, 1862, (12 St. p. 489,) creating the corporation, in the first section authorized and empowered it “to lay out, locate, construct, furnish, maintain, and enjoy a continuous railroad and telegraph;” and thereafter making to it a large grant of lands and loan of bonds, added in the sixth section “that the grants aforesaid are made upon condition that said company shall pay said bonds at maturity, and shall keep said railroad and telegraph line in repair and use.” Counsel for the government says in his brief that the words “railroad and telegraph” are used in connection no less than 38 times in the act. The significance of this conjunction of words is, as claimed, the vesting of a joint railroad and telegraphic franchise in a single corporation, with personal obligation to discharge the duties imposed by each franchise, and with inability, by contract or otherwise, to transfer the duties created by either to any other corporation or individual. With delightful emphasis reference is made to the motto placed by the learned counsel for the railway company on a brief prepared by him in 1880, in a litigation then pending between the rail-

way and telegraph company: "Telegraph franchises and duties to the government and the public of the Pacific Railway Companies: Indivisible, indestructible, inalienable, and of perpetual obligation." That is undoubtedly the general law as to all franchises of a public character. It is said that a special exception exists in this case by reason of the nineteenth section of the act, which provides—

"That the several railroad companies herein named are authorized to enter into an arrangement with the Pacific Telegraph Company, the Overland Telegraph Company, and the California State Telegraph Company, so that the present line of telegraph between the Missouri river and San Francisco may be moved upon or along the line of said railroad and branches as fast as said roads and branches are built; and, if said arrangement be entered into, and the transfer of said telegraph line be made, in accordance therewith, to the line of said railroad and branches, such transfer shall, for all purposes of this act, be held and considered a fulfillment on the part of said railroad companies of the provisions of this act in regard to the construction of said line of telegraph. And in case of disagreement said telegraph companies are authorized to remove their line of telegraph along and upon the line of railroad herein contemplated, without prejudice to the rights of said railroad companies named herein."

This section recognizes the present existence of a telegraph line between the Missouri river and San Francisco, the property of certain telegraph corporations. It was a line whose construction the government had secured in this way: On June 16, 1860, congress passed an act entitled "An act to facilitate communication between the Atlantic and Pacific states by electric telegraph." 12 St. p. 41. It authorized the secretary of the treasury—

"To advertise for sealed proposals, to be received for sixty days after the passage of this act, (and the fulfillment of which shall be guarantied by responsible parties, as in the case of bids for mail contracts,) for the use by the government of a line or lines of magnetic telegraph, to be constructed within two years from the thirty-first day of July, eighteen hundred and sixty, from some point or points on the west line of the state of Missouri, by any route or routes which the said contractors may select, (connecting at such point or points by telegraph with the cities of Washington, New Orleans, New York, Charleston, Philadelphia, Boston, and other cities in the Atlantic, Southern, and Western states,) to the city of San Francisco, in the state of California, for a period of ten years, and shall award the contract to the lowest responsible bidder or bidders, provided such proffer does not require a larger amount per year from the United States than forty thousand dollars: \* \* \* provided, that no such contract shall be made until the said line shall be in actual operation, and payments thereunder shall cease whenever the contractors fail to comply with their contracts: \* \* \* and provided, also, that said line or lines \* \* \* shall be open to the use of all citizens of the United States during the term of the said contract, on payment of the regular charges for the transmission of dispatches."

On September 5, 1860, the directors of the Western Union Telegraph Company passed a resolution authorizing its president, Hiram Sibley, to put in a bid for the contemplated telegraph line, in his own name, but for the benefit of the company and such associates as might thereafter be united with it. In pursuance of this resolution, Mr. Sibley put in an offer, which was accepted by the secretary of the treasury on Septem-

ber 22, 1860, and the line from Omaha westward to the Pacific ocean was constructed and put in operation. While the construction of this line was carried on in the names of other corporations,—as was also the contract, the personal agreement of Mr. Sibley,—yet all was at the instance and for the benefit of the Western Union Company, and those corporations were subsequently merged in, and the contract transferred to, that company. It was this line, thus aided by the government, whose transfer to the right of way was authorized by section 19. Now, this section 19 grants some rights and privileges, but what are they? Evidently, with the broadest construction, only the privilege of transferring by arrangement the telegraphic franchise to the named telegraph companies. It was a privilege to the railroad company; and it was the Union Pacific Railroad Company alone which, so far as this case is concerned, had the benefit of such section. It had the option either to build a telegraph line and accept the franchise itself, or transfer the same by agreement to those telegraph companies. It exercised this option, and built a telegraph line from Omaha to Ogden; and the telegraph companies, on their part, exercised the right, given in the last part of the section, of transferring their line to the right of way. The privilege given to the railroad company was not of building the telegraph line, and then leasing it to some other company, or transferring it, with the telegraphic franchise, to such other company. Indeed, reading the section narrowly, and by the letter, it, as counsel for the government says, refers only to an arrangement for the construction, and does not include the operation and maintenance, of the telegraph line. While the section may have a broader meaning, and include the whole franchise, yet the use of the single word "construction" limits the option to that which includes construction, and means simply that, in view of the hazard and magnitude of the enterprise, the railroad company was given the privilege of transferring the telegraph burden at the commencement to companies which already had a telegraph line, and cannot be construed as giving to the railroad company a general permission, after it has accepted the whole franchise and built a telegraph line, to lease or otherwise transfer that and the telegraphic franchise to another company. Such was the construction placed upon this section by Judge McCrory and Justice MILLER, as far back as 1880, in suits then pending between the Western Union Telegraph Company and the Union Pacific Railway Company. 1 McCrory, 418, 541, 581, 586, 1 Fed. Rep. 745, and 3 Fed. Rep. 1, 423, 721. In the last case, on the last page, may be found the language of Mr. Justice Miller, as follows:

"I concur with Judge McCrory in the opinions delivered by him on the former applications before him to dissolve this injunction, that on the face of the acts of congress of 1862 and 1864, called 'The Pacific Railroad Acts,' the obligation of building a telegraph line along its right of way, and of operating that line, or having it operated under the control of the railroad company, was an obligation which they could not abandon, and which was inconsistent with the contract made in this case, so far as those two acts are concerned; and that, if the case rested on the provision of those original Pacific Railroad acts, namely, the act of 1862 and amendatory act of 1864, the present contract

would be void, as in violation of the obligations imposed upon the railroad company by those acts."

That litigation grew out of these facts: Prior thereto the Union Pacific Railroad Company and the Kansas Pacific Railway Company—two of the constituent companies of the present railway company defendant—had made contracts with the Atlantic & Pacific Telegraph Company and the Western Union Telegraph Company, respectively, for the telegraphic business on their lines. The railway companies sought to break those contracts, take possession of the telegraph lines, and make new arrangements with the American Union Telegraph Company, and to prevent this action by the railroad companies was the purpose of the litigation; so that the question of the powers of the railroad companies came directly in issue. I agree with those judges that the privilege granted by section 19 was exhausted when the railroad company built its telegraph line, and accepted the telegraphic franchise.

Coming now to the act of July 2, 1864, commonly known as the "Idaho Act," (13 St. p. 373.) This contemplated a new and independent telegraph line to the Pacific. This is apparent from the title, reading, as it does, "for increased facilities of telegraphic communication," and it granted to a company other than those mentioned in the act of 1862, to wit, the United States Telegraph Company, the right to construct a line from the Missouri river to the Pacific, and also authorized the railroad companies to make a like arrangement with this company for the construction of its telegraph line. What, if anything, was done under this act is not entirely clear from the testimony. The construction of the Kansas Pacific Railroad from the Missouri river westward through Kansas was commenced by Samuel Hallett, as a contractor with the company. As such contractor, and for the company, he built both the railroad and the telegraph line as far as Lawrence. Thereafter John D. Perry, of St. Louis, and his associates, came into possession and control. From Lawrence to Rossville, a distance of less than 50 miles, it would seem as though the United States Telegraph Company and the railroad company joined in the expense of constructing the telegraph line, but under what exact arrangement is not disclosed. Then the United States Telegraph Company was consolidated with the Western Union Telegraph Company; and the latter with the railroad company, under some arrangement, afterwards put into a contract of date October 1, 1886, completed the telegraph line to Denver. It appears that at the time the act of July, 1864, was passed there was a corporation organized under the laws of the state of New York, known as the "United States Telegraph Company." Shortly thereafter it was consolidated with three other companies into a new corporation, bearing the same name, and this consolidated company was the one which shared in the building of the telegraph line from Lawrence to Rossville. It then consolidated with the Western Union Telegraph Company,—also a New York corporation, and one which controlled and afterwards absorbed the corporations named in the nineteenth section of the act of 1862,—as the owners of the telegraph line, and with whom the railroad companies

were authorized to make arrangements. It may be conceded that the consolidations were authorized by the laws of the state of New York; but does it follow that the Western Union Telegraph Company, by virtue thereof, acquired the right under the Idaho act to arrange for the telegraphic franchises granted by the Union Pacific act? I think not. The privilege given by the Idaho act was personal to the United States Telegraph Company. It was not to it and its assigns, or to it and its successors. The general rule is that a grant of a franchise of a public nature is personal in its character, and incapable of transfer without the sanction of the government making the grant to any other person or corporation. It creates a contract between the government and its grantee, and on the part of the latter carries with it the obligation that it will personally discharge the duties and exercise the rights of that franchise. It is true that Mr. Justice MILLER seemed to be of opinion, in the case referred to, that the Western Union Telegraph Company succeeded to all the rights of the United States Telegraph Company; and yet, as the case when it came before him was on a motion to dissolve an injunction, he left this matter open to further consideration on the final hearing. In his opinion (page 591, 1 McCrary, and page 731, 3 Fed. Rep.) he says:

"The existence of this United States Telegraph Company, and the assertion of the rights of the Western Union Telegraph Company under it, and the effort to show that the contract now in question was made under the act of 1864 with the successor of that company, is for the first time presented to the court at this hearing, and much that might make it plain either that there was such a right or that there was not such a right may possibly exist and be brought to light hereafter, when the case can be heard at a final hearing on the issues made by the pleadings; and this branch of the subject will therefore be postponed for the present."

While I am satisfied as to the formalities attending these consolidations, I am of opinion that by them the rights and privileges given to the United States Telegraph Company by the Idaho act were not transferred to the Western Union Company. Beyond the general rule of law referred to, it is obvious from the legislation of congress that two independent lines were contemplated, and that it was not intended to grant to a company having one line the right to build and operate another. The companies which had the line then in existence were known to congress. It had given to the railroad companies the right to make arrangement with them, and by that arrangement to make their telegraph line the fulfillment of the telegraph obligation cast upon the railroad companies. If congress had intended that the same companies should build and operate another line, it could easily have made the grant to them. The fact that it named another, an independent company, is evidence that competing lines were its purpose; and with that purpose obvious on the face of these statutes it cannot be that by consolidation this purpose could be frustrated.

It may be said that the law of New York authorizing consolidation of corporations was in force at the time of the passage by congress of the act of July 2, 1864; that congress must be presumed to have known



this, and therefore impliedly consented to any subsequent transfer of the franchise granted by that act to any company into which the United States Telegraph Company might lawfully be consolidated; and there is force in the argument. If the subject of the grant was land or other tangible property, it would, in the absence of restrictive words in the act of congress, be true that the subsequent disposal of such tangible property could be made by the grantee corporation in any way authorized by the laws of the state of New York. But there is an element of personality of obligation in a franchise which is not found in a grant of tangible property, and, in view of the intent of congress, displayed by its several acts, the true construction seems to me to be that it granted this franchise and privilege to be exercised by the corporation named as grantee, and by it alone, and only so long as it preserved an independent corporate existence.

It is worthy of note, also, that when the application was made by the Kansas road for the government aid promised on completion of the first 40 miles, the affidavit of the president stated "that said company have completed about 40 consecutive miles of said railway and telegraph, ready for the service contemplated by the acts of congress of 1862 and 1864;" also that the act of March 3, 1869, (15 St. p. 324,) authorizing an arrangement by which the Denver & Pacific Railway & Telegraph Company should have the benefit of the Pacific Railroad acts so far as respects that portion of the Kansas branch which lies between Denver and Cheyenne, in terms authorized the Kansas Company to contract with the Denver Company "for the construction, operation, and maintenance of that part of its line of railroad and telegraph between Denver," etc., with the proviso in section 2 that there should be "a continuous line of railroad and telegraph from Kansas City, by way of Denver, to Cheyenne." Obviously this legislation was upon the assumption by congress—an assumption based, doubtless, on the report made by the president of the Kansas Company—that that company had made no contract with the United States Telegraph Company, and was the builder and owner of both the railroad and telegraph line from Kansas City westward. More than that, the articles of consolidation, signed in 1880, by which the Union Pacific Railroad Company, the Kansas Pacific Railway Company, and the Denver & Pacific Railway & Telegraph Company were consolidated into the present railway company defendant, recite that the first-named company owns its line of railroad and telegraph, and that the second company owns and operates its railroad and telegraph line. These recitals, good against the railway company, seem to imply that up to the time of the contract complained of the same corporations owned both railroad and telegraph, whatever privileges of use of the latter might by previous contracts have been transferred to other companies. These considerations lead to the conclusion that at the time of that contract the double franchise of railroad and telegraph lines remained intact in the railway company, incapable of alienation without further sanction of congress. Hence, irrespective of the reservation in the original Pacific Railroad acts of the right to "add to, alter, amend,

or repeal," and the provision in the act of 1888 directing the personal exercise of the telegraphic franchise by the railroad company, I should be forced to examine the contract of 1881 as the act of a company, charged with a railroad and telegraphic franchise, and incapable of alienating either. But the act of 1888 is not to be ignored. It is pertinent, for it removes all doubts. It is a valid exercise by congress of its power to alter and amend. It does not purport to grant a new or take away an old franchise. It attempts simply to regulate the manner in which a franchise already granted and possessed shall be exercised, and surely the power to regulate the manner of exercise is within the reserved power to alter and amend the charter. With reference to the scope of this power to alter and amend, and concerning the present railway company defendant and its charter, Chief Justice WARRE said in the *Sinking Fund Cases*, 99 U. S. 700, 720:

"We are of the opinion that congress not only retains, but has given special notice of its intention to retain, full and complete power to make such alterations and amendments of the charter as come within the just scope of legislative power. That this power has a limit, no one can doubt. All agree that it cannot be used to take away property already acquired under the operation of the charter, or to deprive the corporation of the fruits actually reduced to possession of contracts lawfully made; but, as was said by this court, through Mr. Justice CLIFFORD, in *Miller v. State*, 15 Wall. 498: 'It may safely be affirmed that the reserved power may be exercised, and to almost any extent, to carry into effect the original purposes of the grant, or to secure the due administration of its affairs, so as to protect the rights of stockholders and of creditors, and for the proper disposition of its assets;' and again, in *Holyoke Co. v. Lyman*, Id. 519: 'To protect the rights of the public and of the corporators, or to promote the due administration of the affairs of the corporation.' Mr. Justice FIELD, also speaking for the court, was even more explicit when, in *Tomlinson v. Jessup*, Id. 459, he said: 'The reservation affects the entire relation between the state and the corporation, and places under legislative control all rights, privileges, and immunities derived by its charter directly from the state;' and again, as late as *Railroad Co. v. Maine*, 96 U. S. 510: 'By the reservation the state retained the power to alter it [the charter] in all particulars constituting the grant to the new company formed under it of corporate rights, privileges, and immunities.' Mr. Justice SWAYNE, in *Shields v. Ohio*, 95 U. S. 324, says, by way of limitation: 'The alterations must be reasonable. They must be made in good faith, and be consistent with the object and scope of the act of incorporation. Sheer oppression and wrong cannot be inflicted under the guise of amendment or alteration.' The rules, as here laid down, are fully sustained by authority. Further citations are unnecessary."

Nothing need be added to this definition of the scope and limits of such a power. Within that definition the act of 1888 was valid legislation; and it, in effect, says to the railway companies: "Notwithstanding you may have in the past discharged the duties of your telegraphic franchise through other corporations and by other instrumentalities, you must in the future discharge them solely through your employees." It orders off from this franchise all other corporations.

Coming, then, to the contract, it is too long to be quoted in full. Its obvious purpose and expected effect, and, in view of the testimony as to

what has taken place since, it may be added, its actual result, was and has been to transfer the telegraphic franchise to the Western Union Telegraph Company. It must be borne in mind that this franchise, as granted by the acts of 1862 and 1864, was not the mere right to place a telegraph wire along the railroad for its sole use. A telegraph wire is a necessary part of a complete railroad under the urgencies of railway operation to-day. The grant of a franchise to build a railway carries with it the right to add such a wire. It is as much a part of the railroad as its depots or its wrecking trains. So nothing of this kind was contemplated in the telegraphic franchise granted by the acts of 1862 and 1864. What was meant was a telegraph line for public and commercial use, as independent and complete in itself as though not built along the railroad right of way, or used at all in connection with its operation.

Now, this contract operates to transfer such telegraphic franchise to the Western Union Telegraph Company, and was intended to make it the exclusive beneficiary thereof. Its purpose, as declared, is "of providing telegraphic facilities for the parties hereto, and of maintaining and operating the lines of telegraph along the railway company's railroads in the most economical manner in the interest of both parties, and for the purpose of fulfilling the obligations of the railway company to the government of the United States and the public in respect to the telegraphic service required by the act of congress of July 1, 1862." The third clause reads that—

"The railway company, so far as it legally may, hereby grants and agrees to assure to the telegraph company the exclusive right of way on, along, upon, and under the line, lands, and bridges of the railway company, and any extensions and branches thereof, for the construction, maintenance, operation, and use of lines of poles and wires, or either of them, or underground or other system of communication for commercial or public uses or business, \* \* \* and the railway company will not transport men or material for the construction or operation of a line of poles and wire or wires or underground or other system of communication in competition with the lines of the telegraph company, party hereto, except at and for the railway company's regular local rates, nor will it furnish for any competing line any facilities or assistance that it may lawfully withhold, nor stop its trains, nor distribute material therefor at other than regular stations: provided, always, that in protecting and defending the exclusive rights given by this contract the telegraph company may use and proceed in the name of the railway company, but shall indemnify and save harmless the railway company from any and all damages, costs, charges, and legal expenses incurred therein or thereby."

And the fourth clause provides that—

"It is mutually understood and agreed that all of the telegraph lines and wires covered by this contract, whether belonging to or used by the telegraph company or the railway company, for the purposes of this contract, as herein provided, shall form part of the general system of the telegraph company. The railway company further agrees that its employes shall transmit over the lines owned, controlled, or operated by the parties hereto all commercial telegraph business offered at the railway company's offices, and shall account to the telegraph company exclusively for all of such business and the receipts thereon, as provided herein. No employe of the railway company shall,

while in its service, be employed by, or have any connection with, any other telegraph company than the telegraph company party hereto, and the telegraph company shall have the exclusive right to the occupancy of and connection with the railway company's depots or station houses for commercial or public telegraph purposes as against any other telegraph company: provided, that if any person or party, or any officer of the government, tender a message for transmission over the railway telegraph lines between Council Bluffs and Ogden, at any railway telegraph station between those points, and require that the service be rendered by the railway company, the operator to whom the same is tendered shall receive and forward the same, accordingly, at the rates to be fixed by the railway company, to the point of destination, if not beyond its own lines. If the destination of said message be beyond said railway company's lines, the telegraph company, when receiving the same at the point at which it leaves the said railway lines, may demand the prepayment of tolls for the service of forwarding the message on its own lines: provided, however, that the local receipts of the railway company on such messages shall be divided between the parties hereto in the same manner and subject to the same conditions as provided in the tenth clause of this agreement."

Further, in the 5th, 6th, and 7th clauses we find these provisions:

"*Fifth.* The railway company agrees to furnish at its own expense all the labor, except a foreman, for the maintenance, repair, and renewal or reconstruction of the existing lines and wires along all the railway company's railroads, and for the construction, maintenance, repair, and renewal or reconstruction of such additional wires or lines of poles and wires as may be required for commercial or railroad telegraph purposes along said railroads, and along future branches and extensions thereof, and along new railroads constructed or acquired by the railroad company, except as modified in the sixth clause hereof. The telegraph company shall furnish a foreman skilled in the work of telegraph construction, who shall have charge of the construction and reconstruction of the lines and wires and the direction of the labor furnished by the railway company for such purposes, said foreman to be subordinate to the superintendent mentioned in article twelfth of this agreement.

"*Sixth.* Each party hereto shall pay one-half of the entire cost of all poles, wires, insulators, tools, and other material used for the maintenance, repair, and renewal or reconstruction of existing lines and wires along all of the railway company's railroads, and for the construction, maintenance, repair, and renewal or reconstruction of such additional wires or lines of poles and wires as may be required for commercial or railroad telegraph purposes along said railroads, and along future branches or extensions thereof, and along new railroads constructed or acquired by the railway company, until the total number of wires shall amount to three for the exclusive use of each party hereto between Council Bluffs and Ogden; two for the exclusive use of each party hereto between Kansas City and Denver; and one for the exclusive use of each party hereto on all other portions of the railway company's railroad branches and extensions. Each party hereto shall pay the entire cost of the construction, maintenance, repair, and renewal or reconstruction of wires for its exclusive use in excess of the number hereinbefore mentioned. The material of the telegraph company for additional wires to be transported free of charge by the railway company over its own lines, as hereinafter provided. The telegraph company agrees to furnish at its own expense all blanks and stationery for commercial or other public telegraph business, and all instruments, main and local batteries, and battery material for the operation of its own and the railway company's wires and offices.

*"Seventh.* Each party hereto shall have the exclusive use, under the division of the cost of material hereinbefore provided, of not exceeding three wires between Council Bluffs, Iowa, and Ogden, Utah, and not exceeding two wires between Kansas City, Mo., and Denver, Col., and not exceeding one wire on all other portions of the railway company's railroads: provided, however, that in case either party hereto shall require additional wires between said places hereinbefore mentioned, or along any of the other railroads of the railway company, the party requiring such additional wire or wires shall furnish at its own expense all the material for the construction, maintenance, repair, and renewal or reconstruction of such additional wire or wires."

Also in the 9th, 10th, 12th, 13th, and 14th clauses these provisions:

*"Ninth.* The railway company agrees to transport free of charge over its railroads, upon application of the superintendent or other officer of the telegraph company, all officers of the telegraph company when traveling on its business, and all employes of the telegraph company when traveling on the telegraph company's business connected with or pertaining to the lines or wires and offices along any of the railroad company's railroads. And the railroad company further agrees to transport and distribute free of charge along the line of any and all its railroads all poles and other materials for the construction, maintenance, operation, repair, or reconstruction of the lines and wires covered by this agreement, and of such additional wires or lines of poles and wires as may be erected under and in pursuance of the provisions of this agreement; also all material and supplies for the establishment, maintenance, and operation of the offices along said railroads; it being understood that no charge shall be made for the transportation of poles or other materials over any of the railway company's railroads for use on any other of its railroads.

*"Tenth.* The telegraph company agrees to supply instruments and local batteries, and blanks and stationery for commercial telegraph business as hereinbefore provided, at offices established and maintained by the railway company. At all telegraph stations of the railway company its employes shall receive, transmit, and deliver such commercial or public messages as may be offered, and shall render to the telegraph company monthly statements of such business, and full accounts of all receipts therefrom, and the railway company shall cause all of such receipts to be paid over to the telegraph company monthly. As compensation to the railway company for the services herein provided for, the telegraph company agrees to pay or return to the railway company monthly one half of the cash receipts at telegraph stations maintained and operated by and at the expense of the railway company, tolls on ocean cable messages and tolls for lines of other companies excepted, all of which shall be retained by the telegraph company, it being understood that the railway company shall not be entitled to any portion of the tolls on ocean cable messages, or tolls belonging to lines of other companies, or to any portion of amounts checked against other offices. The railway company agrees that its employes shall not compete with the telegraph company's offices in the transaction of commercial telegraph business at any point where the telegraph company may now or hereafter have an office separate from the railway company's office, by cutting rates or by active efforts to divert business from the telegraph company."

*"Twelfth.* It is further agreed that the management of the wires, the repairs of all the lines along the railway company's railroads, and the distribution of all materials for use on said lines, shall be under the supervision and control of a competent superintendent, who shall be appointed and paid jointly by the parties hereto, and whose salary shall be fixed by mutual agreement; and said superintendent shall be equally the servant of each of the

parties hereto, and shall, as far as practicable, protect and harmonize the interest of both parties hereto in the transaction of the railroad and commercial telegraph business along the railway company's railroads.

*"Thirteenth.* The railway company shall have the right to the free use of any telegraphic patent rights or new discoveries or inventions that the telegraph company now owns and uses in its general telegraph business, or which it may hereafter own and use as aforesaid, so far as the same may be necessary to properly carry on the business of railroad telegraphing on the line of said railroads as provided for herein.

*"Fourteenth.* The telegraph company hereby promises and agrees to assume and protect the railway company from the payment of all taxes levied and assessed upon the telegraph property belonging to either of the parties to this agreement."

The import of these various provisions is clear. They mean that the telegraphic business and the telegraphic franchise, in the sense we have defined it, should be exercised by the Western Union Telegraph Company, and that no other company—railway or telegraph—should touch it. The purpose was—a purpose disclosed by every section and line of the contract—that the public and commercial use of the telegraph wires should belong to the Western Union Company, leaving to the railroad company only so much use of the telegraph wires as was necessary for its own business. That such was the contemplation of the parties in this contract is evident, not only from its provisions, but from the actual workings subsequent thereto. The Western Union Company transacts the commercial business, and the railroad wires are used exclusively or substantially so for the railroad business. The telegraphic franchise is in fact separated from the railway company, and exercised by the Western Union Company. The telegraph superintendent of the railway company, Mr. Korty, says in his testimony that—

"The Union Pacific has four wires from Omaha to North Platte, and three from North Platte to Ogden. The other wires on the poles are used exclusively by the Western Union Company for commercial telegraph business. The three or four wires of the railroad company are entirely used by it for operating its roads. It would not be practicable to operate those wires for general commercial business without seriously interfering with the railroad business, and the railroad company's wires would be inadequate to carry any additional business."

Of similar effect is the testimony of J. J. Dickey, the western superintendent of the Western Union Company. The report made in 1889 to the interstate commerce commission by the comptroller of the Union Pacific Railway Company states that—

"The wires owned by the railway company are used for its railway business, and those owned by the telegraph company are used for commercial business."

In the bill filed immediately after the passage of the act of 1888 by the Western Union Telegraph Company against the Union Pacific Railway Company, in which an injunction was sought by the former against the latter to restrain any interference with the contract of 1881, it is alleged by the telegraph company, in paragraph 12, that—

"The said wires used by the defendant in the operation of its road are not equal to its necessities in that behalf, and it is impossible for it to do any

business for the public or other companies on said wires without seriously interfering with and impeding the operation of its engines, cars, and trains; and, if it undertakes to do so, it will be under the necessity of using your orator's five wires, or some of them. Upon your orator's said wires is carried on almost the entire transcontinental business of the Union. Nor can your orator submit to any interference therewith by the defendant or any other party without seriously impeding and disarranging that business to its great loss and the public's inconvenience."

And in the brief in this case the counsel for the Western Union Company, replying to one suggestion, say:

"This objection, however, is easily met by the fact that the railway company has, under the contract of 1881, employed us to operate its lines for commercial business, it reserving to itself their operation for railroad business."

Clearly, confessedly, then, the commercial business is transacted by the Western Union Company. If the contract be as suggested,—the mere hiring by the railway of the telegraph company to do this business,—there can be no doubt of the power of congress to put an end to such hiring, and to compel the corporation which it has created to employ other instrumentalities for doing the work. But I think the concession of counsel does not come quite up to the proof. The fact is, the commercial telegraph business is as fully in the hands and under the control of the Western Union Company as if the wires did not run along the right of way, and their working was wholly disconnected from the operation of the railroad; and this result was contemplated and intended by the contract. So it is that the lessons of experience support and establish the construction placed upon the contract of 1881, to the effect that the telegraphic franchise, as a franchise of independent, public, and commercial transportation, was intended to be and was transferred by the railway company to the Western Union Company, leaving only to the former so much use of telegraph wire as would facilitate and further its own railroad business. Summing it up in a word, the purpose and effect of that contract was and has been to transfer the full telegraphic franchise from the railway company to the Western Union Company. Such transfer was beyond the authority conferred by the acts of 1862 and 1864; and yet, to prevent any doubt, the government, in the exercise of its reserved power to alter and amend, by the act of 1888 in terms has commanded the railway company to exercise all the duties of its telegraphic franchise, and forbidden the performance of those duties by any other company, and through any other instrumentality than the direct servants and employees of the railway company.

As the contract of 1881 contemplates action distinctly forbidden by the act of 1888, two matters suggested by counsel for defendants seem excluded from consideration. It is insisted that the practical working of this contract is pecuniarily beneficial to the railway company, and also that the public interests are in fact subserved by placing the commercial telegraphic business along this road in the hands of that corporation which practically controls the telegraphic business of the country. Assume that both these contentions are sustainable, (and I am inclined

to believe that they are,) yet I am constrained to hold that, though established, they constitute no defense to the demand of the government. Take the first, and assume that the testimony establishes beyond question that the contract is pecuniarily beneficial to the railway company, that it earns more money by its continuance than it would by conducting through its own employes the commercial telegraph business, and yet may a court, by reason of this fact, decline to enforce the plain mandate of the government which created this corporation and gave it its powers? The government is, it is true, pecuniarily interested as second mortgagee, but a higher interest is that the administration of its franchises should redound to the general welfare, and not merely to the pecuniary interest of its grantee, or even of itself. The dollar is not always the test of the real interest. It may properly be sacrificed if anything of higher value be thereby attained. But whether the dollar be gained or lost, is not in a matter of this kind a question for the courts. It is for the legislative branch, as representative of the popular will, to settle all such questions. Given power to act in the legislature, and its mandatory action, the simple province of the courts is to enforce such mandate, and they have no revisory determination as to the wisdom or folly of the commanded act. In *U. S. v. Railroad Co.*, 91 U. S. 72, 91, this court, by Mr. Justice DAVIS, responding to a question of this kind, observed:

"Counsel have dwelt with special emphasis upon the consequences which would result from a decision adverse to the appellant. We cannot consider them in disposing of the questions arising upon this record. The rights of the parties rest upon a statute of the United States. Its words, as well as its reason, spirit, and intention, leave, in our opinion, no room for doubt as to its true meaning. We cannot sit in judgment upon its wisdom or policy. When we have interpreted its provisions, if congress has power to enact it, our duty in connection with it is ended."

So here I may not sit in judgment upon the financial wisdom or folly of this act of 1888. I may only inquire whether it is within the power of congress, and whether its enforcement infringes any vested rights of the defendants. That its enforcement may mean loss to either corporation, and loss to the government, does not determine the power of congress, or absolve the courts from the duty of enforcing its mandates.

And so with the other question. It may be true, as contended,—and, not disturbed by the common hue and cry about monopoly, I am disposed to believe that it is true,—that the real interests of the public are subserved by the consolidation of the various transportation systems, and that the putting into the hands and under the control of one corporation the telegraphic business of the country would secure to the public cheaper and better service. But, like the other, this is no question for the courts. This is a government of the people. They express their will through legislative action. It would disarrange our system of government, and would be freighted with peril, if the courts attempted to interpose their opinions upon matters of policy, to stay or thwart such constitutionally expressed judgment. It is enough for the courts to



protect and enforce rights, without entering into questions of policy. So, conceding in respect to these matters all that is claimed by counsel for defendants to be true, I am of opinion that they present no matters into which the court is at liberty to inquire, or which in any manner operate to prevent the enforcement of the declared will of congress in the act of 1888. Neither can there be any question in this case of the right of the government to maintain this bill. It was the creator of the railway corporation defendant, and a large contributor to its finances. It made absolutely a large grant of lands. It loaned its own bonds, and holds to-day a second mortgage. By reason of its governmental duty to regulate the affairs of this corporation, and also its pecuniary interest in their successful management, it may properly legislate in respect thereto, and invoke the aid of the courts to compel compliance with its determination. And when it is the complainant the inquiry is different and broader than when the corporations themselves are the contesting parties or when only individuals are challenging their action. The supervisory power of the government is plenary, and its commands to its corporate creations must be enforced, unless they trespass upon some vested rights of property.

The only remaining question which I deem important to consider is the objection made to the jurisdiction of a court of equity. It is urged that if a duty is cast upon these corporations, it must be enforced by *mandamus*. I had occasion to notice this question in the case of *Chicago, R. I. & P. R. Co. v. Union Pac. Ry. Co.*, 47 Fed. Rep. 15, and deem it unnecessary to add anything to my observations in that opinion. There is something to be considered beyond the mere mandate to obey the act of 1888. The Western Union Telegraph Company has property along the line of the railway company. The determination of its interests therein, protection against their sacrifice, and the securing of payment to it from the railway company are matters which cannot be settled by a court of law in proceedings in *mandamus*. A court of equity, with its flexible procedure, can alone meet all these exigencies. The jurisdiction of such a court seems to me necessary and unquestionable. A decree will therefore be entered in favor of the complainant, setting aside the contract of 1881, and putting an end to the relations created by and subsisting under it between the two defendants, and with it a mandatory injunction upon the railway company to hereafter, by its own agents and employes, and not through the instrumentality of the Western Union Company, exercise all the duties created by the telegraphic franchise of the acts of 1862 and 1864, and directing the latter company to vacate all the offices of the railroad company, with leave to the Western Union Company to apply for and have stated an account between it and the railway company, as to the value of its property along the line of the latter's railroads, and jointly used by the two companies, and for such other relief as equity and good conscience require.

**MEMORANDUM.** A copy of this opinion is sent to each of the counsel in the case. The counsel for the government can prepare a form of decree, and

submit it to the counsel for defendants; and, in case of disagreement as to the terms, it must be submitted to me with the suggestions of the parties, and no entry of record will be made till I have approved it. I have purposely directed a decree which shall be final in character in order that an appeal may be taken, and the rights of the parties fully settled, before the labor and expense of accounting shall, if finally ordered, be undertaken.

### FRANCIE v. HOWARD COUNTY.

(Circuit Court, W. D. Texas, El Paso Division. April 9, 1892.)

#### 1. COUNTIES—BONDS—EXCESSIVE ISSUE—INNOCENT PURCHASERS.

Under Gen. Laws Tex. 1881, pp. 5, 6, authorizing counties to issue bonds for the erection of court-houses, Howard county issued bonds in May, 1883, which, on account of an error, were recalled and canceled, and a new series issued in November, 1883. Between these dates an amendment to the constitution was adopted, reducing the rate of taxation allowed to be levied by counties for the erection of public buildings. The plaintiff bought in open market some of the bonds issued in November, 1883, and sues for the interest due upon them. *Held*, that he was a purchaser with notice of the constitution as amended, and that, as he claimed no interest under the contract for the erection of the court-house, the amendment applied to the bonds in his hands.

#### 2. SAME—AUTHORITY TO ISSUE BONDS—STATE LAWS.

While counties generally have no power to issue negotiable securities unless specially authorized by law, this is a question of state policy, and should be governed by the decisions of the state courts.

#### 3. SAME—LAWS OF TEXAS.

In Texas, the counties, in the absence of legislative authority, have no power to issue negotiable securities. *Nolan Co. v. State*, (Tex. Sup.) 17 S. W. Rep. 836; *Robertson v. Breedlove*, 61 Tex. 816, followed.

#### 4. SAME—INNOCENT PURCHASERS—BONDS PARTLY INVALID.

The bonds issued by a county in excess of the amount allowed by law are void, and their collection cannot be enforced even by a *bona fide* purchaser for value; and when a number of bonds, partly invalid on this account, are issued and delivered at the same time, or at different times as part of one transaction, the invalid portion should be equally distributed among all, and none should have priority.

#### 5. SAME—AMOUNT ISSUABLE.

Gen. Laws Tex. 1881, pp. 5, 6, § 1, confers authority upon counties "to issue bonds in such amount as may be necessary to erect a suitable building for a court-house;" but section 3 of the same act declares that the county shall not issue a larger number of bonds than can be liquidated in 10 years by an annual tax of one-fourth of 1 per cent. upon the property in the county. *Held*, that the latter section must be construed as a limitation upon the former. *Russell v. Cage*, 1 S. W. Rep. 270, 66 Tex. 492, and *Nolan Co. v. State*, (Tex. Sup.) 17 S. W. Rep. 826, followed.

#### 6. SAME—NOTICE.

In ascertaining the taxable value as a basis for determining the amount of bonds which may be issued, the official assessment rolls are the only evidence, and, these being public records, the purchasers of the bonds, notwithstanding any recitals therein, are chargeable with notice of them, and cannot claim to be innocent purchasers.

#### 7. SAME—APPLICATION OF PROCEEDS—ESTOPPEL.

If a county has authority to issue bonds for one purpose, and uses the proceeds of such bonds for a different purpose, they are not thereby invalidated in the hands of an innocent purchaser, and the county is estopped from denying that they were issued for the purpose for which they purported to be issued.

#### 8. SAME—ENFORCEMENT OF BONDS—JURISDICTION AT LAW.

While a suit in equity is ordinarily required to settle the equities and rights of bondholders against a county and among themselves, yet a court of law will give judgment in such cases when warranted by the pleadings and proofs.

At Law. Action by David R. Francis against Howard county, Tex., to recover upon coupons of county bonds.

## Statement by MAXEY, District Judge:

This suit is brought by plaintiff to recover of defendant upon 136 interest coupons for \$80 each, originally attached to certain negotiable court-house bonds, issued by defendant on the 12th day of November, A. D. 1888. It is alleged in the petition that said bonds were duly signed, sealed, countersigned, and registered as required by law; that by the terms of each of said bonds the county promised to pay to J. H. Milliken & Co. or bearer the sum of \$1,000 at the banking-house of Donnell, Lawson & Simpson, in the city and state of New York, 15 years from the date thereof, with interest at the rate of 8 per cent. per annum, payable annually, in installments of \$80 each, on the 10th day of April in each year, at said banking-house, on presentation and surrender of the proper interest coupons annexed to the bonds. The petition further alleges that said bonds, numbered 2 to 40, inclusive, were issued by the defendant county under authority of an act of the legislature of the state of Texas entitled "An act authorizing the county commissioners' court of the several counties of this state to issue bonds for the erection of a court-house, and to levy a tax for the same," approved February 11, A. D. 1881, and in pursuance of an order of the county commissioners' court of said county for the purpose of erecting a suitable building for a court-house. Recovery is sought upon four sets of interest coupons, as follows: (1) 39 coupons, numbered 5, detached from bonds numbered 2 to 40, due April 10, 1888; (2) 39 coupons, numbered 6, detached from bonds numbered 2 to 40, due April 10, 1889; (3) 29 coupons, numbered 7, detached from bonds numbered 2 to 30, due April 10, 1890; (4) 29 coupons, numbered 8, detached from bonds numbered 2 to 30, due April 10, 1891.

The following averments of the defendant's answer present, substantially, the defenses relied upon to defeat a recovery upon the coupons:

"That defendant did not at any time execute and deliver, or authorize the execution and delivery of, more than 35 coupon bonds of the denomination of \$1,000 each, and numbered 1 to 35, inclusive, and of the aggregate amount of \$35,000, for the purpose of erecting a court-house. The defendant further says that if it ever issued, or ever authorized the execution and delivery of, any of said bonds, that the same were executed and delivered for the purpose of erecting a court-house and jail, and for the purpose of sinking an artesian well, and not for the sole purpose of erecting a court-house for the defendant. \* \* \* And for further plea herein the defendant says that plaintiff ought not to have and recover judgment herein against this defendant for the following reasons, to-wit: *First*. Because defendant says that if any issuance, execution, registration, or delivery of said bonds, or their attached coupons, sued on by plaintiff, was ever authorized by the commissioners' court of said defendant, Howard county,—and which fact defendant specially denies,—that the same was *ultra vires*, contrary to law, and above and beyond the powers conferred upon said board of commissioners, officers, and agents by law, for the following reasons, to-wit: Because at the time of the pretended issuance, execution, and delivery of said bonds and attached coupons sued on by plaintiff, and at the time of the creation of said pretended indebtedness, the total value of all the taxable property in Howard county amounted only to the sum of eight hundred and sixty-three thousand and eleven and 88-100

dollars; and that said board of commissioners, officers, and agents had no power or authority of law whatever to bind this defendant in a bonded indebtedness for said purpose alleged in plaintiff's petition, except in such an amount as a tax of one-fourth of one per cent. on said taxable wealth of defendant at that time might, could, or would liquidate, pay off, and discharge, after being levied, collected, and applied thereon for a period of ten years, which said amount of said bonded indebtedness defendant alleges could not have lawfully exceeded the sum of fifteen thousand dollars, bearing interest at the rate of 8 per cent. per annum; and that the issuance, execution, and delivery of \$39,000 in bonds, with interest-bearing coupons attached thereto, and of which those sued on by plaintiff are alleged to be a part, was so far in excess of the amount authorized to be issued by the said officers and agents of this defendant that this defendant is, and has always been, wholly unable to meet, pay off, discharge, or liquidate the annual interest accruing and accrued thereon by the levy and application of a tax of one-fourth of one per cent. on the taxable value of defendant annually, and that for these reasons the bonds and all coupons attached thereto, and those sued on by plaintiff, are wholly invalid, and no legal and subsisting indebtedness against this defendant. *Second.* Because defendant further alleges that it, through its officers and agents, the commissioners' court, on the 29th day of May, 1883, entered into an agreement with J. H. Milliken & Co. to build and erect for it a court-house and jail in consideration of \$33,700 of Howard county bonds, bearing interest at the rate of 8 per cent. per annum, and dated May 14, 1883; that, in pursuance of said agreement, the said J. H. Milliken & Co. erected and completed a court-house and jail for defendant; that said bonds of date May 14, 1883, were executed and delivered to said Milliken & Co., and accepted by them, in payment for erecting said court-house and jail; that, if defendant executed and delivered or authorized the execution and delivery of the bonds and coupons described by plaintiff,—which is not admitted, but denied,—that \$35,000 of the same—that is, 35 of said bonds—were issued for the purpose of liquidating, paying off, and discharging said bonds of date May 14, 1883, and not for the purpose of erecting for defendant a suitable court-house, as claimed by plaintiff; that at the time of the execution of said bonds of date May 14, 1883, defendant, its officers and agents, made no provision for the levy and collection of a sufficient tax to pay the interest thereon, or to provide a sinking fund for the redemption thereof; that at the time of the making of said contract with J. H. Milliken & Co. the defendant, its officers and agents, made no provision for the levy and collection of a tax for the payment of said debt, or any part thereof. \* \* \*

A jury was waived by the parties by written stipulation, and the case submitted to the court. From the evidence before the court the following findings of fact are made:

1. The defendant, county of Howard, is a municipal corporation of Texas, organized under its laws in the year 1882.

2. On April 16, 1883,—the date of the order of commissioners' court of Howard county, awarding the contract to build a court-house and jail to J. H. Milliken & Co.,—Howard county had neither court-house nor jail.

3. The following orders were duly made by the commissioners' court of Howard county at the date therein named, in relation to the construction of a court-house and jail, and the boring of an artesian well, and the issuance of bonds for court-house purposes:

(1) "April 16th, 1883.

"Ordered by the commissioners' court that the contract for the erection of a court-house and jail therein, in Big Springs, Howard county, Texas, be, and is hereby, awarded to J. H. Milliken & Co., of Weatherford, Texas,

for the sum of thirty-three thousand seven hundred dollars, payable in Howard county bonds.

(2) "April 16th, 1883.

"Ordered by the court that the county attorney, assisted by T. W. Wampler, draw up a contract according to the bid, plans, and specifications submitted by J. H. Milliken & Co., stipulating in said contract that J. H. Milliken & Co. give bond in the sum of fifty thousand dollars for the faithful performance of said contract according to the time agreed upon by and between the commissioners, and embodied in said contract, as follows, to-wit: *'To the Honorable County Judge and County Commissioners of Howard County, Tex.—GENTLEMEN: We propose to build the court-house and jail combined, as shown by plans, and defined by the accompanying specifications, in the town of Big Springs, Howard Co., Texas, for the sum of thirty-three thousand seven hundred dollars, payable in the court-house bonds of Howard Co., Texas, and we agree to complete said building and deliver same to county commissioners' court within eight months from date of this bid. Respectfully submitted, J. H. MILLIKEN & Co. April 16th, 1883.'*

(3) "May 14th, 1883.

"It is ordered by the court that so much of the county funds created by the issuance of county bonds, and known as 'Court-House Bonds,' be, and the same is hereby, appropriated for grading the court-house square.

(4) "May 14th, 1883.

"Ordered by the court that the sum of three thousand (\$3,000.00) dollars, or so much thereof as may be necessary, be, and the same is hereby, appropriated out of the funds created by the issuance of county bonds, and known as 'Court-House Bonds,' be, and the same is hereby, appropriated for the purposes of sinking an artesian well on the north-west corner of the court-house square.

(5) "May 14th, 1883.

"In accordance with a previous order of this court, made at its regular February term, 1883, it is hereby ordered, adjudged, and decreed that Howard county bonds, to be known and designated as 'Court-House Bonds,' amounting to thirty-eight thousand (\$38,000.00) dollars, bearing interest at the rate of 8 per cent. per annum, be issued for court-house purposes, and held subject to the disposition of this court.

(6) "May 29th, 1883.

"It is further ordered by the court that court-house bonds to the amount of two thousand (\$2,000.00) dollars be issued in addition to the \$38,000.00 (thirty-eight thousand dollars) ordered issued heretofore, making a total up to this date of \$40,000.00, (forty thousand dollars,) ordered issued by commissioners' court of Howard county, Texas.

(7) "June 18th, 1883.

"It was ordered by the court that the First National Bank of Weatherford be, and is hereby, ordered and required to deliver to J. H. Milliken & Co. the sum of thirty-five thousand dollars (\$35,000.00) in Howard county court-house bonds.

(8) "June 18th, 1883.

"Ordered by the court that the First National Bank of Weatherford be, and it is hereby, authorized to dispose of the remaining five thousand dollars of court-house bonds of Howard county, Texas, now on deposit in said bank, at their face value, and credit Howard county with the proceeds, less 2½ per cent. commission.

(9) "November 12th, 1883.

"Ordered by the court that, whereas, there is an error in the bonds heretofore issued by the county of Howard, state of Texas, bearing date May 14th, 1883, for the purpose of erecting a court-house for Howard county, which er-

ror consists in this: The date of the approval of the act of the legislature of the state of Texas authorizing the issuance of said bonds is on the face of the bonds recited to be Feby. 21st, 1879, when it should have been Feby. 11th, 1881, the said bonds having in fact been issued under the last-named act, in lieu of said bonds: Therefore ordered by the court that there be issued for the purpose of erecting a suitable building for a court-house for said county of Howard, in the state of Texas, thirty-five coupon bonds of the said county of the denomination of one thousand dollars each, payable to J. H. Milliken & Co. or bearer fifteen years after the date thereof, and redeemable at the pleasure of the said county. The said bonds shall bear interest at the rate of eight per cent. per annum. The principal and interest of the said bonds shall be payable at the banking-house of Donnell, Lawson & Simpson, in the city of New York. The interest on the said bonds shall be payable on the 10th day of April annually.

(10) "November 12th, 1883.

"It is ordered by the court that the bonds to be issued as heretofore at this time be delivered to J. H. Milliken & Co. on the cancellation and surrender by them of thirty-five thousand dollars' worth of the bonds referred to in said order as having been issued before that date, with an erroneous reference to the act of the legislature of the state of Texas under which they were issued. The corrected bonds are to be delivered to J. H. Milliken & Co., in lieu of the erroneous bonds, upon the cancellation and surrender of the erroneous bonds, and in an amount corresponding with the amount of the erroneous bonds canceled and surrendered. It is further ordered by the court that on the surrender of the bonds heretofore issued as herein provided for, a draft shall be issued in favor of J. H. Milliken & Co. against the court-house funds of this county for all interest that has accrued on the first bonds issued up to the date of issuing the new or substituted bonds herein provided for.

(10½) "November 12th, 1883.

"Ordered by the court that an annual *ad valorem* tax of one-fourth of one per cent. on the taxable property of Howard county, Texas, be, and the same is hereby, levied, to pay the interest and create a sinking fund for the redemption of bonds of said county, necessary to erect a suitable building for a court-house, as authorized by an act of the legislature of the state of Texas, approved February 11th, 1881.

(11) "February 14th, 1884.

"Ordered by the court that the balance of five thousand dollars court-house bonds may issue, in accordance with law, to any one who may agree to take same at their face or par value, and may be subject to the disposition of Geo. Hogg, county judge, or his successors in office.

(12) "March 24th, 1884.

"Ordered by the court that the forty thousand dollars in Howard county court-house bonds, erroneously issued on the 14th day of May, 1883, be, and they are hereby, ordered canceled and destroyed, and that the county treasurer be required to drop said amount from his register.

(13) "August 19th, 1884.

"It is further ordered that county court-house bond for \$1,000.00, No. 36, be, and the same is hereby, turned over to R. R. Elder, artesian well contractor, as collateral for the payment of the sum of \$1,000.00, part of balance due him, the said contractor, on the closing of said contract.

(14) "March 1st, 1886.

"It was ordered by the court that all coupons on Howard county court-house bonds Nos. 37, 38, 39, and 40, for \$1,000.00 each, up to April 10th, 1886, be detached, and destroyed by the county treasurer.

(15) "March 1st, 1886.

"It was ordered by the court that A. D. Walker deposit said bonds Nos. 37,

38, 39, and 40 in Colorado National Bank, in accordance with the terms of aforesaid contract.

(16) "August 11th, 1886.

"We, the commissioners of Howard county, hereby declare that F. H. James & Co. have failed to comply with their contract in reference to the boring an artesian well upon the court-house square in said Co., and, as the said F. H. James & Co., through their agent, desires to surrender said contract, we accept their proposition, and declare the contract null and void upon the surrender of the bonds and contract now deposited at the Colorado National Bank, in Mitchell county, Texas; and we further authorize J. C. Smith to demand and receive said four bonds of the denomination of \$1,000 each, with said contract, and the obligation the citizens of Howard county signed, deposited together.

(17) "September 13th, 1886.

"We, the commissioners' court of Howard county, Texas, authorize I. S. Thurmond, county judge of said county, to go to St. Louis and Chicago, and purchase a complete outfit for boring an artesian well on the court-house square in said county for the court-house and county purposes. He is authorized to take the remainder of the court-house bonds, amounting to \$4,000.00, Nos. 37, 38, 39, and 40. He is further authorized to negotiate said bonds, or so much of them as is necessary to pay for said outfit, and cash the remainder of them, or cash the entire \$4,000.00 bonds, and purchase the same with cash, and pay J. W. Hykes' expenses to go along with him.

(18) "October 4th, 1886.

"Ordered, that of the bonds heretofore issued by the commissioners' court of Howard county for court-house purposes, that bonds Nos. 40, 39, 38, and 37 be paid first in order named, and that at least one bond and interest in full be paid out of the court-house funds in April, 1887, and at least two of said bonds and interest in full in April, 1888.

(19) "February 13th, 1888.

"It was ordered by the court that the treasurer of Howard Co. be instructed not to pay any interest on court-house and jail bonds till further orders from this court."

4. A contract, of which the following is a copy, was entered into May 29, 1883, between J. H. Milliken & Co. and Howard county, for the construction of a court-house and jail:

"This agreement, made the 29th day of May, one thousand eight hundred and eighty-three, between J. H. Milliken and James Lee, operating and doing business under the firm name and style of J. H. Milliken & Co., party of the first part, and George Hogg, county judge of Howard county, Texas, and G. A. Torbett, Frank Boze, R. M. Bressie, and W. T. Boze, county commissioners of Howard county, Texas, and their successors in office, party of the second part, witnesseth, that the said J. H. Milliken & Co., party of the first part, for considerations hereinafter named, contracts and agrees with the said George Hogg, county judge of Howard county, Texas, and G. A. Torbett, Frank Boze, R. M. Bressie, and W. T. Boze, county commissioners of Howard county, Texas, and their successors in office, that the said J. H. Milliken & Co. will, within eight months next following this date, in a good and workman-like manner, and according to his best skill, well and substantially erect and complete a court-house and jail in the town of Big Springs, Howard county, Texas, on block No. 21, as laid down and described in the plat of the town of Big Springs, situated in the county of Howard and state of Texas. In consideration of which the said George Hogg, county judge of Howard county, and G. A. Torbett, Frank Boze, R. M. Bressie, and W. T. Boze, county commissioners of Howard county, Texas, party of the second part, do for the county of Howard and their successors in office promise to

the said J. H. Milliken & Co., their heirs or legal representatives, to issue or cause to be issued to the said J. H. Milliken & Co., or their legal representatives, bonds drawn on Howard county in the sum of thirty-three thousand seven hundred dollars, (\$33,700.00,) with interest thereon at the rate of eight per centum per annum, at their next regular meeting next after the first day of May, A. D. 1883, and which said bonds are to be deposited in the First National Bank of Weatherford, Parker county, Texas, to the credit of Howard county, Texas, and to be subject to the order of the commissioners' court of Howard county, Texas, for the benefit of J. H. Milliken & Co.

"J. H. MILLIKEN.

"JAMES LEE.

"J. W. HEDRICK.

"A. L. SIMMONS.

"H. E. SWAIN.

"H. M. LASSATER.

"JOE SIMPER.

C. H. MILLIKEN.

"D. C. KYLE.

"Witness to attached  
signatures:

"A. N. GRACE.

"W. B. JOHNSON.

"Accepted May 29th, 1883.

"GEO. HOGG, County Judge Howard County, Texas.

"J. M. ANDERSON, Clk. County Ct. Howard Co."

5. In obedience to the orders of the commissioners' court of May 14, 1883, and May 29, 1883, the bonds of Howard county were issued amounting to forty thousand dollars, to be known and designated as "Court-House Bonds." Of these, the First National Bank of Weatherford, as per the order of the commissioners' court of June 18, 1883, delivered to J. H. Milliken & Co. bonds amounting to the sum of thirty-five thousand dollars. The remaining five thousand dollars of that issue of the bonds, although authorized to be sold by the Weatherford bank, were not negotiated, but were, with those of Milliken & Co. for thirty-five thousand dollars, returned to the defendant, and destroyed.

6. The issue of forty thousand dollars of bonds was canceled and destroyed because of a misrecital in the bonds as to the date of the approval of the act which authorized their issuance. The date recited was February 21, 1879, when it should have been February 11, 1881.

7. On the 12th day of November, 1883, the defendant, in conformity with the two orders of the commissioners' court of the same date,—November 12, 1883,—executed 35 coupon bonds, for court-house purposes, of one thousand dollars each, payable to J. H. Milliken & Co. or bearer fifteen years after the date thereof, and redeemable at the pleasure of the county. This second issue of 35 bonds was given to Milliken & Co. in lieu of the erroneous first issue of thirty-five thousand dollars held by them, the second issue having been delivered after November 22, 1883, and before the destruction of the first. Of the second issue of 35 bonds No. 1, was redeemed in April or May, 1886, and the remainder, from 2 to 35, inclusive, are represented by coupons in suit.

8. The first and only tax to pay the interest and create a sinking fund for the redemption of the bonds was levied November 12, 1883.

9. In compliance with the order of the commissioners' court of February 14, 1884, five other bonds of \$1,000 each, numbered, respectively, 36, 37, 38, 39, and 40, were issued. One of these, No. 36 was, after August 19, 1884, delivered to R. R. Elder, artesian well contractor, as collateral security to secure the payment to him of balance due on his contract. Nos. 37, 38, 39, and 40 were signed after February 14, 1884, and were delivered to the Colorado National Bank, presumably as collateral security to secure F. H. James & Co. against loss under their contract to bore an artesian well. Subsequently, conformably to the order of the commissioners' court dated



August 11, 1886, the 4 last-named bonds were restored to the custody of defendant's treasurer; and under the order of the commissioners' court of September 13, 1886, County Judge Thurmond went to St. Louis to sell said 4 bonds, for the purpose of purchasing with the proceeds "a complete outfit for boring an artesian well on the court-house square in said county for the court-house and county purposes." A part of the coupons in suit represent bonds numbered 36 to 40, inclusive.

10. The bonds admitted in evidence, from which the coupons in suit are detached are in the following form, pretermittting the numbers:

"No. UNITED STATES OF AMERICA. Dollars 1,000.  
"COURT-HOUSE COUPON BOND.  
"Howard County. State of Texas.

"Know all men by these presents, that the county of Howard, in the state of Texas, acknowledges itself indebted unto J. H. Milliken & Co. or bearer in the sum of one thousand dollars, lawful money of the United States of America, which sum the said county promises to pay for value received, at the banking-house of Donnell, Lawson & Simpson, in the city of New York, fifteen years from the date hereof, but redeemable at any time at the pleasure of said county, together with interest thereon from date at the rate of eight per centum per annum, payable annually on the 10th day of April in each year on the presentation and surrender of coupons hereto attached, as they severally become due and payable. This bond is issued in accordance with the provisions of an act of the legislature of the state of Texas entitled 'An act to authorize the county commissioner's court of the several counties of this state to issue bonds for the erection of a court-house, and to levy a tax to pay for the same,' approved February 11th, 1881. In testimony whereof the county commissioner's court of Howard county have caused to be hereto affixed the seal and the signature of the proper officers of said court at Big Springs, Texas, this 12th day of November, A. D. 1883.

"Geo. Hogg, County Judge, Howard County, Texas.

"Countersigned:

"J. M. WALKER, Clerk County Court, Howard County, Texas.

{ Seal of Commissioners' Court }  
{ of Howard County, Texas. }

"Registered 22nd day of November, A. D. 1883.

"F. W. HEYN, County Treasurer, Howard County, Texas."

11. The coupons in evidence, except as to numbers and dates of maturity, are similar in form, and are as follows:

"No. THE COUNTY OF HOWARD, STATE OF TEXAS. \$80.00.

"Promises to pay bearer eighty dollars at the banking-house of Donnell, Lawson & Simpson, in the city of New York, being interest for one year on Bond No. \_\_\_\_.

GEO. HOGG, County Judge.

"J. M. WALKER, Clerk County Court."

12. The 40 bonds of the second issue were, pursuant to the fifth section of the act of 1881, signed by the county judge and countersigned by the county clerk, and registered by the county treasurer.

13. Milliken & Co. procured from B. G. Bidwell, Esq., attorney at law, his written opinion touching the validity of the bonds, of which the following is a copy:

"WEATHERFORD, TEXAS, Dec. 4th, 1883.

"Mr. Sam H. Milliken—DEAR SIR: I have examined the court-house bonds issued by Howard county, Tex., the orders of the court, and the act of

the legislature of the state of Texas, appr'd Feby. 11th, 1881, (chap. 9 of Acts of 1881.) I find that the orders of the county comrs.' court are regular, and in conformity with our law. The bonds, on their face, are regular, and conform to the orders of the court. These bonds are issued under an act of the legislature of Tex., entitled 'An act authorizing the county commissioners' court of the several counties in this state to issue bonds for the erection of a court-house, and to levy a tax to pay for the same,' approved Feby. 11th, 1881. This is the last act upon this subject, and is still in force. It provides as follows: 'That the county commissioners' court of any county which has no court-house at the county-seat is hereby authorized and empowered to issue the bonds of the said county, with interest coupons attached in such amount as may be necessary to erect a suitable building for a court-house; said bonds running not exceeding fifteen (15) years, and redeemable at the pleasure of the county, and bearing interest at a rate not exceeding eight per cent. per annum.' The act authorized the levy of a tax to meet the interest and create a sinking fund to pay the bonds. After carefully examining the constitution of Texas, the statutes thereof, the law, and the whole facts in reference to the issuance of the bonds, I gave it as my professional opinion that the said bonds are regularly and properly issued; they are in all respects legal, valid, and binding on the said county. I give you this opinion after carefully examining the whole question.

[Signed]

"B. G. BIDWELL."

14. Bonds numbered 1 to 30, inclusive, with coupons attached, of the second issue, passed, by sale in due course of trade, to Nelson & Noel, bankers and brokers of St. Louis, and were by Nelson & Noel in open market sold to plaintiff, March 12, 1884, at the rate of 101 and interest; or, in the aggregate, for \$31,100.

15. At the time of his purchase plaintiff knew nothing concerning the issuance of the bonds except what was disclosed upon their face. He was informed by Nelson & Noel that the bonds were "court-house bonds," and that they were good. Plaintiff knew of no defect in the bonds; knew nothing in regard to the assessed wealth of Howard county, and had no examination made of the Howard county records. When Nelson & Noel bought the bonds they had before them the opinion of B. G. Bidwell, but it is not shown that plaintiff ever saw it.

16. After plaintiff's purchase of the 30 bonds, coupons falling due April, 1884, April, 1885, April, 1886, April, 1887, were paid by defendant. But default was made as to the coupons of 1888, 1889, 1890, and 1891. As before stated, bond No. 1 was redeemed in 1886.

17. The following admission, in reference to bonds numbered 31 to 40, inclusive, is inserted as a part of the finding of facts: "It is admitted by defendant that bonds 31 to 35, both inclusive, were purchased by a citizen of the state of Missouri, under the same circumstances, and at the same time, that the bonds were purchased by Gov. Francis, and with only such knowledge as he had as to the validity or invalidity of the bonds purchased by him. The bonds numbered 36 to 40, both inclusive, were purchased by that citizen of Missouri at a later date, but under similar circumstances, and with only such knowledge as Gov. Francis had at the time he purchased the bonds bought by him. It is further agreed that coupons in this suit detached from bonds Nos. 31 to 40, both inclusive, were transferred to Gov. Francis before the bringing of this suit."

17½. It is a just inference arising from the evidence, and is so found as a fact, that the court-house was constructed by Milliken & Co. in accordance with the terms of their contract.

18. The tax-rolls of Howard county, "approved by county commissioners,

sitting as a board of equalization, July 5th, 1883," show that the property, real and personal, subject to taxation in Howard county in 1883, amounted to \$863,011.38. The certificate of the comptroller of the state is to the same effect. A "recapitulation" of the tax-rolls of Howard county for the year 1883, shows the total value of property of the county subject to taxation for that year to be \$863,011.38. The oath of the assessor and order of approval of tax-rolls by the county commissioners are thus certified by the comptroller of the state:

*"The State of Texas, County of Travis: I, John D. McCall, comptroller of public accounts in and for the state of Texas, do hereby certify that the above and foregoing recapitulation is a true and correct copy of the recapitulation of the tax-rolls of Howard county, Texas, for the year 1883, as the same appears in the rolls of said county for said year, which are on file in this office. I further certify that the oath of the assessor, and order of approval of the commissioners' court are true and correct copies. Witness my hand and official seal at my office in the city of Austin, this 8th day of October, A. D. 1889.*

[Signed]

*"JNO. D. MCCALL, Comptroller."*

19. There is nothing in the record showing the taxable value of property in Howard county for any year other than 1883. On November 12, 1883, the tax-rolls were on record in the proper offices, and subject to the inspection of the public.

20. It is a proper inference, deducible from the evidence, and it is therefore stated as a fact, that there were no tax-rolls of Howard county for the year 1882, nor was a tax levied for that year.

21. Howard county regularly levied taxes to provide for the second issue of court-house bonds until 1891, and has accumulated from that tax a sum approximating \$8,000. The interest which the county paid on the bonds up to 1888 was partially paid in funds transferred from the "road and bridge" funds, for which a tax of 15 cents on \$100 was levied. The collection of taxes on account of the court-house and jail fund was insufficient to pay interest on the bonds, and nearly all the road and bridge fund was transferred for that purpose.

#### CONSTITUTIONAL PROVISIONS AND STATUTES.

The following constitutional provisions, together with the act of February 11, 1881, were in force November 12, 1883, the date of the second series of bonds issued by the defendant:

"The construction of jails, court-houses, and bridges, and the establishment of county poor houses and farms, and the laying out, construction, and repairing of county roads, shall be provided for by general laws." Article 11, § 2, Const. 1876.

Section 7 of the same article:

"All counties and cities bordering on the coast of the Gulf of Mexico are hereby authorized, upon a vote of two-thirds of the tax-payers therein, (to be ascertained as may be provided by law,) to levy and collect such tax for construction of sea-walls, break-waters, or sanitary purposes as may be authorized by law, and may create a debt for such works, and issue bonds in evidence thereof. But no debt for any purpose shall ever be incurred in any manner by any city or county unless provision is made, at the time of creating the same, for levying and collecting a sufficient tax to pay the interest thereon, and provide at least two per cent. as a sinking fund; and the condemnation of the right of way for the erection of such work shall be fully provided for."

Section 9, art. 8, of the constitution of 1876, as amended in 1883, is as follows:

"The state tax on property, exclusive of the tax necessary to pay the public debt, and of the taxes provided for the benefit of public free schools, shall never exceed thirty-five cents on the one hundred dollars' valuation, and no county, city, or town shall levy more than twenty-five cents for city or county purposes, and not to exceed fifteen cents, for roads and bridges, on the one hundred dollars' valuation, except for the payment of debts incurred prior to the adoption of this amendment, and for the erection of public buildings, street, sewer, and other permanent improvements, not to exceed twenty-five cents on the one hundred dollars' valuation in any one year, and except as is in this constitution otherwise provided."

The amended article 8 was adopted by the people August 14, 1883, and proclamation duly made thereof by the governor, September 25, 1883.

The original section 9 of article 8, relied on by the plaintiff, provides:

"The state tax on property, exclusive of the tax necessary to pay the public debt, shall never exceed fifty cents on the one hundred dollars' valuation, and no county, city, or town shall levy more than one-half of said state tax, except for the payment of debts already incurred, and for the erection of public buildings, not to exceed fifty cents on the one hundred dollars in any one year, and except as in this constitution is otherwise provided."

The act of February 11, 1881, is as follows:

"An act authorizing the county commissioners' court of the several counties of this state to issue bonds for the erection of a court-house, and to levy a tax to pay for the same. Section 1. Be it enacted by the legislature of the state of Texas, that the county commissioners' court of any county which has no court-house at the county-seat is hereby authorized and empowered to issue the bonds of said county, with interest coupons attached, in such amount as may be necessary to erect a suitable building for a court-house; said bonds running not exceeding fifteen years, and redeemable at the pleasure of the county, and bearing interest at a rate not exceeding eight per cent. per annum. Sec. 2. The commissioners' court of the county shall levy an annual *ad valorem* tax on the property in said county, sufficient to pay the interest, and create a sinking fund for the redemption of said bonds, not to exceed one-fourth of one per cent. for any one year. Sec. 3. The county shall not issue a larger number of bonds than a tax of one-fourth of one per cent. annually will liquidate in ten years, and such bonds shall be sold only at their face or par value. Sec. 4. The interest on said bonds shall be paid annually on the tenth day of April, and they shall be registered, and an account kept by the county treasurer of the amount of principal and interest paid on each. Sec. 5. Said bonds shall be signed by the county judge, and countersigned by the county clerk, and registered by the county treasurer, before they are delivered. Sec. 6. The security and the protection and safe-keeping of the public records and archives of Robertson county make an imperative public necessity that the rule requiring the bill to be read on three several days be suspended, and it is so enacted, and this act shall take effect from and after the day of its passage. Approved February 11, A. D. 1881. Takes effect from passage." Gen. Laws 1881, pp. 5, 6.

John H. Overall and J. E. Townsend, for plaintiff.  
G. W. Walthall and S. H. Cowan, for defendant.

MAXEY, District Judge, (*after stating the facts as above.*) 1. It is insisted by the plaintiff that the original section 9, art. 8, of the constitution of 1876, should apply to this case, upon the ground that the bonds of November 12, 1883, were issued in lieu of the bonds authorized by orders of the commissioners' court of May 14 and 29, 1883, which latter were canceled and destroyed. But it will be observed the plaintiff by his pleadings asserts no rights under the orders of the commissioners' court authorizing the first issue of bonds, and no reference is made in the petition to any contracts, transactions, or bonds issued antecedent to November 12th. On the contrary, the suit is for recovery upon interest coupons detached from bonds bearing date November 12, 1883. These bonds were registered November 22, 1883, and could not have been delivered to Milliken & Co., in exchange for those first issued, until after that date. The order of the commissioners' court, providing for levy of a tax to pay interest on the bonds and create a sinking fund, was passed November 12, 1883, and the bonds on their face purport to have been executed on that day. Plaintiff purchased, March 12, 1884, 30 of the bonds delivered to Milliken & Co., (Nos. 1 to 30,) and a third party the remainder of the 35, (Nos. 31 to 35,) at the same time. The 5 left (Nos. 35 to 40) to complete the issue of 40 bonds were not actually issued by the county until a later period. The amendment of section 9, art. 8, of the constitution, was adopted by the people in August, 1883. The purchaser of the bonds therefore bought with notice that they were issued subsequent to the last-mentioned date, and in obedience to constitutional provisions then in force. If Milliken & Co. were before the court asserting rights under their contract to construct the court-house, there would be force in the objection that subsequent amendments to the constitution could not be held to destroy or impair their rights under the pre-existing contract. But such is not the present case. The plaintiff is a mere purchaser of the bonds in open market, and suing for interest due upon the same. He claims no rights as assignee or otherwise under the contract with Milliken & Co., but merely as the holder of the bonds, and no reason is perceived why the amendment to section 9, art. 8, should not be applied as law in this case. The claims of Milliken & Co. growing out of their contract with the county cannot be here inquired into. See *Insurance Co. v. Middleport*, 124 U. S. 548, 8 Sup. Ct. Rep. 625; *Norton v. Dyersburg*, 127 U. S. 176, 8 Sup. Ct. Rep. 1111; *Buchanan v. Litchfield*, 102 U. S. 293. If plaintiff could rightfully claim the protection of the original section 9, art. 8, of the constitution, because it was in force June 18, 1883, when the commissioners' court ordered the delivery of \$35,000 in bonds to Milliken & Co., then for a like reason he should be held to the situation in which Milliken & Co. were placed by the action of the court in other respects at that time. Going back to June 18th, we find no provision whatever was made for levying and collecting a tax to pay the interest on the bonds and provide a sinking fund; and it admits of serious question, in view of the imperative mandate of section 7, art. 11, of the constitution, whether the collection of bonds issued pursuant to the June order could, under any

circumstances, be enforced. *Bank v. City of Terrell*, 78 Tex. 450, 14 S. W. Rep. 1003. See, also, *City of Terrell v. Dessaint*, 71 Tex. 770, 9 S. W. Rep. 593.

2. The defendant attacks the validity of the entire issue of 40 bonds, because they were issued partly for jail and artesian well purposes; the county being, it is contended, without power to execute its negotiable bonds for the purposes specified. Attention will be first directed to bonds numbered from 1 to 35, which it is claimed were issued partly to construct a jail, leaving bonds 36 to 40 for separate consideration. The county had, November 12, 1883, no express authority, granted by the constitution and laws of the state, to issue negotiable bonds to build a jail. And the question arises, did it possess implied power to issue bonds for such purpose? In *Claiborne Co. v. Brooks*, 111 U. S. 406, 407, 4 Sup. Ct. Rep. 489, it is said by the court:

"Our opinion is that mere political bodies, constituted as counties are, for the purpose of local police and administration, and having the power of levying taxes to defray all public charges created, whether they are or are not formally invested with corporate capacity, have no power or authority to make and utter commercial paper of any kind, unless such power is expressly conferred upon them by law, or clearly implied from some other power expressly given, which cannot be fairly exercised without it."

*Merrill v. Monticello*, 138 U. S. 673, 11 Sup. Ct. Rep. 441; *Concord v. Robinson*, 121 U. S. 165, 7 Sup. Ct. Rep. 937.

"Even where there is authority," says the court, "to aid a railroad, and incur a debt in extending such aid, it is also settled that such power does not carry with it any authority to issue negotiable bonds, except subject to the restrictions and directions of the enabling act." *Young v. Clarendon Tp.*, 132 U. S. 347, 10 Sup. Ct. Rep. 107; *Merrill v. Monticello*, *supra*; *Daviess Co. v. Dickinson*, 117 U. S. 657, 6 Sup. Ct. Rep. 897.

The question of the character and extent of the power possessed by a state political or municipal corporation is one of state policy, and the decisions of the supreme court of this state will be regarded as authoritative, touching the power of its counties to issue negotiable securities. Speaking for the supreme court, in *Claiborne Co. v. Brooks*, *supra*, Mr. Justice BRADLEY employs this language:

"It is undoubtedly a question of local policy with each state what shall be the extent and character of the powers which its various political and municipal organizations shall possess; and the settled decisions of its highest courts on this subject will be regarded as authoritative by the courts of the United States, for it is a question that relates to the internal constitution of the body politic of the state."

In *Merrill v. Monticello*, *supra*, Mr. Justice LAMAR says:

"In *Gause v. City of Clarksville*, 5 Dill. 165, the court, in an able discussion of the inherent and incidental authority of municipal corporations, holds that whether the municipal corporation possesses the power to borrow money and to issue negotiable securities therefor depends upon a true construction of its charter and the legislation of the state applicable to it."

"It may be considered," says the supreme court, "settled law in this state that one of its counties cannot issue bonds without an act of the legislature conferring that power." *Nolan Co. v. State*, (Tex. Sup. Ct.) 17 S. W. Rep. 826; *Robertson v. Breedlove*, 61 Tex. 316. The case of *Nolan Co. v. State* is also authority for holding that counties in Texas were without power, under the act of February 11, 1881, to issue bonds for constructing jails. The plaintiff in this cause sues upon coupons detached from bonds issued under the same act, and pursuant to a contract executed by the county and the contractors, Milliken & Co., for the construction of a jail and a court-house. Both buildings were constructed by the contractors in consideration of the bonds. Hence, following the *Nolan County Case*, which is similar in all essential respects to the case now before the court, the bonds issued for the jail were unauthorized by law. But it does not result that they were void in the hands of innocent purchasers. Upon this point, the observations of the court in that case are especially pertinent and appropriate here:

"Although we hold that the commissioners' court of Nolan county exceeded its authority in issuing bonds to Martin, Burns & Johnson for the construction of a jail, it does not follow that they may not be a valid indebtedness, in part, at least, against the county. They are payable to bearer, and in all other respects they are regular upon their face. They recite that they were issued for the purpose of erecting a court-house for Nolan county, and in pursuance of the authority conferred by the act of February 11, 1881. They also purport to have been registered by the treasurer of the county. The state is admitted to be holder for value of the four bonds of this series, which are in part the foundation of this suit; and it is also admitted that at the time of their purchase its agents had no actual notice of any fact which impaired their validity. The county of Nolan had no court-house, and therefore the commissioners' court had power to issue bonds for the erection of such a structure, containing all the recitals necessary to show the authority for the creation of the debt. If a purchaser were bound to inquire into the existence of the fact which empowered the court to issue bonds to build a court-house, and to know that the county had no court-house, in view of the recitals upon the face of the obligations he was bound to look no further. He had the right to rely upon the truth of such recitals, and, having paid value for the bonds without actual knowledge of their illegality, the county would be estopped to set up that they were not issued for the purpose for which they purported to be issued. *Chambers Co. v. Clews*, 21 Wall. 321; *Wilson v. Salamanca*, 99 U. S. 504; *Marcy v. Oswego*, 92 U. S. 640; *Humboldt Tp. v. Long*, Id. 644; *Davies Co. v. Huidekoper*, 98 U. S. 100. We conclude, therefore, that the four bonds issued to Martin, Burns & Johnson, now held by the state, are valid obligations against the county, unless that entire issue was in excess of the amount of indebtedness which the court was authorized by law to create."

For like reasons, bonds numbered 2 to 35, inclusive, held as they are by innocent purchasers, are valid obligations against Howard county, "unless that entire issue was in excess of the amount of indebtedness which the court was authorized by law to create."

3. What amount of negotiable bonds was Howard county authorized to issue on November 12, 1883, for the purpose of constructing a court-house? That it had power to issue bonds in some amount cannot be

questioned, as the first section of the act expressly confers authority to issue bonds, "with interest coupons attached, in such amount as may be necessary to erect a suitable building for a court-house." But the third section, which must be construed with preceding sections of the act, contains a limitation upon the power of the county as to the amount which may be issued. The act under discussion was construed by the supreme court of this state in *Russell v. Cage*, 66 Tex. 432, 433, 1 S. W. Rep. 270, and the court there says:

"The other question presented is whether a tax of one-fourth of one per cent. levied annually for ten years upon \$1,750,000 of property will liquidate \$27,000 of bonds bearing interest at the rate of eight per cent. per annum. Act Feb. 11, 1881, § 3. The bonds may run for fifteen years, redeemable at the pleasure of the county. They are not required to be paid in ten years, but no more shall be issued than will—that is, may or can—be liquidated by the given tax in the stated period. The third section of the act does not provide for the payment of the bonds, but limits the amount of bonded indebtedness authorized by the law. This cannot be such an amount as will be paid in ten years, when the act expressly provides that the bonds may run for fifteen years, but the amount is such as may be paid by the prescribed tax in ten years. The county is to ascertain the limit upon its power to issue bonds by solving the problem put in the third section. The result of that calculation depends upon the time and manner of applying the proceeds of the tax, not actually in the future, but in the calculation. \* \* \* The object of the law was to fix a uniform and certain standard of authority, applicable to all counties. This standard is gauged by the financial condition of the county. The interest it has to pay depends upon its credit, and the amount of the debt the county may incur depends directly on the interest borne by the bonds and its taxable wealth. These are the given factors, from which to ascertain the extent of the county power. There is no element of uncertainty. The sum for which bonds may be issued is the sum which, together with interest at the given rate, could be liquidated by ten annual stated payments."

It is said by the court in the *Nolan County Case* that "the question of excess in the amount of indebtedness depends upon the construction of the statute." And—

"It must be interpreted in the light of the constitutional provisions which relate to the same subject-matter. In *Bank v. City of Terrell*, 78 Tex. 450, 14 S. W. Rep. 1003, section 9 of article 8 of the constitution, as amended in 1883, was construed; and it was held that the amount of indebtedness which counties, towns, and cities were authorized to create for the erection of public buildings, etc., was limited to 25 cents upon \$100 worth of property, as shown by the assessment rolls of the municipality. The word 'valuation,' as used in the section, was held to mean the value as fixed by competent authority for the purposes of taxation. The result of that decision is that governing bodies of municipal corporations are not empowered, when ascertaining the amount of an indebtedness to be created, to determine for themselves the aggregate value of the property therein subject to taxation, but are to be governed by the official rolls made out by the tax assessor."

It will thus be seen that section 9, art. 8, of the constitution, as amended, does limit the creation of indebtedness by a county, and is not intended, as plaintiff contends, "wholly to limit the amount of the assessment." See, also, *Lake Co. v. Rollins*, 130 U. S. 662, 9 Sup. Ct. Rep. 651. The amount of bonds that the defendant could lawfully issue



was such an amount as a tax of one-fourth of 1 per cent. annually would liquidate in 10 years. The 35 bonds issued to Milliken & Co. pursuant to the order of court of November 12, 1883, were delivered to them contemporaneously with their registration November 22, 1883, or soon thereafter, and at a time when the last official assessment—that of 1883, and the only one then made by the county—showed the amount of taxable property in the county to be \$863,011.38. Adopting the rule prescribed by the supreme court in *Russell v. Cage*, *supra*, and reaffirmed in *Nolan Co. v. State*, *supra*, a tax of one-fourth of 1 per cent. upon this sum would pay in 10 years \$14,982.77. To that extent the 35 bonds under consideration constituted an indebtedness which was within the power of the county to contract. The amount beyond \$14,982.77, as measured by the constitution and laws of this state, was in excess of the defendant's power to issue for the purpose of building a court-house.

4. The question arises: Are those bonds, numbered 2 to 35, inclusive, void, as to the excess, in the hands of innocent purchasers for value, as the holders are clearly shown by the testimony to be? If tested by the ruling of the supreme court of this state in the two cases last cited, the conclusion is irresistible that, as to the excessive issue, the bonds are void,—void in their inception, and void in the hands of any subsequent holder for value without notice. Thus it is said:

"As to the excess over that sum, they were void. \* \* \* That the purchasers of the bonds of a city must look to the official assessment in order to ascertain the extent of the council's authority to create a municipal indebtedness, and that as to an excessive issue they cannot claim to be innocent purchasers."

It is insisted by the plaintiff—as it was contended in *Russell v. Cage*, and *Nolan Co. v. State*—that the recitals in the bonds estopped the county from contesting their validity. The bonds involved in the present controversy contain the following recital:

"This bond is issued in accordance with the provisions of an act of the legislature of the state of Texas entitled 'An act to authorize the county commissioners' court of the several counties of this state to issue bonds for the erection of a court-house, and to levy a tax to pay for the same,' approved February 11th, 1881."

The recital is that the bond was issued in accordance with the act of the legislature. It does not purport to be issued pursuant to, or in accordance with, the constitution; nor is there anything in the recital showing that the taxable value of the property in Howard county, as shown by the assessment rolls, was sufficient to authorize the commissioners' court to issue the bonds which the county actually issued. Construing section 9, art. 8, of the constitution upon this point, the supreme court, in *Bank v. City of Terrell*, says:

"No *ad valorem* tax has ever been collected in this state otherwise than through carefully regulated assessments. It is not practicable, if it can be said to be possible, to arrive at correct taxable values through any other means than an assessment. We would be compelled to ignore common sense and reject all experience before we could hold that when the constitution imposed upon cities [and the same may be said of counties] the duty of ascertaining the val-

uation of their taxable property it contemplated that they should look to any other source for the information than their own assessment rolls, taken for the purpose alone of furnishing such information. We are unable to conclude that the constitution, while intending to so strictly limit the creation of a debt to a percentage on valuation, contemplates that a city council may disregard official assessments, and adopt, according to their pleasure, any other means or no means of ascertaining the required fact. \* \* \* It is firmly settled by the highest authority that, when the law that limits the debt by valuation directs that the valuation shall be ascertained by an assessment, such assessment governs and cannot be overcome by any mere recitals that the fact is otherwise."

That the same principle is applicable to counties will be readily ascertained by reference to the *Nolan Co. Case*. Section 9, art. 8, of the constitution of this state, as amended, and also as the section originally stood, in effect commands that a county shall, in order to create a debt for erecting a court-house, take its latest assessment of property for taxes, and from that ascertain, as heretofore shown, what amount of indebtedness it may lawfully contract. With this understanding of the constitutional provision, it will be readily seen that this case is not governed by the principles announced by the court in *Marcy v. Oswego*, 92 U. S. 637; *Humboldt Tp. v. Long*, Id. 642; and others cited by counsel for plaintiff. But it is thought to be clearly controlled by the cases of *Lake Co. v. Graham*, 130 U. S. 675, 9 Sup. Ct. Rep. 654; *Dixon Co. v. Field*, 111 U. S. 83, 4 Sup. Ct. Rep. 315; and *Buchanan v. Litchfield*, 102 U. S. 278. See, also, *Sutliff v. Lake Co.*, 47 Fed. Rep. 106; *Insurance Co. v. Lyon Co.*, 44 Fed. Rep. 329. In the *Lake Co. Case*, where the recitals were much more comprehensive than in this case, Mr. Justice LAMAR, at pages 682, 683, 130 U. S., and pages 656, 657, 9 Sup. Ct. Rep., quotes from *Dixon Co. v. Field* the following language:

"If the fact necessary to the existence of the authority was by law to be ascertained, not officially by the officers charged with the execution of the power, but by reference to some express and definite record of a public character, then the true meaning of the law would be that the authority to act at all depends upon the actual objective existence of the requisite fact, as shown by the record, and not upon its ascertainment and determination by any one; and the consequence would necessarily follow that all persons claiming under the exercise of such a power might be put to proof of the fact made a condition of its lawfulness, notwithstanding any recitals in the instrument. The amount of the bonds issued was known. It is stated in the recital itself. It was \$87,000. The holder of each bond was apprised of that fact. The amount of the assessed value of the taxable property in the county is not stated; but, *ex vi termini*, it was ascertainable in one way only, and that was by reference to the assessment itself,—a public record equally accessible to all intending purchasers of bonds, as well as to the county officers. This being known, the ratio between the two amounts was fixed by an arithmetical calculation. No recital involving the amount of the assessed taxable valuation of the property to be taxed for the payment of the bonds can take the place of the assessment itself, for it is the amount as fixed by reference to that record that is made by the constitution the standard for measuring the limit of the municipal power. Nothing in the way of inquiry, ascertainment, or determination as to that fact is submitted to the county officers. They are bound, it is true, to learn from the assessment what the limit upon their authority is, as

a necessary preliminary in the exercise of their functions and the performance of their duty; but the information is for themselves alone. All the world besides must have it from the same source, and for themselves. The fact, as it is recorded in the assessment itself, is extrinsic, and proves itself by inspection, and concludes all determinations that contradict it."

Proceeding, the justice further says:

"The question here is distinguishable from that in the cases relied on by counsel for defendant in error. In this case the standard of validity is created by the constitution. In that standard two factors are to be considered,—one the amount of assessed value, and the other the ratio between that assessed value and the debt proposed. These being exactions of the constitution itself, it is not within the power of the legislature to dispense with them, either directly or indirectly, by the creation of a ministerial commission whose finding shall be in lieu of the facts." Pages 683, 684, 130 U. S., and page 657, 9 Sup. Ct. Rep.

Howard county assessment rolls of 1883 were public records, made in obedience to the constitution and laws of the state. They were open to the inspection of the public, and they contained the amount of the taxable property of the county. Purchasers of the bonds were chargeable with notice of these records, and, had they been consulted, the discovery would have followed that a tax of one-fourth of 1 per cent., authorized by the constitution and the third section of the act of 1881, levied annually on property valued at \$863,011.38, would liquidate in 10 years an indebtedness of only \$14,982.77. The bonds in excess of that amount are void, and collection of the excess cannot be enforced against the county, even by a *bona fide* purchaser for value.

5. It remains to consider the validity of bonds numbered 36 to 40, inclusive. These bonds, on their face, purport to be court-house bonds, and bear date November 12, 1883, the same date as the issue of 35 already discussed. Defendant objects to these bonds because (1) they were issued to bore an artesian well, and (2) the county exhausted its authority to issue bonds when, by the order of commissioners' court of November 12, 1883, it authorized the issuance and delivery of 35 bonds to Milliken & Co. to erect a court-house; and hence the subsequent issue of 5 bonds was unlawful and void. If the county had authority to issue bonds 36 to 40, inclusive, at the time the order for their issuance was passed, the fact that they were sold and the proceeds used to sink an artesian well would not invalidate them in the hands of an innocent purchaser. That point has been already decided against defendant touching the bonds, which it maintains were issued to construct a jail, and requires no further thought. The second objection, however, is more serious. The commissioners' court, November 12, 1883, ordered "that there be issued for the purpose of erecting a suitable building for a court-house for said county of Howard \* \* \* thirty-five coupon bonds of the said county, of the denomination of one thousand dollars each, payable to J. H. Milliken & Co. or bearer," etc. No other bonds were then ordered to be issued, and Milliken & Co. were not entitled to any others, or anything else, under their construction contract. An additional order of November 12, 1883, was passed, authorizing the levy

of a tax of one-fourth of 1 per cent. "to pay the interest and create a sinking fund for the redemption of said bonds necessary to erect a suitable building for a court-house," as authorized by the act of 1881. It was not until February 14, 1884, the order was passed "that the balance of five thousand dollars court-house bonds may issue, in accordance with law, to any one who may agree to take same at their face or par value, and may be subject to the disposition of Geo. Hogg, county judge, or his successors in office." August 19, 1884,—about five months after the order authorizing the destruction and cancellation of the first and erroneous issue of 40 bonds,—an order was made by the commissioners' court that bond 36 be "turned over to R. R. Elder, artesian well contractor, as collateral security," etc. On March 1, 1886, it was ordered by the court "that A. D. Walker deposit said bonds Nos. 37, 38, 39, and 40 in Colorado National Bank, in accordance with terms of aforesaid contract,"—presumably a contract with James & Co. for boring an artesian well. These four bonds were subsequently withdrawn from the bank, conformably to the order of August 11, 1886, and remained in the custody of the county treasurer until County Judge Thurmond negotiated them in St. Louis, pursuant to the order of September 13, 1886. Bonds numbered 37, 38, 39, and 40, together with bond 36, were purchased by a citizen of St. Louis; after March 12, 1884, for value, and with only such knowledge of their validity or invalidity as plaintiff had at the time of his purchase of bonds numbered from 1 to 30. The court is of opinion that these 5 bonds are absolutely void, on the ground that the county had no power or authority to issue them. The power to issue bonds for the erection of a court-house was exhausted when the 35 bonds were issued and delivered to Milliken & Co.; and thereafter the county was without lawful authority to issue additional bonds, apparently for court-house purposes, but really and in fact intended and used for the purpose of boring an artesian well. *Daviess Co. v. Dickinson, supra*. Granted the power, under such circumstances, to issue bonds, purporting on their face to be court-house bonds, the authority would be susceptible of indefinite expansion; and under the pretense of lawful right a county would be enabled to flood the country with negotiable securities, binding upon the people. Such a doctrine is inconsistent with reason, and, it is believed, finds no support in the principles asserted by text-writers, or as enunciated by judicial tribunals. My conclusion, therefore, is that bonds numbered 36, 37, 38, 39, and 40 are void, and hence not enforceable.

6. It has been shown that bonds numbered 1 to 35, inclusive, are in part valid and partly void. The question now arises, is the county liable for the amount of indebtedness within the restricted limit? The supreme court of this state replies in the affirmative. *Bank v. City of Terrell, supra*; *Daviess Co. v. Dickinson, supra*; *Insurance Co. v. Lyon Co., supra*. The supreme court of Iowa holds the same view, and, in *McPherson v. Foster*, 43 Iowa, 72, 73, says:

"As we have seen, the constitutional inhibition operates upon the indebtedness, not upon the form of the debt. The district may become indebted to

the amount of \$2,057.50 by bond. If the debt exceeds that amount, it is void as to the excess, because of the inhibition upon the power of the district to exceed the limit; and the bonds as to the same excess are void because of the non-existence of a valid debt therefor. But this restriction does not extend to the sum of \$2,057.50 for which the district had power to issue its bonds. That sum is a valid debt. The bonds, to that extent, are valid. It is no unusual thing for instruments of this character to be partly valid and partly invalid. So far as they secure a lawful debt, they are valid. So far as the debt is unlawful, they are invalid. \* \* \* It appears that the bonds all bear the same date, and were issued, though at different times, as a part of one transaction. They were intended as security for a debt of \$15,000, which was attempted to be contracted in building the school-house. It cannot be said that in justice invalidity should attach to certain particular bonds, while others, to the amount for which the district could lawfully contract indebtedness, should be held valid. Each bond, being but a part of the whole debt, must partake alike of invalidity and validity; it must be partly valid and partly invalid. The whole alleged debt is \$15,000. Of this sum \$2,057.50 is valid. Each bond will be valid to the extent it represents a portion of the debt lawfully contracted. Such a sum is the proportion of the amount of the bond as \$2,057.50 bears to \$15,000; that is,  $\frac{2,057.5}{15,000.0}$  of the principal of each bond is valid and collectible. The interest on each bond is determined by the same rule, or calculated upon the amount of each bond held to be valid."

Howard county could lawfully issue, November 12, 1883, bonds to the amount of \$14,982.77. It did in fact issue bonds, partly valid and partly invalid, aggregating \$35,000. Bonds to the extent of its power to issue—\$14,982.77—became a valid indebtedness against the county, and enforceable by suit. Bonds in excess of that limit or amount are invalid and uncollectible. The 35 bonds were all issued and delivered at the same time to Milliken & Co., and they were subsequently bought at the same time by plaintiff and another citizen of St. Louis. None, therefore, have priority over the others, and the amount of valid debt should be equally distributed among them all. According to the rule laid down by the supreme court of Iowa, each one of the 35 bonds of \$1,000 issued represents a valid indebtedness of \$428, and each coupon of \$80 a valid debt of \$34.24. The suit embraces of these coupons, partly valid and partly invalid, 34 due April 10, 1888; 34 due April 10, 1889; 29 due April 10, 1890; and 29 due April 10, 1891. There is then due the plaintiff on the coupons the following amounts:

(1) Coupons due 1888, principal,	-	-	-	\$1,164	16	
Interest to April 10, 1892,	-	-	-	372	53	
						\$1,536 69
(2) Coupons due 1889, principal,	-	-	-	\$1,164	16	
Interest to April 10, 1892,	-	-	-	279	39	
						1,443 55
(8) Coupons due 1890, principal,	-	-	-	\$992	96	
Interest to April 10, 1892,	-	-	-	158	87	
						1,151 83
(4) Coupons due 1891, principal,	-	-	-	\$992	96	
Interest to April 10, 1892,	-	-	-	79	43	
						1,072 39
Total,	-	-	-			\$5,204 46

Judgment should be rendered for the foregoing amount, with 6 per cent. interest thereon from date, (Gen. Laws 1891, p. 87; Const. Amend. adopted Aug., 1891,) if, indeed, it be proper to enter judgment in favor of plaintiff for any amount in this suit at law. This question presents a serious difficulty. The supreme court of Iowa, in *McPherson v. Foster*, *supra*, and Judge SHIRAS, in *Insurance Co. v. Lyon Co.*, *supra*, declined to enter judgment; the latter basing his refusal on the ground that the rights and equities of the bondholders could only be adjusted by a proper proceeding in equity, with all the parties before the court. Discussing the question, he observes:

"It is argued that the bonds would be valid until the amount needed to refund the enforceable debt had been reached, and that it will be presumed that the bonds were sold in the order of their number. Such a presumption cannot be indulged in under the facts of this case. To settle the equities and rights of the bondholders against the county, and their rights as between themselves, would seem to require the institution of a suit in equity. In this action at law between one owner of part of the bonds and the county, it is beyond the power of the court to hear and determine the question of the order in which the series of bonds were sold, or the application of the proceeds realized from the sales thereof, and whether the facts are such that a certain number of the bonds can be held valid at law, or whether it should not be held that each owner of a bond is equitably entitled to demand his share of the total sum which may be adjudged to be collectible from the county."

Touching this point, the supreme court of this state says:

"Neither the pleadings nor the proof in the record before us present the case so as to authorize a judgment of the nature indicated by us as being proper. Strictly speaking, no judgment other than the one from which the appeal was taken could have been rendered. We think it right, however, to give the appellee an opportunity amend his pleadings, and have the issues so presented as to show what proportion of the debts sued on he may be entitled to recover, under the rules that we here announce." *Bank v. City of Terrell*, *supra*.

See, also, *Davies Co. v. Dickinson*, *supra*.

This court fully concurs in what is said in the cases cited. But the rulings in those cases were predicated upon the particular facts of each case. While in this suit the court entertains serious doubts as to the propriety of entering judgment in behalf of plaintiff, yet, after giving the question careful consideration, I am impressed with the conviction that such a judgment would be warranted by both the pleadings and proofs; and perceiving no insuperable objection, in a case of this kind, to the rendition of a judgment in a suit at law, my conclusion is that plaintiff should recover the amount found due, with legal interest and costs of suit. If he be not permitted to recover all he claims, he should at least have judgment for the amount to which he is lawfully entitled.

Ordered accordingly.



## LEAR v. UNITED STATES.

*(District Court, D. Alaska. February 19, 1892.)***ABANDONMENT OF MILITARY POST—SALE OF BUILDINGS—POWER OF SECRETARY OF WAR.**

When a military post located upon lands belonging to the United States is abandoned, the secretary of war has no power, in the absence of authority from congress, to order a sale of the buildings, and such a sale is void.

At Law. Action by W. K. Lear against the United States for the recovery of money.

*Delaney & Gamel and Geo. A. King, for plaintiff.*

*C. S. Johnson, U. S. Dist. Atty.*

BUGBEE, District Judge. This action was brought under and by authority of section 2 of an act of congress entitled "An act to provide for the bringing of suits against the government of the United States," approved March 3, 1887. From the admissions in the pleadings and from the evidence, which is entirely documentary, it appears that the material facts in the case are as follows: During the years 1868, '69, '70, the government erected at Wrangell, then occupied as a military station, certain wooden buildings for the use and occupation of the United States soldiers at that place. In 1871 the site was abandoned as a military post, and by authority of the secretary of war, and under the instructions of the department commander, the chief quartermaster advertised the buildings for sale. On or about the 23d of August, 1871, they were sold to the petitioner, Lear, for the sum of \$600, which was paid by him to the government on December 19, 1871, and the property so sold was thereupon transferred by the military officers, then occupying it, to petitioner, who remained for years thereafter in possession, and who still claims ownership of the same, by reason of such purchase. On August 1, 1875, Ft. Wrangell was re-established as a military post, and subsequently, during the period from August 1, 1875, to June 15, 1877, when the garrison was withdrawn, the buildings in question were reoccupied by the troops, as tenants of the plaintiff, and rent was paid to him by the government at a rate fixed by a board of army officers appointed to tax the same. The same board also recommended the purchase of the buildings by the government from petitioner for the price of \$7,000. On the 21st of June, 1884, the deputy collector of customs at Wrangell, acting under instructions from the secretary of the treasury, demanded of petitioner the possession of the said buildings, claiming them as the property of the United States. The demand was not acceded to, and on the 25th day of June, 1884, the deputy-collector took possession by force, and the property has ever since remained in the possession of the government, and been used for civil purposes. It is not claimed that the government has ever parted with its title to the land on which the buildings claimed by petitioner were erected. The prayer of the petitioner is: (1) For the sum of \$7,000,

v.50F.no.1—5

being the purchase price fixed by the military board, above mentioned. (2) If not allowed that sum, then that he be allowed rent from the time of his ouster by the treasury department. (3) If not allowed either amount, then that he be awarded the \$600 paid by him as purchase money on December 19, 1871, with interest at 6 per cent. per annum from that date. In its answer the government confesses that plaintiff is entitled to judgment for the amount paid for the property, with interest, but claims that petitioner is not entitled to any other relief asked for, because the sale was without authority of congress, in violation of the constitution of the United States, and therefore wholly void, and passed no title to plaintiff. The relief asked for in the first and second subdivisions, respectively, of the prayer could only be granted on the theory that the sale was a valid one, and that thereby the petitioner acquired, as against the United States, the full title to the property. No authority whatever has been produced, nor have I been able to find any law, which will support such a theory. The sale was not authorized nor ratified by congress, and I must therefore hold that it was void. Judgment, however, is given for petitioner for the amount confessed in the answer to be due, to-wit, the sum of \$600, with interest at 6 per cent. per annum from December 19, 1871, and the costs of the clerk of the court, after issue joined.

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*In re POPPER.*

(Circuit Court, S. D. New York. October 13, 1891.)

**CUSTOMS DUTIES—MANUFACTURED ARTICLES—PIECES OF BEVELED GLASS.**

A decision of the board of appraisers that small squares, triangles, and circles of glass, the squares from  $2\frac{1}{2} \times 2\frac{1}{4}$  to  $4 \times 4$ , and the circles from 5 to 6 inches in diameter, with edges beveled and polished, are dutiable at 45 per cent. *ad valorem* as "articles of glass cut," under Act Cong. March 3, 1883, (Tariff Ind. New, par. 135,) rather than at 8 cents per square foot, as "cast polished plate-glass, unsilvered," not exceeding 10x15 inches square, under Tariff Ind. New, par. 140, of said act, will not be disturbed, although the bevel was produced by abrasion, rather than by cutting with a sharp instrument, it appearing that in the trade of the glass cutter the word "cutting" is frequently used to denote a process which in popular language would more properly be styled "grinding" or "abrading."

**At Law.** Extract from the report of district attorney:

"The proceeding was an application by the importers for a review by the circuit court of a decision of the board of United States general appraisers, delivered on the 13th of February, 1891, affirming the decision of the collector on the classification of certain merchandise, \* \* \* which merchandise was classified for duty by the collector as 'articles of glass cut,' and duty assessed thereon at the rate of 45 per cent. *ad valorem*, under the provisions of Tariff Ind. New, par. 135. (Tariff Act March 3, 1883.) Against this classification the importers protested, claiming that the merchandise was dutiable at three cents per square foot as 'cast polished plate-glass, unsilvered,' not exceeding 10x15 inches square, under Tariff Ind. New, par. 140, of said tariff act, and, if not so dutiable, then at four cents per square foot, under Tariff Ind. New, par. 141, of said act, as 'looking-glass plates.' The importers



abandoned their contention under the last head, and stood upon their claim that the merchandise was dutiable under Tariff Ind. New, par. 140. \* \* \* It appeared that the merchandise in this present proceeding consisted of small squares, triangles, and circles, varying in size, the squares up to 4x4 inches, the half squares or triangles from  $2\frac{1}{2} \times 2\frac{1}{2}$  up to 4x4, and the circles from 5 inches up to 6 inches in diameter. These articles were made from polished plate-glass, and all of them beveled as to their edges with a bevel of from 5-8 to one inch in width, polished. It appeared by the evidence that they were a finished article, as bought and sold in the trade of this country."

*Comstock & Brown*, for appellant.

*James T. Van Rensselaer*, for the United States.

LACOMBE, Circuit Judge. As to the proposition advanced that the articles in question are dutiable under paragraph 140, rather than under paragraph 135, for the reason that paragraph 140 is denominative and paragraph 135 descriptive, I am unable to assent to the views of the plaintiff, because it seems to me that paragraph 140 is not truly denominative, but in fact descriptive. Referring to glass in the form of plate which has been cast, which has been polished, and which has not been silvered, it is not, in my judgment, the equivalent of such a term as "handkerchiefs," which was found by the supreme court in the *Glendinning Case*, 10 Sup. Ct. Rep. 44, to be a denominative term, and to take precedence of the mere descriptive phrase. It is claimed by the collector that these are dutiable as articles of glass cut. The testimony here shows that the bevel upon the glass was produced by a process of abrasion. Such operation is not "cutting," in the ordinary sense of the word, as found in the dictionaries. There has been neither section nor incision by a cutting instrument,—a sharp-edged instrument. Still the board of appraisers have found and returned that the beveled edges were produced by cutting, and without going into a discussion of its details, I do not think that the testimony, as a whole, will warrant the court in reversing their decision, there being sufficient in it to warrant the inference that in the trade of the glass cutter the word "cutting" is frequently used as descriptive of a process which would be more accurately described in common speech as "grinding" or "abrading." For these reasons the decision of the board of appraisers is affirmed.

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*In re WERTHEIMER et al.*

(Circuit Court, S. D. New York. April 20, 1892.)

**1. CUSTOMS DUTIES—MEN'S LEATHER GLOVES.**

Men's leather pique or prick seam gloves held to be dutiable at 50 per cent. *ad valorem*, with an additional duty of one dollar per dozen pairs.

**2. SAME—PARAGRAPH 458, SCHEDULE N, TARIFF ACT OCT. 1, 1890.**

The additional duties provided for in the said paragraph held to be alternative, and not cumulative.

At Law. Appeal from decision of board of United States general appraisers.

The merchandise in suit consisted of men's leather pique or prick seam gloves, imported by Wertheimer & Co. on October 15, 1890, upon which the collector of customs at the port of New York assessed a duty of 50 per cent. *ad valorem*, and also an additional duty of one dollar per dozen pairs as "men's gloves," and also an additional duty of 50 cents per dozen pairs as "pique or prick seam gloves," (making a total additional duty of \$1.50 per dozen pairs,) under the provisions of Schedule N, par. 458, of the act of October 1, 1890, viz.:

"458. Gloves of all descriptions, composed wholly or in part of kid or other leather, and whether wholly or partly manufactured, shall pay duty at the rates fixed in connection with the following specified kinds thereof, fourteen inches in extreme length when stretched to the full extent, being in each case hereby fixed as the standard, and one dozen pairs as the basis, namely: 'Ladies' and children's schmaschen of said length or under, one dollar and seventy-five cents per dozen; ladies' and children's lamb of said length or under, two dollars and twenty-five cents per dozen; ladies' and children's kid of said length or under, three dollars and twenty-five cents per dozen; ladies' and children's suedes of said length or under, fifty per centum *ad valorem*; all other ladies' and children's leather gloves, and all men's leather gloves, of said length or under, fifty per cent. *ad valorem*; all leather gloves over fourteen inches in length, fifty per centum *ad valorem*; and, in addition to the above rates, there shall be paid on all men's gloves, one dollar per dozen; on all lined gloves, one dollar per dozen; on all pique or prick seam gloves, fifty cents per dozen; on all embroidered gloves, with more than three single strands or cords, fifty cents per dozen pairs: provided, that all gloves represented to be of a kind or grade below their actual kind or grade shall pay an additional duty of five dollars per dozen pairs: provided, further, that none of the articles named in this paragraph shall pay a less rate of duty than fifty per cent. *ad valorem*."

The importers duly protested, claiming the gloves to be dutiable, under said paragraph, at 50 per cent. *ad valorem*, with an additional duty of 50 cents per dozen pairs only, as "pique or prick seam gloves." The board of general appraisers affirmed the decision of the collector, and held the additional duties to be cumulative, and, as the goods were concededly men's gloves, and also pique or prick seam gloves, the additional duties for both of said classes of gloves were properly assessed thereon. Appeal was duly taken by the importers to the United States circuit court, under the provisions of the act of June 10, 1890.

*Edward Mitchell*, U. S. Atty., and *Henry C. Platt*, Asst. U. S. Atty.  
*Curie, Smith & Mackie*, for importers.

LACOMBE, Circuit Judge. The case is hardly susceptible of argument unless upon the question of what the intent of congress was. That would involve going back of the face of the statute, which does not seem ambiguous, and entering upon a consideration of the relative rates of duty fixed upon different kinds of goods, and the reasonableness of such rates,—a speculation which, possibly, the modern doctrine as to statutory construction may require, but which I do not feel warranted in

embarking on in this case, where there is not apparent uncertainty to call for special construction. I am satisfied to take the paragraph as it reads, and interpret it according to the language which congress has used. In the first part of the section there are certain rates of duty fixed on different kinds and varieties of kid gloves; then there is a rate of duty of a dollar per dozen on all men's gloves assessable in addition to the rate of duty enumerated in the first part of the section, the language being, "in addition to the above rates." If it happens that the goods are pique or prick seam gloves, there is a duty of 50 cents a dozen assessable in addition to the rates specified in the first part of the section, but there is nothing in the paragraph to indicate that it is to be additional to any one of the rates named in the latter part of the section. I cannot see, therefore, that the phraseology following the words, "in addition to the above rates," contemplates a cumulative series of duties. They are alternative. Under whichever one or the other of the four classes the gloves may fall, they are to pay the duty prescribed for that class, in addition to the rate of duty which was fixed in the earlier part of the section. If they fall equally under two or more of the classes named in the latter part of the section, then they shall pay the rate of duty of the highest class within which they may properly be included. Section 5. These are concededly men's gloves. As men's gloves they are to pay one dollar a dozen extra. As pique gloves they would pay only fifty cents a dozen extra. They should therefore pay the larger of the two additional rates, viz., one dollar a dozen. The finding of the board of appraisers is reversed, and the goods will be classified at the regular rate specified by paragraph 458, with the additional rate of one dollar per dozen, prescribed for all men's gloves.

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BAUMGARTEN v. MAGONE.

(Circuit Court, S. D. New York. December 19, 1890.)

1. CUSTOMS DUTIES—CLASSIFICATION—MARBLE BLOCKS.

Small blocks of marble, about half an inch square, used for mosaics, mural decorations, and pavements in vestibules, are dutiable under the tariff act of 1883, either as "marble in block," or as "manufactures of marble," to the exclusion of the general clause, "all other manufactures not before enumerated."

2. SAME—TRADE SIGNIFICATION.

It is a question for the jury whether the words "marble in block" have a special trade meaning, limiting them to large, roughly-hewed blocks as they come from the quarry, so as to exclude marble blocks about half an inch square, used in mosaics.

3. SAME—WHAT CONSTITUTE "MANUFACTURES."

The mere fact of the application of labor to an article, either by hand or by mechanism, does not make it necessarily a "manufactured article," within the meaning of the tariff laws, unless the labor has been carried to such an extent that the article suffers a species of transformation, and is changed into a new and different article, having a distinctive name, character, or use. *U. S. v. Semmer*, 41 Fed. Rep. 324, followed.

At Law. Action to recover duties paid.

*Chas. Curie*, for plaintiff.  
*Edward Mitchell*, U. S. Atty.

COXE, District Judge, (*charging jury*.) As I stated in your presence, I have considerable doubts upon the facts in this case whether or not there is a question of fact to be submitted to you. There being a doubt, however, I think it safer to send the case to you, as any mistakes that are made upon the law can be taken care of hereafter. The plaintiffs imported into this country small pieces of marble, specimens of which have been shown you; concededly, upon this proof they are used for mosaics, mural decorations, panels, and sometimes for pavements in vestibules and upon floors. The collector looked through the tariff act of 1883 and assessed duty upon them as "manufactures of marble." The plaintiffs protested, insisting that they were covered by a prior clause in the act as, "marble in block." Another clause was referred to in their protest, which does not come before you, however, for the reason that it seems to me, so far as this controversy is concerned, that the character of these importations must be decided under the two sections to which your attention has been called. In other words, if the importations are not "marble in block" then the clause "manufactures of marble" covers them, rather than the general clause relating to "all manufactures." If they are "manufactures" at all, the clause "manufactures of marble" is clearly a more specific definition than the general clause which relates to "all other manufactures not before enumerated." So the question for you to determine is whether the specimen (and they are concededly upon this proof all alike) which has been shown you—a small piece of marble about half an inch square—is, or is not a "block of marble" or "marble in block." The burden is upon the plaintiffs to satisfy you, by a fair preponderance of proof, that it is. If you say that it is not covered by the language "marble in block," your verdict must be for the defendant. In other words, it is not important upon this controversy, to decide whether or not the collector is right, if you find that the plaintiffs are wrong in selecting this statute as covering their importations, your verdict must be against them.

There are two questions I think which should be presented to you: *First*, whether or not the term "marble in block" had any special trade signification at the time the act of 1883 was passed. If it had, then it may be assumed that congress used the term as it was known by commercial men at the time. As I have, I think, said in your presence, such a term, to have such a signification, must be so general that it may be presumed that congress took notice of it; it must be a term understood by importers and large dealers in the country generally, and not in specific, isolated instances. One witness has been called upon that subject, and he has testified that as known in trade and commerce "marble in block" related to marble as the blocks came from the quarry, which were squared and "scabbled off;" and he thought that a marble block which was less than 10 inches square would not be a merchantable article, and would not be covered by the term "marble in block." It is

true that but one witness has been sworn upon this subject, and he has not been contradicted; but in view of all the facts and circumstances of the case I deem it proper to send the question to you to say whether or not upon this proof the term "marble in block," or "marble blocks," had a trade signification within the definition which I have given you. If you say that it had, and that the term "marble in block" as used in this section of the statute meant a block of marble greater than 10 inches square, of course it excludes the importations of the plaintiff; and your verdict will be for the defendant. There is no pretense that, if that is the meaning of that section of the statute, these small cubes of marble would come within the definition of congress. If, however, you say that there was no such signification as that, then the question arises, whether or not the importations are "marble in block" or "manufactures of marble."

As to what constitutes a "manufacture" I will follow the language of the supreme court in the case referred to by counsel, (*Hartranft v. Wiegmann*, 121 U. S. 609, 7 Sup. Ct. Rep. 1240,) but as adapted to a case which was tried in the circuit court for this district, (*U. S. v. Semmer*, 41 Fed. Rep. 324;) and I will say to you, "that the mere fact of the application of labor to an article, either by hand or by mechanism, does not make the article necessarily a manufactured article, within the meaning of that term as used in the tariff laws, unless the application of such labor is carried to such an extent that the article suffers a species of transformation, and is changed into a new and different article, having a distinctive name, character, or use." There is no dispute as to the manner in which these small cubes of marble are made,—sometimes by hand, and sometimes by machinery,—and there is no dispute as to the uses to which they are put.

So, gentlemen, you will bear in mind that the questions you are to determine are first, had the term "marble in block" a trade meaning? If you say that it had, and that the meaning was properly defined by the witness who testified upon that subject, your verdict will be for the defendant. If you say that it had not, then the question arises, whether or not the importations were covered by the term "marble in block," or by the term "manufactures of marble;" and, taking in view the law which I have given you as to what constitutes a "manufacture" you will answer that question. If you say that the importations are "marble in block" and covered by that phrase, your verdict will be for the plaintiffs in the sum of \$3.99. If you say that the importations are not covered by that term, your verdict will be for the defendant.

*In re HERTER BROS.**(Circuit Court, S. D. New York. October 18, 1891.)*

**At Law.** Application to review a decision of the board of general appraisers as to the classification of certain marble blocks.

*W. Wickham Smith*, for importers.

*James T. Van Rensselaer*, for the United States.

LACOMBE, Circuit Judge. In disposing of this case there is very little to add to the suggestions and construction of the statute which appear in the charge of Judge COXE in the case of *Baumgarten v. Magone*, 50 Fed. Rep. 69, which of course is the law of this court until reversed, if it ever should be, by the court of appeals. These articles are manifestly small blocks of marble, and I cannot find in the testimony sufficient to warrant a conclusion that the general trade and commerce of this country has given a special trade meaning to the words "marble in blocks" other and different from its ordinary meaning in the speech of everyday life. It may be that it has, but there is not enough in this testimony to show that fact. For that reason, I shall reverse the decision of the appraisers, and direct the assessment of duty upon these articles as marble in blocks, at 65 per cent.

*WHITNEY v. BOSTON & A. R. Co. et al.**(Circuit Court, D. Massachusetts. April 8, 1892.)***PATENTS FOR INVENTIONS—INFRINGEMENT—DISCLAIMER—ORIGINAL INVENTOR.**

One who is in fact the original and first inventor of all the things covered by the several claims of his patent may, without filing the disclaimer required by Rev. St. U. S. § 4922, maintain a suit for infringement of such claims as are valid, notwithstanding that the things covered by the other claims were in public use for more than two years prior to his application.

**In Equity.** Suit by Baxter D. Whitney against the Boston & Albany Railroad Company *et al.* for infringement of a patent. Decree for injunction.

*D. Hall Rice*, for complainant.

*Parkinson & Parkinson*, for defendants.

NELSON, District Judge. Defendants' motion to withhold a decree in favor of the plaintiff until the plaintiff shall have disclaimed the 1st, 4th, 5th, 6th, and 7th claims of his patent is denied, upon the ground that, assuming, as the defendants contend, that the evidence in the case proves that said claims cover what had been in public use and on sale for more than two years prior to the plaintiff's application for his patent, yet, since it appears that the plaintiff was the original and first inventor of the parts of his invention secured by said claims, he is therefore not required by Rev. St. § 4922, in order to entitle himself to a decree for an

infringement of the second and third claims of his patent, to make disclaimer of the other claims. *Manufacturing Co. v. Sprague*, 123 U. S. 249, 8 Sup. Ct. Rep. 122; *Telephone Co. v. Spencer*, 8 Fed. Rep. 512; Walk. Pat. § 197. The plaintiff, having waived his right to an account, is entitled to a decree for an injunction against the infringement of the second and third claims of the patent, with costs, and it is so ordered.

### DICKERSON v. MATHESON *et al.*

(Circuit Court, S. D. New York. April 18, 1892.)

#### 1. SALE—PATENTED ARTICLE—NOTICE OF RESTRICTION—TRADE CUSTOMS.

A firm in Germany having the right, under European and American patents, to sell a patented coloring matter in Europe and the United States, was in the habit of selling with restrictions against exportation to the United States. A London firm, which knew, in a general way, of this restriction, sent an order to the London agents of the German firm for a quantity of the goods "strong for export." *Held*, that it could not be presumed that these words conveyed notice of an intention to export to the United States, in the absence of proof that such was their trade meaning in London.

#### 2. PRINCIPAL AND AGENT—NOTICE TO AGENT.

On receiving notice of the arrival of the goods in London, the purchasers made out a check for the price, and gave it to their clerk, who, in the usual course of business, exchanged it for the invoice sent by a messenger of the seller's London agent. This invoice contained a notice of the prohibition against exporting to the United States, but the attention of the firm was not called thereto until a day or two later. *Held*, that notice to the clerk was notice to the firm, and, having accepted the goods with notice, the firm was bound by the restriction.

#### 3. PATENTS FOR INVENTIONS—SALE WITH RESTRICTIONS—INFRINGEMENT.

The owner of patents granted in Europe and the United States, who sells the patented article in Europe with a prohibition against importation into the United States, may treat as an infringer one who sells that article in this country. *Dickerson v. Matheson*, 47 Fed. Rep. 819, affirmed.

#### 4. PRACTICE—STIPULATED EVIDENCE—SUBSEQUENT TESTIMONY.

The parties to a cause stipulated that, in order to save the delay and expense of a commission to England, the cause should be tried as if certain evidence therein set out had been given. Afterwards, however, it became necessary to send a commission, and certain testimony was taken thereunder, but nothing was done to have the stipulation expunged. *Held* that, even if the commission was inconsistent with the stipulation, the stipulated evidence would not be disregarded on the motion of one party first made at the final hearing without notice to his adversary.

#### 5. FOREIGN LAWS—HOW PROVED.

Foreign laws must be proved as facts in the courts of this country, and mere citations to English statutes and authorities cannot be accepted as showing the English law.

In Equity. Suit by Edward N. Dickerson against William J. Matheson and James N. Steele for infringement of a patent. Decree for complainant.

Statement by COXE, District Judge:

On the 3d of November, 1885, Carl Duisberg, a German, obtained United States letters patent No. 329,632 for an improvement in coloring matter, known as "Benzo-Purpurine." On the 21st of December, 1885, Duisberg assigned the patent to the Bayer Company, of Ger-

many, which was the owner of a German patent for the same invention. On the 8th of March, 1888, the Bayer Company assigned the patent, including the right to recover for past infringements, to the complainant. The transaction out of which this controversy arose occurred in November, 1887. At that time another German corporation, known as the "Berlin Company," had the right, as licensee of the Bayer Company, to sell the patented color in Europe and in this country under the European and United States patents. Greeff & Co. were the London agents of the Berlin Company. On the 4th of November, 1887, Domeier & Co., of London, gave an order to Greeff & Co. for one ton of benzo-purpurine. This order contained the words "strong for export." On the 15th of November the benzo-purpurine arrived in London and Greeff & Co. notified Domeier & Co. of the fact, stating that it would be sent on in the course of the day, and requested Domeier & Co. to have check ready for payment. A check was accordingly filled out by an employe, signed by Mr. Domeier, and handed by him to a clerk, who subsequently delivered it to Greeff & Co.'s messenger in exchange for the invoice in the usual course of business. The invoice contained the following:

"NOTICE. The importation into the United States of North America of our patented substantive cotton dye-stuffs, congo, benzo-purpurine, etc., is prohibited."

The attention of Mr. Domeier was not called to this notice until a day or so afterwards. The goods were marked with a label on which was the following notice: "The importation into the United States of North America is forbidden." This label was not seen by Mr. Domeier, and did not come to his knowledge until after he had paid for the goods. The defendant Matheson, in describing the marks on the packages after their arrival in this country, does not mention the notice of prohibition on the label, the inference being that it was not there at that time. On the 25th of November, 10 days after the purchase by Domeier & Co., Barnes & Co., the defendants' London agents, shipped the goods to the defendants. The exact date of the sale to Barnes & Co. does not appear, although on November 22d they wrote the defendants as follows: "Benzo-purpurine, we have received the ton and shall forward same by steamer on Thursday." It is frequently stated in defendants' brief that Domeier & Co. were not aware of the notice on the invoice until after the property had passed out of their hands. I am unable to find the proof of this. Domeier does not so testify and the affidavit attached to Mitchell's testimony as to what he heard Domeier say, certainly, is not evidence. Domeier & Co. knew, generally, at the time they ordered the goods of the agents of the Berlin Company that benzo-purpurine was sold under restrictions against importation into this country. Barnes & Co. also knew this, and Domeier & Co.'s instructions from Barnes & Co. were not to buy unless they could do so without restrictions. The Berlin Company believed that the goods were to be used in England. On the 16th of January, 1890, counsel for the respective parties entered into a stipulation which begins as follows:



"In order to save the delay and expense of a commission to England it is hereby stipulated \* \* \* that on the final hearing it shall be taken as though the following testimony has been given."

Then follows a statement of some of the facts and circumstances out of which the controversy arose. Subsequently, on the 27th of May, 1891, it became necessary to send a commission to England to take testimony regarding the sale to Domeier & Co. The defendants now insist that because of the commission the stipulation became inoperative and should be absolutely disregarded by the court. A witness named Mitchell, who was a member of the firm of Barnes & Co., was examined in London under the commission referred to. His examination was directed almost wholly to what he had heard Mr. Domeier say regarding the transaction. The testimony was duly objected to.

*E. N. Dickerson*, for complainant.

*Henry P. Wells*, for defendants.

COXE, District Judge. The court cannot now disregard the stipulation of January 16, 1890. Assuming that the commission afterwards issued was inconsistent with the terms of the agreement, it was clearly the duty of defendants' counsel to move to have the stipulated evidence expunged. The complainant could then have proved in other ways most, if not all, of the facts agreed upon. It would be manifestly unfair to permit a party to come down to final hearing and then without previous notice strike from the record proof upon which his adversary has, in good faith, relied to establish his side of the controversy. However, after having read the record with care I do not recall an instance where a material fact of the stipulation has been proved untrue. In so far as the testimony of Mitchell relates to what he heard Domeier and others say it is clearly hearsay and cannot be considered.

Upon the merits the only question is one of infringement. The defendants admit having sold the patented coloring matter in this country, but they allege that they had a right to do this, having purchased it in open market without restrictions, the title coming from those who were licensed to sell it under the patents. It is argued that the bargain was originally made without restrictions and that the Berlin Company could not alter its terms by a notice upon the invoice. This contention is based upon the theory that the statement "strong for export" in the order of Domeier & Co. was notice to the vendor that the goods were to be sent to the United States. There is no foundation for such an assumption. If, when a London merchant, dealing with a Berlin merchant, uses the term quoted he means that the goods are to be exported to the United States that fact should have been proved. It cannot be inferred.

Again, it is said, that Domeier & Co. were not bound by the notice of restriction, because Mr. Domeier did not see it till one or two days after the sale was consummated, and that Domeier & Co. were not bound by the act of their clerk in accepting the invoice containing a notice printed in a foreign language. If such propositions are to receive the sanction of the courts it will be well-nigh impossible to carry on the bus-

iness of commerce. A person cannot avoid responsibility by closing his eyes and ears and delegating his business to others. If Domeier & Co. would have been bound by the notice of restriction had Domeier personally received the invoice in exchange for the check the firm is equally bound by the action of their clerk. The clerk stood in the place and stead of Domeier & Co. and represented them in that transaction. He stood for the firm precisely as a cashier represents a bank, or a purser a ship. He was acting entirely within the scope of his authority. His acts were the acts of Domeier & Co. Story, Ag. § 135. The entire invoice was in the German language, but no objection to receiving it was made on that account. Indeed, the presumption is that the invoice was perfectly understood when it is remembered that a large part of the correspondence with Domeier & Co. was carried on in that language. If the copy of the invoice printed in the record is correct, the notice was conspicuously placed and was one which Domeier would have seen and understood at a glance. The firm cannot escape responsibility by proving that one member did not know of the notice until a day or so afterwards. There is nothing in the want of knowledge by Domeier incompatible with legal knowledge by the firm, through its duly-authorized agent or otherwise, of the contents of a paper which was their voucher for the goods.

In *Steers v. Steam-Ship Co.*, 57 N. Y. 1, the court, at page 5, says:

"That the plaintiff herself never read the contract is of no moment. The arrangement was made by her agent, who must be presumed to have acquainted himself with the terms of the engagement which the defendant assented to."

In *Belger v. Dinsmore*, 51 N. Y. 166, it was said, at page 170:

"The presumption of law is that a party receiving an instrument, in the transaction of any business, is acquainted with its contents."

In *Kirkland v. Dinsmore*, 62 N. Y. 171, it was held that—

"A party cannot escape from the terms of a contract in the absence of fraud or imposition, because he negligently omitted to read it; and when the other party has a right to infer his consent he will be precluded from denying it to the other's injury."

It is argued that the transaction, having taken place in London, is to be governed by English law, and certain English authorities and statutes are referred to. But there is no adequate proof of what the law of England is. The rule is well established that foreign laws, written or unwritten, must be proved as facts in the courts of this country. *Pierce v. Indseth*, 106 U. S. 546, 1 Sup. Ct. Rep. 418; *Ennis v. Smith*, 14 How. 400, 426. It must, then, be held that the order of Domeier & Co. upon Greff & Co. of November 4th did not operate as a completed sale; that the expression "strong for export" was not notice to the Berlin company, or its agents, that the goods were intended for the United States, and that the Berlin company had the right to insert the prohibition clause; that Domeier & Co., having received and retained the invoice containing this clause, accepted the goods subject to this restriction.

The simple question, therefore, is this: Whether the owner of patents,

granted in Europe and the United States, who sells the patented article in Europe with restrictions against importation into the United States, can treat as an infringer one who uses or sells that article in this country. This question is *res judicata* in this court. On the motion for a preliminary injunction it was held that "the right of the complainant to treat the defendants as infringers hinges upon the question of fact whether Domeier paid or sent his check for the benzo-purpurine \* \* \* before he received the invoice which gave notice that the patented article was sold on condition that it was not to be used or sold in the United States." *Dickerson v. Matheson*, 47 Fed. Rep. 319. In other words, it was decided that the restriction would follow the goods to this country if the original sale was made subject to the restriction, and that the sale was so made if the goods were paid for after or at the time the notice on the invoice was received. To the same effect, by implication, is the case of *Holiday v. Matheson*, 24 Fed. Rep. 185. If the defendants were *bona fide* purchasers led inadvertently into the attitude of infringers the court might, perhaps, be more zealous to protect them, but the impression cannot be avoided that they do not occupy such a position. The complainant is entitled to a decree.

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UTERMAYER v. FREUND *et al.*

(Circuit Court, S. D. New York. April 18, 1892.)

1. DESIGN PATENTS—INFRINGEMENT—CONSTITUTIONAL LAW.  
Act Cong. Feb. 4, 1887, creating a liability of \$250 against the infringer of a design patent, was a valid exercise of the authority granted by Const. U. S. art. 1, § 1, to secure to inventors for a limited time the exclusive use of their inventions.
2. SAME—CONSTRUCTION OF STATUTE.  
As the act declared that "hereafter, during the term of letters patent for a design, it shall be unlawful," etc., its provisions applied to existing, as well as to future, suits for infringement.
3. SAME—MEASURE OF DAMAGES.  
As the act declares that the infringer shall also be liable for any excess of profits over the \$250 arising from the sale "of the article or articles" to which the design has been applied, the courts cannot restrict the recovery merely to the profits arising from the increase of value imparted by the design.

In Equity. Suit by Henry Utermeyer against Max Freund *et al.* for infringement of a patent. Heard on exceptions to the master's report. Overruled.

This action was begun December 30, 1886, for the infringement of letters patent No. 15,121, granted to complainant July 1, 1884, for a design for a watch-case. A decision sustaining the patent was filed January 15, 1889. 37 Fed. Rep. 342. An interlocutory decree adjudging that the complainant recover damages and profits "together with any penalty incurred," and referring it to a master to take the account, was entered January 24, 1889. On the 6th of May, 1891, the master filed his report in which he found nominal damages, and no profits

prior to February 4, 1887,—the date of the act relating to design patents. 24 St. at Large, p. 387. He did find, however, that the complainant was entitled to recover \$250 as provided by said act and the profits in excess of \$250 since February 4, 1887, on each watch-case to which the design was applied, amounting to \$889.02. In brief, the master holds that the act of February, 1887, applies to this cause and under it the complainant is entitled to recover \$250 and \$889.02. If the act does not apply the complainant, under the rule of the *Carpet Cases*, 114 U. S. 439, 5 Sup. Ct. Rep. 945; 118 U. S. 10, 6 Sup. Ct. Rep. 946, would be entitled to nominal damages only. The defendants filed exceptions to the report, and now urge the following propositions: *First*, that the act of February, 1887, is unconstitutional because it imposes a penalty without due process of law in contravention of article 3, § 2, cl. 3, of the constitution and also of the 5th, 6th, 7th and 8th amendments. *Second*, that the act does not apply for the reason that this suit was commenced one month and five days before the act was approved. *Third*, that congress did not intend to change the rule as laid down in the *Carpet Cases*, the object of the act being to give the patentee \$250 in every case and the profits, in excess of that sum, if he can prove them under the rules established by the supreme court.

*Rowland Cox*, for complainant.

*Frederic H. Betts* and *Samuel R. Betts*, for defendants.

COXE, District Judge. The act of 1887 is constitutional. Article 1, § 8, of the constitution gives congress the power "to promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries." The practical result of the decision in *Dobson v. Carpet Co.*, 114 U. S. 439, 5 Sup. Ct. Rep. 945, (decided April 20, 1885,) was to deprive the owner of a design patent of all redress against infringers. The attention of congress being called to this condition of affairs the act of 1887 was passed to remedy what seemed to the law-makers a gross injustice. Congress evidently thought that existing law was inadequate to secure to inventors of designs the exclusive right to their discoveries. The \$250 which the act permits the owner of the patent to recover is in the nature of a penalty, it is true, but so are the provisions permitting punitive damages in sections 4919 and 4921 of the Revised Statutes. It seems clear that congress had power, under the constitutional provision quoted, to protect a meritorious inventor from the depredations of an intentional infringer even to the extent of designating a fixed sum which, at the expense of perfect accuracy, has frequently been denominated "liquidated damages." In other words, congress had the power to say to the wrong-doer, "You have, with full knowledge of the patentee's rights, appropriated his property and caused him injury; hitherto you have escaped, because he could not show the extent of his loss. This shall not continue; we know he has suffered damage by your act and if you continue to use his property you must pay him at least \$250." As the law existed prior to February 4, 1887, the inventor was

remediless. It was the purpose of congress to afford him some relief and nothing short of the provisions of the act in question seemed adequate for this purpose. But even though the court should entertain doubt upon the question of constitutionality it would still be its duty to resolve the doubt in favor of the validity of the law.

In this connection it may not be inappropriate to quote the language used when a similar argument was addressed to this court. In *Sarony v. Lithographic Co.*, 17 Fed. Rep. 591, it was said:

"The court should hesitate long and be convinced beyond a reasonable doubt before pronouncing the invalidity of an act of congress. The argument should amount almost to a demonstration. If doubt exists the act should be sustained. The presumption is in favor of its validity. This has long been the rule,—a rule applicable to all tribunals, and particularly to courts sitting at  *nisi prius*. Were it otherwise, endless complications would result, and a law which, in one circuit, was declared unconstitutional and void, might, in another, be enforced as valid."

The point that the act of 1887 does not apply, because the action was commenced before the approval of the act, is not well taken. The language of the first section is unmistakable. It says, "that hereafter, during the term of letters patent for a design, it shall be unlawful," etc. There is no exception regarding existing suits. As plainly as language can state it congress has declared that after February 4, 1887, the provisions of the act shall apply to patents for designs. The master has carefully restricted the recovery to infringements occurring after the approval of the act. The defendants have no valid complaint in this regard.

The remaining question relates to the proper construction of the act. It is argued that it was not the intention of congress to give to the owner of a design patent the entire profits made from the manufacture or sale of the article to which the design has been unlawfully applied. That the act says that the owner is entitled to these profits cannot be denied. There is no ambiguity in the language employed, but it is urged that the court is at liberty to place a construction upon the act which will prevent results thought to be unjust and absurd. The act provides:

"And in case the total profit made by him [the infringer] from the manufacture or sale, as aforesaid, of the article or articles to which the design, or colorable imitation thereof, has been applied, exceeds the sum of two hundred and fifty dollars, he shall be further liable for the excess of such profit over and above the said sum of two hundred and fifty dollars."

Nothing can be plainer than this. It is the profit on the sale of the article for which the infringer must account, and not alone the profit which can be demonstrated as due to the design. Having ascertained what the law means the duty of the court seems clear; it must be enforced. Whether the law is wise or unwise is not a question for the court. Arguments of this character should be addressed to the legislative and not to the judicial branch of the government. Discussion might well stop the moment the plain meaning of the law is ascertained.

But if we go a step further and examine the situation at the time the law was passed the conclusion cannot be resisted that the law says precisely what congress intended to say and accomplishes precisely what congress intended to accomplish,—no more and no less. As has been seen the task to which the law-makers were addressing themselves was to find some remedy for a consummated infringement. Without legislation the rights of owners of design patents were null. If the recovery against infringers were confined to profits due to the design the patentee was without redress. It was to remedy this well-recognized evil that the act was passed. Is it likely that congress expected to remedy the evil by re-enacting the precise rule of damage which produced the evil? If it were intended that the profits should be confined to the value imparted by the design no legislation was necessary. The paragraph above quoted might well have been omitted. The report of the committee and the debates in congress are all in consonance with this view. The precise objection now urged was sharply pointed out in congress, and, with full and exact knowledge of the radical change which it would produce, the bill was passed.

Suppositive cases have been suggested for the purpose of showing how the act may produce unjust results requiring the payment of large profits in no way due to the design, but actually due to other and, perhaps, patented features. On the other hand, the hardship to the patentee of the situation as it existed prior to the act has been enlarged upon. With full knowledge of the situation *pro* and *con* congress attempted to solve the problem. The act proceeds upon the idea that a willful infringer is not entitled to the same consideration as a meritorious inventor. That if one or the other must suffer it shall be he who by his wrongful act has produced the situation in which exact justice is impossible. By analogy to a well-known principle of equity the theory of the law seems to be that where an infringer intentionally appropriates the design and so mixes up the patentee's profits with his own that it is impossible to apportion them the loss must fall upon the guilty and not upon the innocent party. The exceptions must be overruled and the report of the master confirmed. If the foregoing views are correct it follows that the defendants must pay the master's fees. The master has done his work ably and well and it is hoped that there will be no difficulty in arriving at a satisfactory compensation. Any difference on the subject may, perhaps, be adjusted by a reference to *Doughty v. Manufacturing Co.*, 8 Batchf. 107.

## ELECTRICAL ACCUMULATOR CO. v. NEW YORK &amp; H. R. CO.

(Circuit Court, S. D. New York. April 9, 1892.)

## 1. PATENTS FOR INVENTIONS—INVENTION—ELECTRIC ACCUMULATORS.

Reissued letters patent No. 11,047, granted to the Electrical Accumulator Company, as assignee of Joseph Wilson Swan, December 17, 1889, claiming a perforated plate for secondary batteries, having the perforations extending through the plate, and the active material packed in the perforations only, cover a patentable invention.

## 2. SAME—UTILITY.

The fact that, before the date of this invention, Prof. Eaton had packed active material in perforations extending through the plate, at the same time covering the surfaces thereof, and that Mr. Brush had packed it into grooves in the plate without covering the surfaces, does not show a want of invention in the idea of confining it entirely to perforations extending through the plate, since this apparently slight change avoided the difficulties before encountered, and produced an electrode which has, to a great extent, superseded all others, and has become the electrode of commerce.

In Equity. Suit by the Electrical Accumulator Company against the New York & Harlem Railroad Company for infringement of a patent.  
Decree for complainant.

*Frederic H. Betts*, for complainant.

*Thomas W. Osborn*, for defendant.

COXE, District Judge. This is an action for infringement of reissued letters patent No. 11,047, granted to the Electrical Accumulator Company of New York, as assignee of Joseph Wilson Swan, on the 17th of December, 1889, for an improvement in secondary batteries. The invention of the reissue is intended to facilitate the construction of secondary battery plates by preparing them with perforations, cells or holes extending through the plate, in which holes the active material is packed. The original patent, No. 312,599, dated February 17, 1885, was considered by this court in the case of *Accumulator Co. v. Julien Co.*, 38 Fed. Rep. 117. The original was held invalid (pages 140–142) for the reason that it described and claimed a plate the outer surface of which might be covered by the active material. This construction, in view of the work done by Prof. Eaton, was held to be anticipated. The theory of the reissue is that the valuable feature contributed by Swan consists in confining the active material to the holes, without permitting it to extend beyond them to the surface of the plate. That portion of the original which refers to the coating of the outer surface of the plate has been omitted in the reissue. In other respects the description is unchanged.

The claim is as follows:

“A perforated or cellular plate for secondary batteries, having the perforations or cells extending through the plate and the active material or material to become active packed in the said perforations or cells only, substantially as described.”

This is the claim of the original, except that the word “only” has been added. The patent cannot be criticised as a reissue. The

claim instead of being broadened is greatly restricted. The application was filed within a reasonable time after the inventor was informed of the facts which made a narrower claim necessary. The facts bring the case within the provisions of section 4916 of the Revised Statutes.

The field of invention is, concededly, a narrow one. The counsel for the defendant correctly states that Swan's improvement consists "wholly in the idea of putting on the surface of a perforated plate for secondary batteries no active material beyond the contents of the perforations; everything except this is conceded to be old." The date, *de jure*, of Swan's invention is January 18, 1882. Prior to that time Prof. Eaton had filled the perforations, but he had covered both sides of his plate as well. Mr. Brush had rammed or pressed absorptive substance, in the form of dry powder, into grooves or receptacles without covering the surface of the plate. No one had packed active material into holes extending through the plate, confining it entirely to these holes. This combination was original with Swan. Did it involve invention? In approaching this subject it is well to remember, as the court has frequently had occasion to remark before, that we are dealing with a comparatively new and abstruse art, where the most important results are said to follow from changes, apparently, of the most unimportant character. Complete success has not been attained, but if we may credit the statements of those who are entitled to speak *ex cathedra* on the subject, the rapid strides in that direction during the last decade, are due to changes of form and material which, in many other arts, would be insufficient to support invention. The substitution of one material for another in a door-knob is the work of the mechanic, the substitution of one material for another in secondary battery electrodes may solve a problem which will revolutionize the motive power of the world.

In holding that there is sufficient invention disclosed to support the reissue the court is influenced by the following considerations: The Swan electrode is to-day the electrode of commerce. It has largely taken the place of other structures and is almost universally used. The advantage of having the active material composed of small disconnected masses, packed in holes extending through the plate, is unquestioned. The electrolyte is thus permitted to reach and operate upon both sides of these small masses, instead of on one side where the active material is packed in cells or pockets. The expansion and contraction of the electrode when the battery is in use causes the active material, if packed in cells or grooves or spread upon the surface of the plate, to crack, and portions of it to be pushed out of place and to fall away. These defects which produce "buckling," "short circuiting" and other disastrous results are entirely remedied by the Swan construction. If one of the small masses in his plate becomes injured or falls out it does not affect injuriously the other parts of the electrode. As Sir William Thomson puts it: "The perforated plates have also the great advantage of extending the area of electric communication between the continuous metallic conductor and the porous or spongy material and so



minimizing the electric resistance. The application of the oxide in the form of numerous mutually detached parts, separately held by the perforations, has also a great advantage in almost annulling the warping or fracturing effects of the expansion and contraction produced by the changes of oxidation to which the active material is exposed in the charging and discharging of the battery." It is true that the step from the structures of Eaton and Brush to the electrode of Swan seems to be very short when looking back upon the work of these men. But standing where Brush and Eaton did and looking forward to the ideal electrode which should avoid the then existing difficulties and possess the excellencies of the present Swan structure, the steps undoubtedly seemed many and long. If it had occurred to Eaton to scrape off the active material from his plate leaving the holes full, he would have hit upon the invention. But it never did. If Brush had thought of punching out the bottom of his receptacles and had then rammed them full of active material without covering the external plate he would be entitled to the credit of having made the successful structure. But he did not think of it. The experiments at that time seemed to be proceeding along different lines, the object being to keep as much material as possible upon the surface of the plate. The conviction cannot be avoided that the idea which has made these plates a commercial success was first given to the world in a practical embodiment by Mr. Swan.

Confirmation of these views is found in two recent decisions of the supreme court. In *Washburn & Moen Manuf'g Co. v. Beat'Em All Barbed-Wire Co.*, 12 Sup. Ct. Rep. 443, the court says:

"The difference between the Kelly fence and the Glidden fence is not a radical one, but slight as it may seem to be, it was apparently this which made the barbed-wire fence a practical and commercial success. The inventions of Hunt and Smith appear to be scarcely more than tentative, and never to have gone into general use. The sales of the Kelly patent never seem to have exceeded 3,000 tons per annum, while plaintiff's manufacture and sale of the Glidden device (substituting a sharp barb for a blunt one) rose rapidly from 50 tons in 1874 to 44,000 tons in 1886, while those of its licensees in 1887 reached the enormous amount of 173,000 tons. \* \* \* Under such circumstances courts have not been reluctant to sustain a patent to the man who has taken the final step which has turned a failure into a success. In the law of patents it is the last step that wins. It may be strange that, considering the important results obtained by Kelly in his patent, it did not occur to him to substitute a coiled wire in place of the diamond-shaped prong, but evidently it did not; and to the man to whom it did ought not to be denied the quality of an inventor."

In *Magowan v. Belting, etc., Co.*, 141 U. S. 332, 12 Sup. Ct. Rep. 71, it was held that the fact that the patented improvement "went at once into such an extensive public use, as almost to supersede all packings made under other methods, \* \* \* was pregnant evidence of its novelty, value and usefulness." These quotations seem peculiarly applicable to the present controversy. The principles which are there so clearly and pointedly reaffirmed require a decision sustaining the validity of the complainant's patent. As to defendant's infringement there can be no

doubt. The question arising upon the expiration of the Danish patent has not been argued. The casual examination which the court, in the absence of explanation, has been able to give to this patent leads to the conclusion that it is not for the same invention as the Swan reissue.

There should be a decree for the complainant.

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STAUFFER v. SPANGLER *et al.*<sup>1</sup>

(Circuit Court, E. D. Pennsylvania. January 29, 1892.)

1. PATENTS FOR INVENTIONS—NOVELTY—PRIOR STATE OF THE ART.

The first two claims of letters patent 345,186, for apparatus for treating unbaked bretzels, containing as elements the generator, the perforated pipe leading from near the bottom of the generator, a perforated spray-pipe, and a casing located over the carrier, all of which elements, each operating in the same way and for analogous purposes, being shown in prior patents, and no new or better results being obtained, do not cover patentable novelty.

2. SAME—EXTENT OF CLAIM—INFRINGEMENT.

The natural construction of the third claim of letters patent No. 345,186, which contained the phrase, "spraying and salting devices," and the fact that the specification described the machine as having a spraying pipe and a perforated drum, by which salt was sprinkled over the dough being treated, will cause to be included in this claim, as elements, both the drum and the spray-pipe, although an ambiguous correspondence between the patent-office and inventor, and the fact that the solution discharged by the spray-pipe was alkaline, be urged in favor of construction of claim, including only the spraying device; and defendant, not employing the salting drum, does not infringe.

Bill in equity by David F. Stauffer against Harrison Spangler, H Samuel Spangler, George H. Smith, and W. H. Soader to restrain infringement of letters patent 345,186, issued to complainant July 6, 1886, for apparatus for treating unbaked bretzels. Bill dismissed, claims 1 and 2 declared invalid, claim 3 restricted and declared not infringed.

*Jos. C. Fraley*, for complainant.

*Strawbridge & Taylor*, for respondents.

ACHESON, Circuit Judge. The bill charges the defendants with the infringement of letters patent No. 345,186, granted July 6, 1886, to the plaintiff, David F. Stauffer, for improvements in apparatus for treating unbaked bretzels and crackers and other similar articles formed of dough for baking, "so as to more conveniently give them the glazed and salted surfaces characteristic of such articles when baked." The specification states that theretofore the dough, when formed into proper shape, "has been dipped in a suitable solution, and the salt afterwards sprinkled over the same by hand, which is a slow and tedious operation, involving the loss, in addition, of considerable material, which is scattered and wasted." The declared object of the invention is "to provide an apparatus by which these operations may be conveniently and thoroughly effected with comparatively little loss of material, and in a much more thorough and ex-

<sup>1</sup> Reported by Mark Wilks Collet, Esq., of the Philadelphia bar.

peditious manner than heretofore." The apparatus shown by the illustrative drawing and described in the specification consists of a trough, above which moves an endless carrier or apron, which conveys a reticulated shaft, upon which the articles to be treated are placed; "a small boiler or vapor generator," in which there is a steam-coil for heating the solution; a pipe, with side perforations in the lower part, where it is within the generator, and extending from near the bottom of the generator through the top and up to a perforated spray-pipe above the carrier; at the other end of the trough, and above the carrier, a hollow perforated drum, mounted so as to rotate, and to be "charged with salt, to be sprinkled upon the articles;" and a pipe to conduct the superfluous liquid from the trough down to a collecting vessel or tank, which communicates with a pump, whereby the contents can be pumped into the generator. The specification thus describes the operation:

"The boiler or generator is nearly filled with the solution, and steam, being let into the coil at high pressure, raises the liquid to the boiling point. The boiling solution and its steam together pass through the perforations in the sides of the pipe, and thence to the spray-pipe, where both are discharged upon the pans of bretzels traveling beneath them at the proper rate of speed upon the belt. The effect of this spray of salt solution and steam is to 'boil' the bretzels, precisely as in the old method, where they were dipped in a boiling pot; and by the time they have passed from beneath the sprays the necessary glaze and color has been given to them. As they travel along upon the belt they drain through the open wire pan, the surplus solution falling into the trough beneath, whence it is conducted to the tank, and, while still hot, pumped back into the generator, to repeat the operation."

The claims are as follows:

"(1) The combination, with the generator, of the perforated pipe, leading from near the bottom of the generator, and connecting with a perforated spray-pipe above the carrier, whereby the alkaline solution is forced out of the generator and sprayed over the articles, substantially as specified. (2) The combination, with the generator and perforated pipe, of the spray-pipe and casing, located over the carrier, substantially as specified. (3) The combination, with the generator and the spraying and salting devices, of the collecting trough, whereby the salt solution is collected, and the tank and pump with the pipes for conveying the salt solution back to the generator, substantially as specified."

The solution commonly employed in treating bretzels and similar articles for the purposes contemplated by the patent, is an alkaline solution, composed of water and potash or lye, and is hot when used. This treatment was old at the date of Stauffer's alleged invention, the articles being dipped (as stated in his specification) in the heated solution; and the most that can be said of the plaintiff's method of applying solution is that thereby the work is more rapidly done.

Now, taking up the first and second claims of the patent in suit, we clearly perceive that the several devices or parts entering into the combinations therein set forth were all old, and that in the plaintiff's apparatus each part operates in its old way. In Etzenberger's United States patent of April 1, 1879, for an improvement in apparatus for making infusions, we find a generator having therein a steam-coil to heat the

liquid in the generator, precisely as in Stauffer's apparatus, together with a perforated pipe extending from near the bottom of the generator through its top, and thence upwardly, for the purpose of delivering the liquid to a device above, which is effected by steam pressure when steam is raised in the generator by heat from the steam-coil. Again, Mitchell's United States patent of September 8, 1874, shows a machine for steaming cakes and crackers, having an endless apron, upon which the articles are placed, and by which they are carried past the steam-ejecting nozzles, whereby a stream of moist steam is thrown upon them; the device having a steam-supply pipe, and also a water-supply pipe to moisten the steam with "aqueous spray or vapor." Then the patent of Oberle and Janggen, of July 10, 1883, discloses an apparatus for steaming jumbles, crackers, etc., before baking, consisting of a casing, within which are spray-pipes with fine perforations for emitting steam, an endless apron with a moving mechanism and means for regulating the speed; the articles to be treated being placed upon the apron, and thereby carried under the steam spray-pipes. Such being the known state of the art, the idea of subjecting bretzels to the bath of hot alkaline solution by the use of mechanical appliances analogous to those employed in steaming crackers and like articles, required for its accomplishment nothing more than the exercise of ordinary mechanical skill. It is to be borne in mind, too, that no new result was thereby secured, nor, indeed, any better result than is effected by dipping the articles in the heated solution. The conclusion that Stauffer's first and second claims do not disclose anything of patentable novelty is in line with the rulings in *Hollister v. Manufacturing Co.*, 113 U. S. 59, 5 Sup. Ct. Rep. 717; *Aron v. Railroad Co.*, 132 U. S. 84, 10 Sup. Ct. Rep. 24; *Burt v. Ivory*, 133 U. S. 349, 10 Sup. Ct. Rep. 394; and many other like adjudications.

As respects the third claim of Stauffer's patent, it is only necessary to say that, as the defendants' machine does not contain the perforated drum or any equivalent salting device, the salt being sprinkled by hand upon the articles after they leave the machine, there is no infringement of that claim. The plaintiff's counsel, indeed, has made an ingenious but unconvincing argument to show that the third claim does not include the perforated drum, or any equivalent therefor; but that the phrase "spraying and salting devices" refers altogether to the one device for spraying the alkaline solution. The basis for this argument is that the file wrapper shows that the office rejected a claim which had as elements the spray-pipe and the perforated drum as a mere aggregation. But this argument loses any force it might otherwise have when we come to note that the collecting trough, by which these two devices were connected, was omitted from the rejected claim. The construction upon which the plaintiff here insists is a forced one, contrary to the specification throughout, and against the words and plain meaning of the claim. The sprinkling of salt over the bretzels by a distinct operation, after they have been treated with the alkaline solution, is a prominent feature of the invention; and the mechanical device for so salting the articles is fully explained in the specification, and shown by the drawings. By the described operation the

articles are first brought "under the spraying device," and, after being sprayed by the solution, are then brought "under the perforated drum," to be salted. To hold, then, that the words "spraying and salting devices" mean the "spraying device" alone, to the exclusion of the salting device, would be to violate every recognized canon of construction applicable to the subject. The foregoing views being decisive of the case, I do not deem it necessary to consider other matters of defense which counsel have discussed. Let a decree be drawn dismissing the bill, with costs.

### ACTIEBOLAGET SEPARATOR *et al.* *v.* SHARPLESS.<sup>1</sup>

(Circuit Court, E. D. Pennsylvania. December 30, 1891.)

#### 1. PATENTS FOR INVENTIONS—EXTENT OF CLAIMS.

Claim 1 of letters patent No. 298,314, containing as elements a rotary vessel, an upwardly projecting neck open at the top, and having a discharge orifice or notch at its upper edge, must be restricted to a creamer having this notch cut through the side of the neck at a level below its upper horizontal edge, since all the other elements of the claim are old, and creamers had been constructed with holes pierced in the neck for discharge openings, and with open tops, over the walls of which the cream could be discharged.

#### 2. SAME—INFRINGEMENT.

Claim 1 of letters patent No. 298,314, being restricted to a construction making a notch cut in the top of the open-topped neck of the creamer, and extending down through the wall of this neck, an essential element, is not infringed by a creamer having an open-topped neck, with a curved depression on the inner face of the rim which projects inwardly from the walls of the neck, said depression not extending downwards into the wall of the neck.

Bill in equity by the Actiebolaget Separator and the De Laval Separator Company against Phillip M. Sharpless to enjoin the infringement of letters patent No. 298,314, for improvement in centrifugal creamers. Bill dismissed.

*Jos. C. Fraley*, for complainants.

*Geo. J. Harding* and *Geo. Harding*, for respondent.

ACHESON, Circuit Judge. The bill of complaint charges the defendant with the infringement of letters patent No. 298,314, granted February 12, 1884, to Gustav De Laval, for an improvement in centrifugal creamers. The invention relates to a class of machines previously well known and in use for the separation of compound fluids, and more particularly used for creaming milk, and delivering the cream and the skim-milk separately, by the agency of centrifugal force. The ordinary creaming machine consists of a revolving globular metallic vessel, into which the new milk is fed, mounted upon a vertical shaft, and rotated by suitable mechanism with great rapidity, and with such effect that a separation of the cream from the skim-milk takes place, the latter by reason of its greater specific gravity being thrown outwardly against the

<sup>1</sup>Reported by Mark Wilks Collet, Esq., of the Philadelphia bar.

walls of the vessel, and assuming an upright hollow cylindrical form, while the cream is collected in the center of rotation standing upright in a zone or belt, so that the two can be discharged at different levels into separate annular receiving-pans suitably arranged and supported on a fixed casing. Several prior patents illustrative of the state of the art are in evidence. The earliest of these is an English patent to De Laval, dated November 4, 1878, which discloses an apparatus having all the features above mentioned, and in which the cream is discharged by overflowing the top edge of the open neck of the cylindrical rotating chamber. The next is an English patent to Alexander dated December 24, 1879, showing a machine having the same general characteristics, the cream being forced over the outwardly curved lip formed around the edge of the open mouth of the centrifugal drum. The United States patent No. 249,731, dated November 15, 1881, to De Laval, discloses an apparatus of the like general character, but in which the cream is delivered into its annular receiver through a hole pierced through the wall of the neck of the revolving chamber. The United States patent No. 281,916, dated July 24, 1883, to Neilson, shows a centrifugal creamer of the same general type, and in which the cream is discharged through a discharge port or hole formed in the wall of the upwardly projecting tubular extension or neck of the centrifugal vessel.

The declared object, as expressed in the patent, of the invention involved in the present suit, is "to prevent the clogging by impurities of the orifice through which the cream is delivered from the rotating vessel;" and it consists in a discharge orifice or notch in the upper edge of the upwardly projecting open throat of the rotary vessel. The specification states:

"In the upper edge of the throat, *c'*, is formed a delivery notch or orifice, *j*, for cream which passes thence into the vessel or receiver, *D'*, from whence it is delivered by a spout, *k*. It is advantageous to have the delivery orifice for cream thus formed, because, if any impurities approach it, they will rise and be thrown over the upper edge of the throat, *c'*, hence the orifice will not be liable to be clogged, as is the case where the orifice is formed by a fine hole or boring in the usual way."

The patent drawing shows the upper edge of the throat as having an inwardly projecting and overhanging rim, which somewhat contracts the top of the mouth, and the delivery notch or orifice, *j*, as a horizontal cut or slot of an even depth, (somewhat less than the thickness of the overhanging rim,) and with rectangular sides, extending across the top edge of the throat, and passing, not only through the rim, but also entirely through the upright wall of the neck. Referring to the delivery notch or orifice, *j*, the plaintiff's expert testifies:

"And the peculiarity of this upper discharge orifice is that, instead of consisting of a hole made through the wall, it is open at its upper side, so that any solid impurities which may be carried with the cream to the inner entrance or mouth of this discharge orifice will be shoved upwards by the movement of the cream, and will pass over the top of the vessel without clogging the orifice."

The distinguishing feature, then, between the old discharge orifice, by a hole through the neck of the rotating vessel, and the orifice, *j*, of the patent, is that the latter is open lengthwise at the top; but, like the old construction, orifice, *j*, is a channel formed in and through the wall, affording a lateral escape for the cream below the horizontal edge of the mouth of the vessel.

In further explanation of how the open-top notch obviates the obstruction by solid matter at the mouth of the discharge orifice, the same expert states:

"The flow of cream would carry the matter to the mouth of the notch, and would shove it upwards; and, as the matters accumulated from beneath, those first arriving at the notch would be forced upward by the accumulation beneath them until these would pass over the rim of the cream notch, the cream continuing to pass through the notch as before."

The patent contains the following disclaimer:

"I am aware that it is not new to construct a rotary vessel for a fluid separator, with an upwardly projecting throat, open at the top, and having in its side and below its upper edge a hole for the delivery of a fluid. In this vessel there is no discharge orifice consisting of a notch in the upper edge of the throat, and I do not claim such a vessel as included in my invention."

The first claim of the patent, which is the one alleged to be infringed by the defendant, is as follows:

"(1) A rotary vessel, C, for a fluid separator, provided with an upwardly projecting throat, C', open at the top, and having a discharge orifice or notch, *j*, in its upper edge, substantially as and for the purpose described."

From the foregoing recitals these deductions are clearly to be made: *First*, the invention relates exclusively to the "discharge orifice or notch, *j*," everything else in the plaintiffs' apparatus with which we have here to do being old; *second*, the purpose of the invention is to prevent clogging, an evil incident to a separator provided with a fine side hole or boring for the escape of the cream; *third*, the patent in suit contemplates and provides for the discharge of the cream through the side of the neck of the rotating vessel at a level below its upper horizontal edge.

Now, turning to the defendant's separator, we find that his cream discharge consists of a curved depression, or cut of half-moon shape, made in the inner face of the inwardly overhanging rim of the mouth of the rotary vessel, and leads upwardly, avoiding the upright wall of the neck; so that the cream is thrown outward above and over the level edge of the neck. In a word, the defendant's machine is a top-discharge separator, differing from those described in the English patents referred to, in that the cream discharge is confined to one particular point, namely, that part of the circumference of the mouth of the centrifugal vessel which is enlarged by the vertical cut or concavity, and is thus removed further from the center of rotation than the rest of the periphery of the mouth. The discharge of cream is thus concentrated because the concaved part is subjected to greater centrifugal force than the other portion of the top orifice or mouth of the vessel. Manifestly the top cream discharge was never subject to the clogging for which the patent in suit

was intended to furnish a remedy. The invention in question was for a side-discharge separator, and undoubtedly it was an improvement to such centrifugal creamers, although the evidence shows that it did not entirely remove the difficulty, as the cream slot or notch, *j*, sometimes becomes stopped by extraneous matter. But this can never happen in defendant's separator.

As to who is entitled to the credit of originally devising the vertical cut or depression in the mouth of the rotary vessel for the top discharge of the cream we need not here inquire. It is sufficient to say that, in view of the prior state of the art, the obvious and declared purpose of the invention embodied in the first claim of the patent in suit, and the terms of the specification and claim, it is totally inadmissible so to construe that claim as to make it cover the top cream discharge orifice of the defendant's machine. Let a decree be drawn dismissing the bill, with costs.

### JOHNSON CO. v. TIDEWATER STEEL-WORKS.<sup>1</sup>

(Circuit Court, E. D. Pennsylvania. March 1, 1892.)

#### 1. PATENTS FOR INVENTIONS—ROLLING RAILS—INVENTION.

Claim 1 of patent No. 360,086, for method of rolling side-bearing girder rails, consisting in rolling down the metal forming the side tram in rolls provided with passes, in one or more of which that portion of metal forming the offset or head of the rail is subjected to elongating action, and that portion only forming its side tram is subjected to displacing or dummy action, does not involve patentable invention, since it was old to roll girder rails with a dummy action on both the head side and the tram side, and it was old in other forms of rails to turn the whole lateral flow of metal to the tram side, and the changes necessary to accomplish this result in the rolls used for rolling girder rails were obvious to a skilled mechanic.

#### 2. SAME—LIMITATIONS OF CLAIM.

Claim 1 of patent No. 360,086, if valid, is limited to a process in which all the rolls described in the specification are employed, and in the specific form shown and described, and is not infringed by a process of rolling in which the rolling of the rails prior to their insertion into the dummy pass is performed by rolls of a substantially different construction.

In Equity. Suit by the Johnson Company to enjoin the Tidewater Steel-Works from infringing letters patent No. 360,086, for method of and rolls for rolling side-bearing girder rails, granted to Arthur J. Moxham, March 29, 1887. Bill dismissed.

*George J. Harding and George Harding*, for complainant.

*William A. Redding*, for respondent.

ACHESON, Circuit Judge. The bill charges the defendant with the infringement of letters patent No. 360,086, dated March 29, 1887, for a "method of and rolls for rolling side-bearing girder rails," granted to Arthur J. Moxham, and by him assigned to the plaintiff. This form of rails is used principally for street railways, and consists of an offset, upon which the wheel of the car runs; a side tram, at a lower level, and

<sup>1</sup>Reported by Mark Wilks Collet, Esq., of the Philadelphia bar.



to the opposite side, upon which the wheels of ordinary vehicles may travel; a verticle or girder web and base flanges on the opposite sides of the foot of the web. The object of the invention, as described in the specification, "is to reduce to a minimum the number of the dummy passes required in rolling the side-tram girder rail, and also, if desired, to dispense with the use of tongues in said passes." The specification defines "dummy passes" as those in which a special part of the entering mass of hot metal is subjected to a widening action, or transverse flow across the rolls, instead of being rolled out in the direction of the rolls' rotation, while the rest of the billet is subjected to that amount of elongation only which will prevent distortion during the passage of the mass.

The "tongues" referred to as used in such passes are protrusions on the grooves of the rolls, which press upon the central mass, and, as the specification states, form "a line of neutral flow of metal," and "thus tend to prevent the distortion that would otherwise occur from the difference in flow of metal on either side of said tongues." The patent drawings illustrative of the invention show three sets of rolls, having altogether twelve passes, numbered from 1 to 12, each pass having a special configuration. The described rolling is effected by entering the hot bloom first into pass No. 1, and, after passing it there-through, then passing the hot billet through each of the other passes in regular order. By the successive actions of the first five passes the billet is brought approximately to the general shape in cross-section of a side-bearing girder rail, the part intended for the side tram having been rolled down so as to project outwardly a greater distance than the part underneath, intended for the base flange; and, as the billet emerges from pass No. 5, it is adapted in conformation to enter and be effectively acted upon in pass No. 6, which is the only dummy pass shown by the patent drawings. The succeeding passes are all edging passes, the last, or No. 12, having the shape of the finished rail in cross-section. In pointing out "the essential difference in the treatment of the metal by the patented rolls from that before practiced," the specification states that it had been customary "to quickly work down in the rolls that portion of the metal which subsequently forms the side tram of the rail, and to produce this effect by providing tongues in the dummy passes;" but that "in the rolls forming the subject of this invention" the working down of the part intended for the side tram "is more gradually effected," and the necessity for the tongues is obviated, although their presence is optional. The specification further states that "in using a dummy pass, divided by a tongue as above mentioned," the requisite width of "head of rail"—that is, from the outside of the offset part, or head proper, to the outside of the tram—was obtained by dummy action on both sides,—the head proper and the side tram; but by that operation there was not a sufficient lateral displacement or widening on the tram side to properly fill out the tram to the required width. The specification then proceeds:

"Now, in order to obviate this defect, the whole lateral action of the dummy pass No. 6, used in this invention, so far as displacement of metal is con-

cerned, is thrown upon one side of said pass,—the tram side; and the full width of the tram proper and the tram are thus secured without sacrificing any of the necessary thickness of the tram, a greater body of the metal being thus acted on to accomplish the desired purpose than in the other case."

It is added that, so efficient is "this one-sided action dummy pass," that girder rails may be rolled with a less number of such passes than by any other plan of rolling, so that in some cases, "as shown in the drawings at pass No. 6," but one of such dummy passes is necessary, though in some cases, depending upon the proportion and shape of the rail, it may be advantageous to increase the number of such dummy passes. The defendant is charged with infringing the first claim of the patent, which is as follows:

"(1) The method hereinbefore described of rolling side-bearing girder rails, consisting in rolling down the metal forming the side tram in rolls provided with passes, in one or more of which that portion of the metal forming the offset part or head of the rail is subjected to elongating action, and that portion forming its side tram is subjected to displacing or dummy action only, whereby requisite elongation of metal is obtained without pinching the end of said tram, or excessively reducing it in thickness, substantially as described, and for the purpose set forth."

The experts on both sides agree that in the described operation there must of necessity be some elongation of the tram portion, and, as this is undoubtedly the case, the claim should be read with the word "only" transposed thus: "And only that portion forming its side tram is subjected to displacing or dummy action." As I understand the matter, all concur in this reading.

The second and only other claim is for rolls whose passes have the respective configurations described; but, as it is not alleged that the defendant infringes that claim, it need not be quoted at length.

The defendant manufactures side-bearing girder rails, and in so doing employs rolls having 13 passes. The first eight of them differ from the plaintiff's first five preparatory passes both in configurations and result. The defendant's pass No. 8 is an oblique dummy pass, and its dummy action upon the hot billet taken from No. 7 is upon the offset part, or head proper, and upon the diagonally opposite base flange, simultaneously. Then the billet of pass 8 enters pass Nos. 9, which is also an oblique dummy pass, and it acts simultaneously upon the side tram and upon the diagonally opposite base flange,—that is, the flange beneath the offset part. The succeeding passes are edging passes. The only dummy passes employed by the defendant are Nos. 8 and 9, and each of them is essential to the defendant's method. Now, it is clear that the defendant does not violate the first claim of the patent in suit unless it is by the employment of dummy pass No. 9, in which the dummy action, as respects the head part, is concentrated upon the tram side, while the offset side is confined by the rolls, and subjected to elongation only. This pass, as already noticed, is arranged obliquely to the axis of the rolls, while the plaintiff's dummy pass No. 6 is at right angles to the rolls; and a further difference between these two passes is that in the plaintiff's there is no dummy action upon the base flange. As the use

by the defendant of pass No. 9, in its method of rolling side-bearing girder rails, any encroachment upon the exclusive rights of the plaintiff? To intelligently answer this question we must first look into the prior state of the art of rolling rails for railways. It is quite evident, upon the face of the specification itself, that the invention which is the subject of the patent in suit was at the most a mere improvement in the art. But when we come to consider the proofs in the case it becomes still clearer that the invention was not one of any primary character. The rolls long in prior use for making the well-known "T" rail,—which has a head central on a vertical web and a double-flanged base,—besides the preparatory roughing passes, were provided with both dummy passes and edging passes; and in one of the dummy passes the base flanges (both at the same time, it is true) were spread out or widened laterally, while simultaneously the head and web were subjected to vertical compression and were thus elongated. Moreover, during this operation the web was unrestrained laterally. Again, many years before the date of the invention in question, flat, side-bearing street rails were made by rolling down the hot billet in rolls having flat passes, in which the offset part or head of the rail was confined vertically and elongated, while simultaneously therewith the side tram was widened. But, still further, the double-flanged side-bearing girder rails shown in the plaintiff's patent were old, and had been successfully and perfectly made in rolls, furnished with suitable passes. Such a side-bearing girder rail is disclosed in letters patent No. 272,154, dated February 20, 1883, granted to T. L. Johnson, and by him assigned to the plaintiff; the expressed object of the invention there patented being to improve the form of that class of street-railroad rails theretofore used, and which combined the principal features of the tram rail and those of the "T" rail.

From the numerous prior patents in evidence it appears that rails of the most irregular shapes in cross-section had been rolled through passes of peculiar and diverse configurations. It was old to arrange in series for such purposes preparatory and finishing rolls, provided with roughing, dummy, and edging passes. In rolling the rails it was common to apply dummy action to secure the lateral spreading, wherever it was desired to widen out a special portion of the mass of hot metal, while other parts of the billet were simultaneously subjected to elongating action. Moxham's patent, No. 312,213, dated February 10, 1885, shows a method of rolling flangeless, side-bearing girder rails, consisting in first rolling the billet through the preparatory passes to bring it to the proper sectional shape, and then through dummy passes wherein the offset or head part is confined against lateral spreading, and is subjected to elongation under vertical pressure, while at the same time the side tram is widened out by dummy action, which is concentrated wholly on the tram side, and then the billet is put through finishing passes. Moxham's patent No. 330,998, dated November 24, 1885, for rolls for rolling a hot metal bloom into a trilobe form, suitable for subsequent rolling into any of the ordinary forms of side-bearing girder rails, shows a three-sided action dummy pass, whereby simul-

taneously dummy action is applied to the offset or head part, the tram-side part, and the central web part of the billet. The Moxham and Trauter patent, No. 292,759, dated January 29, 1884, described and shows rolls for rolling double-flanged side-bearing roll girder rails having dummy passes provided with tongues and edging passes; and in each of these dummy passes the dummy action is simultaneously upon both that portion of the billet which goes to form the offset part or head proper and that portion which goes to form the side tram, the metal spreading laterally in opposite directions, while the rest of the billet is subjected to elongation. It is to be noted that during the two-sided dummy action of the Moxham and Trauter rolls the web portion of the billet is unconfined and unrestrained laterally, which, as we have seen, is also the case in the manufacture of the "T" rail. This feature, which is common to the plaintiff's pass No. 6 and to the defendant's pass No. 9, is not referred to at all in the specification of the patent in suit, but, if it is a matter of any importance in securing the result, certainly it is not new.

Enough has been said to show that at the date when Moxham devised his dummy pass No. 6 the domain of invention with respect to rolls for making side-bearing girder rails had become very contracted. Now, what did Moxham really here do? Comparing the dummy passes of the prior Moxham and Trauter rolls with pass No. 6 of the patent in suit, we find that he simply extended the collar of the lower roll upwardly, so as to bear against the outer end of the offset head of the billet, and thus turned the whole lateral flow of the metal to the other or tram side. Did the conversion of the two-sided dummy action pass into a one-sided dummy action pass constitute invention? The idea of concentrating the entire dummy action upon the tram-side portion of the billet was old, and had been practiced in the manufacture of flat, side-bearing street rails; and it was also shown in Moxham's earlier patent for rolling flangeless, side-bearing girder rails. Was it, then, anything more than the exercise of ordinary mechanical skill and good judgment to carry up the collar of the under roll to prevent the lateral flow of metal at the offset side, and confine the transverse flow to the tram side, where the metal was needed to fill out the tram? Looking at what had been accomplished in the art of rolling railroad rails of all forms, and having regard to the views and decisions of the supreme court upon the subject of what amounts to patentable invention, as announced in *Atlantic Works v. Brady*, 107 U. S. 192, 2 Sup. Ct. Rep. 225; *Holister v. Manufacturing Co.*, 113 U. S. 59, 5 Sup. Ct. Rep. 717; *Thompson v. Boisselier*, 114 U. S. 12, 5 Sup. Ct. Rep. 1042; *Aron v. Railway Co.*, 132 U. S. 84, 10 Sup. Ct. Rep. 24; *Burt v. Evory*, 133 U. S. 349, 10 Sup. Ct. Rep. 394; *Trimmer Co. v. Stevens*, 137 U. S. 423, 11 Sup. Ct. Rep. 150; and other cases,—I cannot avoid the conclusion that the change in the construction of the rolls, whereby the dummy action was confined to one side of the pass No. 6, and thus was concentrated upon the tram, did not call into exercise the inventive faculty in the true sense.

But, were a different conclusion allowable, what construction should

be given to the first claim of the patent? Undoubtedly it is for the particular method of rolling side-bearing girder rails, disclosed in the specification and accompanying drawings. "The method hereinbefore described" are the opening words of the claim; "substantially as and for the purpose set forth," the closing words. Now, the use of pass No. 6 is but one of the steps in the described method. There are other co-acting rolls necessary to the specified operation. Mr. Hunter, the plaintiff's expert, correctly apprehends the alleged invention as consisting "in subjecting the billet to successive rolling actions in a number of passes," in one of which it is subjected to peculiar dummy action; and he truly says:

"The billet, prior to being subjected to the peculiar action in the pass wherein the dummy action is concentrated upon the tram or side bearing, must be brought to a cross-section which adapts it to enter the said pass, and be capable of permitting the intermediate steps in the process being carried into effect."

That the described preparatory steps are matter of substance seems very clear when we consider, in connection with the words of the claim, that part of the specification in which the patented method is contrasted with the prior method:

"It has heretofore been customary to quickly work down in the rolls that portion of the metal which subsequently forms the side tram of the rail, and, to produce this effect, by providing tongues in the dummy passes. \* \* \* In the rolls forming the subject of this invention the working down of the side tram of the rail is more gradually effected, and any necessity for the presence of said tongues is obviated, though their presence is optional."

This language enables us to perceive the force of the opening words of the claim:

"The method hereinbefore described of rolling side-bearing girder rails, consisting in rolling down the metal forming the side tram in rolls provided with passes, in one or more of which," etc.

True, in the words immediately following, great prominence is given to the pass or passes in which the dummy action takes place, but still the preparatory passes described and shown for rolling down the part of the metal intended for the side tram are an essential part of the method as claimed. But, furthermore, in view of the gradual advances towards perfection in the art of rolling side-bearing girder rails, and the state of the art at the date of the invention here in question, the scope of the claim must, on well-settled principles, be limited to the specific forms of construction shown and described by the patentee. *Railway Co. v. Sayles*, 97 U. S. 554; *Duff v. Pump Co.*, 107 U. S. 636-639, 2 Sup. Ct. Rep. 487; *Castor Co. v. Spiegel*, 133 U. S. 360, 10 Sup. Ct. Rep. 409. The defendant's method of rolling is not a mere colorable departure from that of the plaintiff's. The differences between their rolls are substantial. I am, then, of the opinion that infringement is not shown.

It may be added that the conclusions I have here reached, both upon the question of patentability and the question of construction of the claim,

are in harmony with the views expressed by Judge HAWLEY in the case of *Johnson Co. v. Pacific Rolling-Mills Co.*, 47 Fed. Rep. 586, which was a suit upon the Johnson patent for improvements in street-railroad rails, above referred to in connection with the discussion of the prior art. Let a decree be drawn dismissing the bill with costs.

### DEDERICK v. GARDNER *et al.*

(Circuit Court, N. D. New York. April 19, 1892.)

#### 1. PATENTS FOR INVENTIONS—INVENTIONS—BALING PRESSES.

Letters patent No. 145,029 and No. 341,559, issued to Peter K. Dederick November 12, 1889, and May 11, 1886, respectively, the latter being upon a divisional application for an improvement in horizontal "continuous" baling presses, cover, as the gist of the invention, a device consisting of a loose connection, as a chain or rope, between the toggle and the horse lever, so that the toggle is pulled back and forth across the center line by the vibration of the horse lever. *Held* that, in view of the fact that the press has gone into extensive use, the device must be considered to have patentable invention, over the somewhat analogous device shown in patent No. 261,323, issued July 18, 1882, to George Ertel, and which is adapted to an upright press.

#### 2. SAME—INVENTION—INFRINGEMENT.

Letters patent No. 232,400, issued to Peter K. Dederick, as assignee of Albert A. Gehrt, are for a method in a baling press, resisting the backward movement of the traverser caused by the expansion of the hay, consisting of the application of friction, so as to stop the motion gradually. Claim 3 covers the combination, with the traverser having the rearward extension, of the lining or planking, and the set screw for adjusting the same, substantially as described. *Held* that, if this involved any patentable invention, it is limited to the specific device, and is not infringed by the device covered by patent No. 349,934, issued September 28, 1886, to George Ertel.

In Equity. Suit by Peter K. Dederick against Henry Gardner and others for infringement of a patent. Decree for complainant.

*Church & Church*, for complainant.

*George H. Knight*, for defendants.

COXE, District Judge. This is a suit for the infringement of three patents, Nos. 415,029, 341,559, and 232,400, granted to the complainant November 12, 1889, May 11, 1886, and September 21, 1880, respectively, for improvements in baling presses. The latter patent, No. 232,400, was granted to complainant as assignee of Albert A. Gehrt. The application for the first two patents was filed October 31, 1882. This application was divided and a new one filed December 18, 1885, on which No. 341,559 was granted. The invention of No. 415,029 relates to improvements in the manner of connecting the horse lever to the toggle in the power applying devices of "continuous" baling presses. Letters patent No. 257,153 granted to complainant May 2, 1882, show mechanism by which the toggle is pushed from one side of the center line to the other, the back expansion of the hay operating to return the traverser and project the joint of the toggle alternately out at opposite sides of the press as the horse lever is worked from side to side. This

is known as a push-power device. The patent in hand describes a pull-power device. The substitution of a pull-power mechanism for the push-power of the older patent is the essential feature of the invention. Instead of pushing the toggle over the central line by direct contact with the head of the horse lever, it is pulled over by the horse lever through the intervention of a loose rope or chain connection.

After describing the various figures of the drawing and the operation of the machine the patentee says:

"These modifications in the form and location of the horse lever and cam may be multiplied indefinitely so long as the central idea is preserved of having the lever or the cam thereon connected to the toggle by a loose connection—such as a rope, chain, or the like—so that the vibration of the horse lever will draw the toggle back and forth across the center, as stated."

The claims involved are as follows:

"(2) In a baling press, the combination, with a double-acting toggle and a double-acting reversible horse lever, of a double-acting reversible connecting member secured at one end to said toggle and at the other end to the horse lever; whereby the said toggle and the said connecting member will be drawn bodily across the center alternately from opposite sides of the press when the horse lever is vibrated, substantially as and for the purpose set forth."

"(4) In a baling press, the combination with the traverser, of the arms, E, the double-acting pitman extending beyond the point of connection with the arms, E, the double-acting horse lever, also extended beyond its pivot, and the loose connection—such as a chain—for connecting the extended end of said pitman and horse lever, substantially as described."

"(7) In a baling press, the combination, with a double-acting toggle moving in a horizontal plane, of a reversible horse lever or sweep operating in a plane substantially parallel with the plane in which the toggle operates, and having a rounded or drum-shaped end, and a flexible connection attached at one end to the toggle and at the other end to the rounded or drum-shaped end of the horse lever or sweep, as set forth."

The invention covered by the single claim of No. 341,559 was originally part of No. 415,029. As the granting of the latter patent was delayed by an interference commenced by the defendant George Ertel, the complainant filed a divisional application designed to cover an arrangement of the power mechanism, not involved in the interference proceedings. The distinguishing feature of the invention is that the horse lever is mounted upon a pivot separate from the pivot on which the arms of the toggle are mounted. Instead of having the horse lever and fulcrum arms on the same pivot, each has a pivot of its own. The claim sufficiently describes the invention. It is as follows:

"In a baling press, the combination, with a traverser and a double-acting toggle, of a horse lever mounted upon a pivot separate from the pivot of the outer arm of the toggle, and a loose connection between the horse lever and toggle, whereby upon the vibration of the horse lever the toggle will be pulled back and forth across the center, substantially as described."

The defense to these patents is that they are void for lack of patentable novelty. Infringement is not seriously disputed.

The patent No. 261,323, granted to George Ertel, July 18, 1882, is v.50F.no.1—7

chiefly relied upon by the defendants. The press described in this patent is upright, the traverser moving vertically instead of horizontally. A detailed description of this press is unnecessary. Suffice it to say that while the principle on which it operates is somewhat analogous to that of the complainant's structure, the mechanism is wholly unsuited to operate in a horizontal press. Instead of being a simple and durable machine, it is the reverse of this. If the power device described could be made to operate in a horizontal press at all it would be a most cumbersome structure, requiring, in place of the compact frame of complainant's press, which is 2½ feet wide, the substitution of a frame between 12 and 15 feet wide. The difference between the two presses is the difference between partial and complete success. As the Ertel press of 1882 is the nearest approach to the combinations of the claims in question, it is not necessary to examine other references.

It is thought that complainant is entitled to the credit of having made the first operative pull-power machine for horizontal presses, and that the production of such a machine required the exercise of the inventive faculty. As was said by Mr. Justice Brown in *Electric Co. v. La Rue*, 139 U. S. 601, 11 Sup. Ct. Rep. 670:

"While the invention does not seem to be one of great importance, we think the adaptation of this somewhat unfamiliar spring to this new use, and its consequent simplification of mechanism, justly entitles the patentee to the rights of an inventor."

The fact that this press has gone into extensive use and has been adopted by the defendants, to the exclusion of devices patented by Mr. Ertel, is entitled to great weight. *Magowan v. Packing Co.*, 141 U. S. 332, 12 Sup. Ct. Rep. 71; *Washburn & Moen Manuf'g Co. v. Beat 'Em All Barbed-Wire Co.*, 58 O. G. 1555, 12 Sup. Ct. Rep. 443. The claims quoted above seem to be aptly expressed to cover the inventions, and that they are infringed there can be no doubt.

In letters patent No. 232,400 it was the design of Gehrt to provide means for resisting the retraction of the traverser produced by the expansion of the hay, for the purpose of preventing shock. This is done by applying more or less friction to the traverser during its backward movement, thus stopping its motion gradually. The specification says:

"Various instrumentalities may be employed in carrying out this idea; but I prefer to adjust the lining or planking, E, by means of an adjusting screw or screws, S, so as to cause it to bear upon the top of the upper rear extension of the traverser, as shown in Fig. 1. By operating the screw the lining or planking can be made to bear more or less tightly, as will be readily understood. The lining or planking may be made permanently contracted, if desired, and the same result be produced."

The third claim only is involved. The second claim, which is much broader, has been declared invalid by this court. *Dederick v. Siegmund*, 42 Fed. Rep. 842. The third claim is as follows:

"(3) The combination, with the traverser having the rearward extension, of the lining or planking and the set-screw for adjusting the same, substantially as described, for the purpose specified."



The defenses are non-infringement, anticipation, and lack of patentable novelty.

The defendants' apparatus for checking the backward movement of the traverser consists of a clamp lever pivoted in its middle on the point of a screw. It is a double self-acting clamp. When the incline on the rear of the traverser strikes the incline on the rear of the lever the forward end of the lever is forced down upon the top of the traverser and arrests its backward motion. Whether the traverser comes back with a heavy or a light rebound is immaterial, for when it has reached the point where it is desirable to stop it the clamp catches it instantaneously and holds it firm. This device effectually prevents further backward motion, but offers no resistance to the next forward movement of the traverser. In this respect it is superior to the complainant's device, which does not adjust itself to the varying rebounds of the traverser, which sometimes returns with great force and at other times with comparatively little force. If, for instance, the lining is set to arrest a fast return and the back expansion is light the front end of the traverser will not clear the feed opening, thus causing inconvenience and delay. The defendants' screw does not perform the same function as the set-screw of the patent. The latter is used to force down the lining or planking and hold it in position to resist the backward throw of the traverser. The former is the pivot on which the lever operates, but it does not regulate the amount of the clamping force. The defendant Ertel obtained a patent, No. 349,934, on the 28th of September, 1886, for the apparatus used by the defendants. Whether the defendants infringe or not depends upon the construction of the claim. If a broad construction is justifiable, one which gives complainant the benefit of the doctrine of equivalents, infringement may be found, otherwise not.

In the first place, it may well be doubted whether the subject-matter of the Gehrt patent can in any view be regarded as belonging to the realm of invention. The problem he had to solve was an exceedingly simple one. The traverser bounded back too far. It did not require even a skilled mechanic to appreciate this defect. The remedy might not have occurred to the farmer who used the press, but had he called to his assistance the village carpenter, and asked him how to stop the traverser, it is, at least, possible that he might have replied—unconscious that his answer was giving him a place by the side of Bell, Brush and Edison—"Put on a brake."

It is, and for years has been, a matter of common knowledge in many similar arts that friction should be applied when the object is to stop or retard a moving body. The record discloses many instances where it has been used to accomplish results very similar in principle to that accomplished by Gehrt's device. For instance, if the word "traverser" were substituted for "shuttle" in the following quotation from the Haskins patent of 1868, it would describe the Gehrt mechanism in all essential particulars:

"To check this momentum gradually and arrest the motion of the shuttle at the proper point to receive the return blow of the picker shaft, a shuttle-

binder is generally placed upon or in the side of each shuttle-box, the operation of which binder is gradually to narrow the width of the passage in which the shuttle is moving and produce more or less friction upon the shuttle until it is brought to a stand-still. As the speed of looms is liable to be changed at times so that the rate of motion of the shuttle and its momentum will be greater at one time than another, it is desirable to vary the amount of friction or pressure exerted by the binder upon the shuttle, so that the shuttle, whatever its rate of speed, may always be stopped at the same point."

It is thought that this case belongs to that class of inventions where the doctrine of equivalents cannot be invoked to suppress improvements. Where change of form or combination only is involved, each inventor must be content with the mechanism claimed by him. *McCormick v. Talcott*, 20 How. 402; *Burr v. Duryee*, 1 Wall. 531; *Railway Co. v. Sayles*, 97 U. S. 564; *Bragg v. Fitch*, 121 U. S. 478, 7 Sup. Ct. Rep. 978. The traverser, moving in the press-box, was forced back too far, and Gehrt made the box smaller at the desired point, and stopped it. It is by no means clear that this involved invention. *McClain v. Ortmyer*, 141 U. S. 419, 12 Sup. Ct. Rep. 76; *Cluett v. Clafin*, 140 U. S. 180, 11 Sup. Ct. Rep. 725; *Clothing Co. v. Glover*, 141 U. S. 560, 12 Sup. Ct. Rep. 79; *Blake v. San Francisco*, 113 U. S. 682, 5 Sup. Ct. Rep. 692; *Pope Manuf'g Co. v. Gormully, etc., Manuf'g Co.*, 12 Sup. Ct. Rep. 637, 641-643.

But if the third claim can be sustained at all, it must be within narrow limits and confined to the precise mechanism claimed. As Gehrt could not claim all means of arresting the traverser by friction, and must be strictly confined to the method described, which consists in adjusting by a set screw the planking of the press-box to pinch and hold the traverser, and as the defendants do not use this mechanism, they cannot be held as infringers.

The complainant is entitled to a decree upon claims 2, 4 and 7 of No. 415,029, and the single claim of No. 341,559, but without costs.

### ASHTON VALVE CO. v. COALE MUFFLER & SAFETY-VALVE CO.

(Circuit Court, D. Maryland. February 19, 1892.)

#### 1. PATENTS FOR INVENTIONS—INVENTION—PRIOR ART—SAFETY-VALVES.

Letters patent No. 200,119, issued February 12, 1878, to Ashton, for an improvement in safety-valves, in so far as they cover, in claim 1, merely a combination of an under-discharge pop-valve, an inner casing, and an outer casing with a suitable outlet, are void for want of invention, in view of the patents to Ashfield, (No. 97,472, Dec. 7, 1869,) to Prescott, (No. 121,659, Dec. 5, 1871,) to Guelis, (No. 195,003, Sept. 11, 1877,) and English patent No. 891, of August 28, 1872, to Gilles.

#### 2. SAME—EXTENT OF CLAIM—COMBINATION.

In his specifications Ashton states that, in order to prevent back pressure, he provides the chamber inclosing the spring of his pop-valve with special vent-holes for the steam which finds its way into it, but these vent-holes are not mentioned in any claim, and the claims cover only a combination of his peculiar valve with a spring chamber, and an outer casing, "arranged to operate as described." Held, that the vent-holes, if covered at all, are claimed only in combination with the peculiar pop-valve, and there is no infringement in using them with a different form of pop-valve.

3. SAME—ANTICIPATION.

Letters patent No. 299,503, issued June 3, 1884, to Ashton, for a combination of a muffling chamber surrounding a safety-valve, with a pipe communicating from the spring chamber to the outside air, was anticipated by patent No. 297,066, granted April 15, 1884, to Coale.

4. SAME—SENIOR AND JUNIOR PATENTS—PRESUMPTIONS.

Where two patents cover practically the same invention, the presumption is in favor of the senior patent, and it requires a clear preponderance of the evidence to show that the junior patentee was in fact the first inventor.

In Equity. Suit by the Ashton Valve Company against the Coale Muffler & Safety-Valve Company for infringement of a patent. Bill dismissed.

*James E. Maynardier*, for complainant.

*O'Brien & O'Brien, Hector T. Fenton, and Robert J. Fisher*, for defendant.

Before BOND, Circuit Judge, and MORRIS, District Judge.

PER CURIAM. The complainant asks for an injunction and account, based upon letters patent No. 200,119, dated February 12, 1878, for an improvement in safety-valves, and letters patent No. 299,503, dated June 3, 1884, for a muffler for safety-valves. The defendant is the manufacturer of a safety-valve and muffler which is alleged to be an infringement. Complainant's patent, No. 200,119, is for an under-discharge pop-valve surrounded by a chamber or casing which prevents the escape of the steam after it has passed the safety-valve. There is no suggestion in the patent that the chamber surrounding the valve and preventing the free escape of steam was to be used for any muffling device. Ashton, the patentee, states in his specification that the main feature of his invention consists of a pop-valve having a chamber into which the steam enters as soon as the valve begins to rise, and causes the valve to open largely and suddenly, in combination with a cylinder into which the valve rises, and a hood or casing to receive the escaping steam, making what he terms "an under-discharge pop-valve." Ashton's real invention and discovery shown in this patent was his peculiar form of pop-valve. He states that pop-valves are not new, and that under-discharge valves are not new, but claims that he is the first to combine a pop-valve with an under-discharge device. His first claim is for the pop-valve in combination with a cylinder and casing, and his second claim is for the peculiar construction of the pop-valve itself, having a huddling chamber with perforations. It is not contended that the second claim is infringed, and it is the first claim which is in suit. The combination of a simple under-discharge safety-valve with a cylindrical jacket inclosing the spring, and protecting it from the escaping steam, is shown in patent No. 97,472, December 7, 1869, to Ashfield, and also in patent No. 121,659, December 5, 1871, to Prescott. The exterior casing confining the escape of the steam, in combination with a simple safety-valve, is shown in No. 195,003, September 11, 1877, to Guels. There could hardly be claimed to be invention in merely substituting the improved pop-valve, which was patented by Richardson in 1866, in any combination in which the simple valve had been used. In the

English patent to Giles, No. 891, sealed August 23, 1872, for an improvement in safety-valves, there is shown a pop-valve with under-discharge, and with the spring inclosed so as to exclude the steam, making an inner casing; and also with an outer casing to confine the steam, so that the steam passing the valve ascended between the inner and outer casings, and then escaped through perforations in the top or other suitable outlet. These prior patents show that there was no patentable novelty in the combination in complainant's first claim, so far as it claims simply the combination of a pop-valve, an inner casing, and an outer casing with a suitable outlet. The complainant, therefore, is obliged to base its contention for the patentable novelty of this claim of the patent upon something which certainly is not explicitly set out in the claim. When an under-discharge safety-valve has the spring inclosed in a jacket or casing to protect it from the steam, the valve to some extent must work in the jacket as a piston does in a cylinder, and through this working space the confined steam to some extent penetrates, and if it has no outlet thus, to some extent, creates a back-pressure which prevents the valve rising. This back-pressure can be cured by making an opening from the interior of the spring-casing out to the atmosphere. In the specification of complainant's patent it is said:

"Besides the central hole in the cover, *n*, (through which the upper part of the screw, *m*, passes,) I provide other holes, in order to give a free outlet to the air in the chamber, *c*, and to such steam as passes into that chamber while the valve is rising."

This feature of providing a special vent for the spring-chamber is nowhere else mentioned in the specification, and is not spoken of as an invention or discovery. The vent-holes are not mentioned in any claim, but only the combination of his peculiar valve with a spring-chamber, and an outer casing "arranged to operate as described." The patentee, Ashton, states that the main feature of his invention is his form of pop-valve and its under-discharge construction, and it seems quite evident from the language used that he did not consider the venting of the spring-chamber a discovery which he intended to claim in that patent. Ashton did, however, claim it in combination with other elements in a prior patent granted to him. Patent No. 197,073, dated November 13, 1877, granted to Ashton about three weeks before the application for the patent in suit, is for an improvement in apparatus for utilizing the escape-steam from safety-valves on locomotives. In two of the drawings is shown the peculiar form of pop-valve claimed in the patent in suit, and he says:

"Figures 2 and 3 show the details of the construction of the safety-valve, which will form the subject-matter of another application."

In the first claim of that patent he does claim the vented spring-chamber, in combination with a feed-water tank and other elements, but he does not claim it as a separate invention. Whenever, in a spring-chamber, the head of the valve-spindle is carried through the top of the chamber, and works up and down through the hole in the top

of the chamber, as it does in Giles' patent of 1872, and as it does in the Ashton patent in suit, there is necessarily a venting of the chamber. In Ashton's locomotive feed-water device, in No. 181,624, there was need of additional venting on account of the great back-pressure caused by forcing the steam into the water-reservoir of the tender. We are of opinion that in the second claim of complainant's patent, No. 200,119, the venting of the spring-chamber, if claimed at all, is claimed only in combination with the other elements of the claim, including complainant's peculiar form of pop-valve; and, as defendant does not use complainant's peculiar form of pop-valve there is no infringement.

As to complainant's patent, No. 299,503, for a combination of a muffling chamber surrounding a safety-valve, with a pipe communicating from the spring-chamber to the outside air, if defendant could be held to infringe it, we think it a sufficient answer to cite the Coale patent, No. 297,066, granted April 15, 1884, on application filed January 17, 1884. This muffler patent is prior to complainant's patent, No. 299,503, and defendant's device is made substantially in conformity with it. Complainant has endeavored to carry the date of the invention of Ashton's patent, No. 299,503, back prior to the invention of Coale's, No. 297,066; but the burden is upon the complainant to establish this by a clear preponderance of proof sufficient to overcome the presumption arising from the grant of the prior patent. We do not think the complainant has succeeded in doing so. The testimony as to the dates is purely from memory, unaided by any drawings or models or records which identify the device. In our judgment, the complainant's bill must be dismissed.

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TAPPAN v. BEAN *et al.*

(Circuit Court, E. D. Pennsylvania. December 8, 1891.)

**1. PATENTS FOR INVENTIONS—EXTENT OF CLAIM.**

In view of the state of the art, patent No 432,451, to Herman Tappan for perfume holder, must be strictly construed, and is not infringed by a device not containing the specific elements of the claims.

**2. SAME—NOVELTY.**

Patent No. 432,451, containing no new element except "a cap held on the neck of the bottle to engage a collar" around this neck, is invalid for want of patentable novelty.

**In Equity.**

Bill by Herman Tappan to restrain Bean & Vail Bros. from an alleged infringement of letters patent No. 432,451, for improvement in perfume holders. The patented device had the general form of a lantern, comprising a bottle or flask to hold the perfume, a base piece, a collar around the neck of the bottle, a cap adapted to fit upon the neck of the

<sup>1</sup>Reported by Mark Wilks Collet, Esq., of the Philadelphia bar.

flask, and screwed down thereon, and pressing a packing ring down on the cork and on the upper part of the flask. The collar and the base were connected by curved rods, provided with hooks, adapted to be sprung into suitable openings in the collar and base, and serving the double purpose of holding the parts together and forming a cage for the glass flask. The alleged infringing device did not contain a packing ring adapted to pass over the cork of the bottle or a cap screwing on the neck, or rods fitting as described on the collar and base. All the elements of the claims were old in similar combinations, except the cap held on the neck of the flask, and adapted to engage the collar. Bill dismissed.

*Allen H. Gangewer*, for complainant.

*George J. Harding and George Harding*, for respondent.

PER CURIAM. The bill must be dismissed. If the patent is valid, the history of the art before us shows that its scope must be confined within limits so narrow as to exclude the respondent's device. In our judgment, however, the patent is not valid. The alleged invention described seems to be entirely wanting in patentable novelty.

### SINGLEHURST v. LA COMPAGNIE GENERALE TRANSATLANTIQUE.

(Circuit Court of Appeals, Second Circuit. January 18, 1902.)

#### ADMIRALTY—PRACTICE—SECOND CIRCUIT—NEW EVIDENCE ON APPEAL.

On an appeal in admiralty, it is not a matter of course to allow parties who have withheld evidence available to them in the district court to present such evidence on appeal. It has, however, been the practice on appeals in the second circuit to take such testimony, without excusing its nonproduction below, where neither side has objected. In view of such practice, where no objection was interposed by an appellee to the taking of new proof until such taking was completed, *held*, that a motion thereafter made, to suppress such depositions, would be denied.

Appeal from the District Court of the United States for the Southern District of New York.

In-Admiralty. On motion to suppress depositions. For former report, see 47 Fed. Rep. 122.

*Jones & Govin*, (*Edward K. Jones*, of counsel,) for the motion.

*Sidney Chubb*, (*Robert D. Benedict*, of counsel,) opposed.

Before WALLACE and LACOMBE, Circuit Judges.

LACOMBE, Circuit Judge. This is a motion to suppress certain testimony taken in this court by the libelant and appellant in an admiralty suit, after appeal from the district court under the forty-ninth rule in admiralty. All of the witnesses, whose testimony is the subject of this motion, were accessible to the appellant, and could have been called by him, at the trial in the district court. They are the counsel for the appellee; two of the clerks in the office of the appellee; two per-

sons in the employ of appellant, who were present at the trial; the agent of the appellant, who was also present at the trial; and the chief engineer of the appellee's steamer, who was examined at the trial. Another item of testimony is a protest made by the master of the said steamer, a copy of which was in the hands of proctor and counsel of the libellant before the trial in the district court. It is conceded that, up to the time this motion was argued, no reason was shown or attempted to be shown, either on the record or otherwise, why these supposed matters of evidence were not produced at the trial in the court below. No new allegations or amendments have been made in the pleadings.

Appellate courts in admiralty treat an appeal as a new trial, in which new pleadings and new proofs are permitted, in furtherance of justice. But it is not a matter of course to allow parties who have withheld evidence available to them in the district court to present such evidence on appeal. Such was declared to be the law of this circuit in *The Saunders*, 23 Fed. Rep. 303, and *The Stonington and The Wm. H. Payne*, 25 Fed. Rep. 621. It is unnecessary to add anything to the discussion of this question in the case of *The Saunders*. The decision therein seems to be in entire accord with the authorities, and when objection is raised the party offering the new evidence should show some good reason, if any, why it was not produced before. It has, however, been the practice in this circuit to take such testimony, without excusing its nonproduction below, where neither side has objected. Upon the hearing of this motion an affidavit was filed by the proctor for the appellant, stating that the new proofs are material and necessary to the determination of the appeal, and "relevant to points referred to in the written decision of the district judge, but not referred to by counsel on the trial in the court below," which, it is contended, is sufficient excuse for failure to produce the evidence before. If this means that the district judge detected a weakness in the appellant's case, which counsel had overlooked, the bald statement of that fact is not sufficient. If it means that the district judge decided the case on facts not in proof, or upon assumptions and inferences not warranted by the evidence, such errors, for all that appears, may be corrected without new testimony. It appears, however, that no objection was interposed by the appellee to the taking of this new proof until such taking was completed. Although present and cross-examining the witnesses, its counsel did not raise the point that such witnesses were available or were examined at the trial below until their testimony in this court was closed. Under these circumstances, we do not think he should be allowed to insist upon the suppression of such testimony, in view of the practice in this circuit, above referred to. If a party wishes to insist upon his rights in that regard, he should interpose his objections promptly, and not wait till his adversary has been put to the trouble and expense of taking the new proofs.

The other points argued by appellee in support of this motion should be determined on the argument of the appeal, not on motion to suppress. The motion is denied.

## ROCHESTER COACH LACE CO. v. SCHAEFER.

*(Circuit Court of Appeals, Second Circuit. January 18, 1892.)*

## PATENTS FOR INVENTIONS—NOVELTY.

Letters patent No. 177,194, issued May 9, 1876, to Oscar Boehme, for an improvement in the manufacture of balls and rosettes of yarn, consisting in the use of a funnel-shaped tube, through which the yarn is drawn, so that it comes out of the small end in a compressed condition, ready to be bound and cut, are void for want of patentable novelty.

In Equity. Suit by the Rochester Coach Lace Company against Schaefer for infringement of letters patent No. 177,194, issued May 9, 1876, to Oscar Boehme, and afterwards assigned to complainant. In the circuit court the patent was held void for want of patentable novelty, and decree entered dismissing the bill. The opinion was delivered by Judge COXE. See 46 Fed. Rep. 190. Plaintiff appeals. Affirmed.

*George W. Hey*, for appellant.

*Fred. F. Church*, (*Church & Church*, of counsel,) for appellee.

PER CURIAM. We are entirely satisfied with the conclusions reached by the learned district judge who decided this case in the circuit court, as expressed in his opinion. The decree is affirmed.

BATTLE *et al.* v. FINLAY *et al.**(Circuit Court, E. D. Louisiana. April 8, 1892.)*

## 1. TRADE-MARK—FEDERAL COURTS—EQUITY JURISDICTION.

As the jurisdiction of equity in matters of trade-mark is recognized by a long line of both English and American cases, the federal courts may administer equitable remedies therein when they have jurisdiction by reason of the citizenship of the parties, notwithstanding that the federal statutes on the subject have been declared unconstitutional in the Trade-Mark Cases, 100 U. S. 82.

## 2. SAME—INFRINGEMENT.

It is an infringement of a trade-mark to employ an imitation likely to deceive and impose upon the customers and patrons of the proprietor, and the use of the arbitrary term "Bromidia," previously adopted by another, is such an imitation, notwithstanding the fact that the infringing manufacturer's name is printed on each label.

In Equity. Bill by Battle & Co. against Finlay & Brunswick for injunction against the infringement of a trade-mark. Injunction allowed. *Denegre & Bayne*, for complainants.

*B. R. Forman*, for defendants.

BILLINGS, District Judge. This cause is submitted upon bill, answer, depositions, and exhibits for a final decree. Upon the motion for an injunction *pendente lite*, an opinion was rendered by the circuit judge, PARDEE, reported in 45 Fed. Rep. 796, which states the facts and the



law of the case, as they were presented at that preliminary hearing, with completeness. The proofs have not varied the case from its features as then presented, and I have only to refer to that opinion, and adopt it, as, in my view, the law of the case is correctly stated. The solicitor for the defendants has submitted views and authorities upon one or two points not then presented, which I will consider. It is urged that since the decision of the *Trade-Mark Cases*, 100 U. S. 82, this court can derive no jurisdiction from the United States statute concerning trade-marks, and therefore that the equity jurisdiction can exist only in case of fraud upon, and intended deceit of, the public by the defendants, which the solicitor urges are wanting upon the proofs in this case. The first proposition is correct. But the jurisdiction of the court is derived from the citizenship of the parties, the complainants being citizens of the state of Missouri, and the defendants being citizens of Louisiana. The equity jurisdiction of these trade-mark cases is founded upon a long line of English and American cases, even when the rights of the parties are to be determined entirely by the written and unwritten laws of the states. See *Trade-Mark Cases*, 100 U. S. 92, where the court say:

"The right to adopt and use a symbol or a device to distinguish the goods or property made or sold by the person whose mark it is, to the exclusion of use by all other persons, has been long recognized by the common law and the chancery courts of England and of this country, and by the statutes of some of the states. It is a property right for the violation of which damages may be recovered in an action at law, and the continued violation of it will be enjoined by a court of equity, with compensation for past infringement. This exclusive right was not created by the act of congress, and does not now depend upon it for its enforcement. The whole system of trade-mark property and the civil remedies for its protection existed long anterior to that act, and have remained in full force since its passage."

See, also, 2 Kent, Com. (8th Ed.) p. 453, marg. p. 372; *Taylor v. Carpenter*, 11 Paige, 292; *Partridge v. Menck*, 2 Barb. Ch. 101, and cases cited in the last case. In these cases equity jurisdiction was maintained because the right on the part of merchants to use certain marks, whereby the public are informed that goods or products are made or selected for sale by them, is recognized as being a species of property, and because the wrongful interference with or employment of such marks by others injured a business. Undoubtedly there must be imitation or simulation "in such a manner as to be likely to deceive and impose upon the complainant's customers or the patrons of his trade or business." This is stated to be the test by Chancellor WALWORTH in *Partridge v. Menck*, 2 Barb. Ch., at page 103, and in this connection may be noticed the fact urged by defendants' solicitors, that defendants' name was printed upon the label. The answer to this suggestion is that the employment of the arbitrary term "Bromidia," coined by the complainants, which has no meaning of itself, and is used solely to indicate in the trade the complainants' compound, is a simulation not overcome by the fact that the defendants printed their own name on each label. As to the effect to be given to the printing of the name of the person, who appropriates the trade-mark, along with it, the supreme court (*Menendez v. Holt*, 128 U.

S. 521, 9 Sup. Ct. Rep. 143) say: "That is an aggravation, and not a justification, for it is openly trading in the name of another upon the reputation acquired by the device of the true proprietor." Unless a simulation was intended, it is difficult to see why the name "Bromidia" should be adopted by defendants, which has no meaning whatever, except as connected with complainants' business, and as associated with and indicative of a soothing or soporific mixture prepared and sold by them. I think the complainants are entitled to a decree perpetuating the injunction.

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THE JAMES G. SWAN.

UNITED STATES v. THE JAMES G. SWAN.

(District Court, D. Washington, N. D. March 26, 1892.)

1. **PENALTIES AND FORFEITURES—KILLING FUR SEALS IN ALASKA WATERS.**  
The unauthorized killing of fur seals anywhere within the boundaries described in the treaty of the 30th of March, 1867, between the United States and Russia is unlawful, and vessels found within said boundaries engaged in that business are subject to seizure and condemnation as forfeited to the United States.
2. **SAME—SOVEREIGNTY OVER BERING SEA.**  
The president and congress are vested with all the responsibility and powers of the government for determination of questions as to the maintenance and extension of our national dominion; and, they having assumed jurisdiction and sovereignty over the waters of Bering sea outside of the three-mile limit, the people and the courts are bound by such action.
3. **INDIAN TRIBES—MAKAH INDIANS—TREATY.**  
The treaty between the United States and the Makah tribe of Indians gave no rights or privileges to the Indians peculiar from or superior to those of the citizens of this country in general.

In Admiralty. Libel of forfeiture for violation of Rev. St. § 1956.

The schooner James G. Swan (formerly the Anna Beck) was seized, and by a decree of the district court for the district of Alaska was condemned as forfeited to the United States, for being engaged in the business of killing fur seals in the waters of Alaska, in violation of section 1956, Rev. St. At the marshal's sale pursuant to said decree the claimant, Chestoqua Peterson, an Indian of the Makah tribe, purchased said vessel, and changed her name to the James G. Swan. In the spring of 1889 he sent her, with a crew of Makah Indians, under command of a white man, on a sealing voyage upon the Pacific ocean and Bering sea. On July 30, 1889, said vessel with her said master and crew, in Bering sea, in latitude 55° 44' N., longitude 171° 4' W., distant about 70 miles from the nearest land, and within the boundaries of the territory ceded to the United States by the emperor of Russia, as the same are defined in the treaty between the governments of the United States and Russia, was engaged in killing fur seals; and was for that cause then and there by the commander of a United States revenue cutter seized and brought to Port Townsend, in this district. Fur seals were actually

killed by the crew during said voyage in Bering sea, but not within a distance of nine miles from land. A libel of information was filed against said vessel by the United States attorney in the late district court for the third judicial district of the territory of Washington. This court, upon its organization as successor of said territorial court, took cognizance of the case. A hearing has been had, and the cause has been submitted upon the libel of information and the answer, there being no dispute as to any material fact.

*P. H. Winston*, U. S. Atty., and *P. C. Sullivan*, Asst. U. S. Atty.  
*James G. Swan* and *Geo. H. Jones*, for claimant.

HANFORD, District Judge. Fur seals in great numbers habitually make annual visits to the Pribilof islands, in Bering sea, affording to the native inhabitants their means of living, the flesh of the animals being their principal article of food, and seal-skins being the only commodity of commercial value obtainable by their industry. Previous to the acquisition of Alaska by our government, the preservation of these animals from indiscriminate slaughter and extermination was by the Russian government deemed necessary for the subsistence of said inhabitants, and accordingly authority over all of Bering sea for the protection of fur seals therein from destruction by persons other than said inhabitants was assumed. The emperor of Russia also asserted authority over Bering sea by assuming to transfer to the United States certain territory and dominion within definite boundaries, including a large part thereof; and the United States, by the ratification of the treaty and consummation of the purchase of said territory, acquired a claim of right to exercise the authority and sovereignty over that portion of the sea which had been theretofore exercised by Russia. Our government asserted its authority to restrict the killing of seals in all the waters included within the boundaries described in the treaty very promptly after the formal transfer of the territory. At the first session of congress thereafter a statute was passed, entitled "An act to extend the laws of the United States relating to customs, commerce, and navigation over the territory ceded to the United States by Russia, to establish a collection district therein, and for other purposes." The first section of said act (now section 1954, Rev. St.) declares that "the laws of the United States relating to customs, commerce, and navigation are extended to and over the main-land, islands, and waters of the territory ceded to the United States by the emperor of Russia by a treaty concluded at Washington on the thirtieth day of March, Anno Domini eighteen hundred and sixty-seven, so far as the same may be applicable thereto." 15 St. U. S. p. 240. The sixth section in terms prohibits the killing of fur seals within the limits of said territory, or in the waters thereof, and further provides that all vessels found engaged in violation of the said act shall be forfeited. The first section above quoted is without change of phraseology incorporated into the Revised Statutes, but the sixth section, which is section 1956 of the Revised Statutes, is therein changed so as to refer to Alaska territory and the waters thereof by substitution of the name

"Alaska" for the word "said" preceding the word "territory." For about one century preceding the year 1885 the validity of the laws of Russia and of the United States, respectively, for the preservation of fur seals in Bering sea, remained unchallenged. And it is a matter of common knowledge that since the year 1885 instances of poaching by sealing vessels in Bering sea have been greatly multiplied, and that there has been on the part of officers of the United States charged with the duty of enforcing the above statutes a corresponding increase of efforts to prevent such depredations. A large number of arrests and seizures were made between 1885 and 1889 on the assumption that said laws were effective and applicable throughout the entire extent of the territory and waters including the portion of Bering sea within the boundaries of the territory and dominion ceded by the emperor of Russia. From said arrests and seizures and the consequent prosecutions, questions arose as to the proper construction or interpretation of section 1956, and as to the extent of our national jurisdiction over Bering sea. Thereupon, on March 2, 1889, congress passed an act giving a legislative construction to said section, declaring it to include and be applicable to all the dominion of the United States in the waters of Bering sea. 25 St. U. S. p. 1009, § 3. Effect must be given to these statutes according to the intention of congress, which is to be ascertained from the words used and consideration of the course of legislation on the subject, and the facts and circumstances known to have been operative in inducing such legislation.

Now, considering the several statutory provisions and the historical facts above recited, and keeping in mind section 1954, which must govern the interpretation of other statutes referring to the dominion of the United States in Bering sea, I am constrained to hold that the killing of fur seals anywhere within the boundaries defined by the treaty referred to in said section is unlawful; and that vessels found within said boundaries, engaged in that business, are subject to seizure and condemnation as forfeited to the United States. There is a question, however, as to the validity of these statutes. On the part of the defense it is contended that the criminal laws of the United States can have no force upon the sea beyond the limits of national jurisdiction, which, by the law of nations, cannot extend beyond the range of cannon shot from the shore; and therefore the government has no power to prohibit fishing, or the taking of animals which are *feræ naturæ* in the open sea, which is common and free to the inhabitants of all nations. National dominion and sovereignty may be extended over the sea as well as over land. Should circumstances render it necessary, a nation having the power to do so may assert its dominion over the sea beyond the limits heretofore admitted by the powers of the earth to be lawful. "It is probably safe to say that a state has the right to extend its territorial waters from time to time, at its will, with the now increased range of its guns, though it would undoubtedly be more satisfactory that an arrangement on the subject should be arrived at by common consent." 1 Whart. Int. Law Dig. p. 114, from Hall, Int. Law, 127. As our government is constituted, the president and congress are vested with all the responsibility

and powers of the government for determination of questions as to the maintenance and extension of our national dominion. It is not the province of the courts to participate in the discussion or decision of these questions, for they are of a political nature, and not judicial. Congress and the president having assumed jurisdiction and sovereignty, and having made the declarations and assertions as to the extent of our national authority and dominion above indicated, and having, by a treaty with Russia, established an international boundary line including a portion of Bering sea, all the people and the courts of the country are bound by such governmental acts, declarations, and assertions, and by the treaty; and the responsibility of maintaining the national authority within the boundaries so fixed, and to the extent asserted by executive and legislative authority against foreign governments, rests with the executive and legislative branches of the government. In the opinion of the supreme court in the case of *Jones v. U. S.*, 137 U. S. 202, 11 Sup. Ct. Rep. 80, written by Mr. Justice GRAY, the law is thus stated:

"Who is the sovereign, *de jure* or *de facto*, of a territory, is not a judicial, but a political, question, the determination of which by the legislative and executive departments of any government conclusively binds the judges as well as all other officers, citizens, and subjects of that government. This principle has always been upheld by this court, and has been affirmed under a great variety of circumstances. *Gelston v. Hoyt*, 3 Wheat. 246, 324; *U. S. v. Palmer*, 3 Wheat. 610; *The Divina Pastora*, 4 Wheat. 52; *Foster v. Neilson*, 2 Pet. 233, 307, 309; *Keane v. McDonough*, 8 Pet. 308; *Garcia v. Lee*, 12 Pet. 511, 520; *Williams v. Insurance Co.*, 13 Pet. 415; *U. S. v. Yorba*, 1 Wall. 412, 423; *U. S. v. Lynde*, 11 Wall. 632, 638. It is equally well settled in England. *The Pelican*, Edw. Adm. Append. D.; *Taylor v. Barclay*, 2 Sim. 213; *Emperor of Austria v. Day*, 3 De Gex, F. & J. 217, 221, 233; *Republic of Peru v. Peruvian Guano Co.*, 36 Ch. Div. 489, 497; *Republic of Peru v. Dreyfus*, 38 Ch. Div. 356, 359. \* \* \* All courts of justice are bound to take judicial notice of the territorial extent of the jurisdiction exercised by the government whose laws they administer, or of its recognition or denial of the sovereignty of a foreign power, as appearing from the public acts of the legislature and executive, although those acts are not formally put in evidence, nor in accord with the pleadings. *U. S. v. Reynes*, 9 How. 127; *Kennett v. Chambers*, 14 How. 38; *Hoyt v. Russell*, 117 U. S. 401, 404, 6 Sup. Ct. Rep. 881; *Coffee v. Groover*, 123 U. S. 1, 8 Sup. Ct. Rep. 1; *State v. Dunwell*, 3 R. I. 127; *State v. Wagner*, 61 Me. 178; *Taylor v. Barclay*, and *Emperor of Austria v. Day*, above cited; 1 Greenl. Ev. § 6."

It has been further contended on the part of the defense that this vessel was especially privileged to engage in the sealing business in Bering sea by reason of the fact that her owner and crew were Indians of the Makah tribe, and by virtue of the treaty made with said tribe of Indians, whereby "the rights of taking fish, and of whaling and sealing at usual and accustomed grounds and stations, is further secured to said Indians in common with all citizens of the United States, and of erecting temporary houses for the purpose of curing, together with the privilege of hunting and gathering, roots and berries on open and unclaimed land." 12 St. U. S. p. 940. It is obvious, however, from the language above quoted, that the treaty secures to the Indians only an equality of rights and privileges in the matter of fishing, whaling, and sealing. The

guaranty is of rights in common with all citizens of the United States, and certainly such treaty stipulations give no support to a claim for peculiar or superior rights or privileges denied to citizens of the country in general. A decree of forfeiture as prayed for in the libel of information will be entered.

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ELTING v. TOWN OF EAST CHESTER

(District Court, S. D. New York. April 1, 1892.)

**WHARFAGE—NAVIGABLE STREAM—DUTY OF WHARFINGER—RIVER BED.**

The owner of a wharf in a public navigable stream about 150 feet wide, who keeps the usual berths safe for which wharfage is charged, is not required to dredge or to keep even the bed of the stream near its middle, abreast of the wharf, so that vessels against which no wharfage is chargeable may moor, and lie there safely until they can come to the wharf in turn; and where a boat moored at high water nearly in the middle of the stream, outside of three other boats at such wharf, without directions from the wharfinger, paying no wharfage, and not being liable to pay any, and the person in charge of her ascertained soon after her arrival, and before the tide fell, that the bottom was uneven, and knew that he would be aground at low water, and the boat did take the ground and received injury, *held*, that the vessel took the risk of injury arising from the uneven nature of the bottom, and could not recover for her damage.

In Admiralty. Libel for damage to canal-boat while lying off respondents' wharf.

*Hyland & Zabriskie*, for libelant.

*Milo J. White*, for town of East Chester.

*Wing, Shoudy & Putnam* and *Mr. Burlingham*, for C. Schmidt.

BROWN, District Judge. The libelant's canal-boat, loaded with coal, was damaged by grounding upon an uneven bottom abreast of the dock in East Chester creek. This dock was built on public lands, the title of which was in the trustees of public lands, but subject to the directions, however, and for the benefit, of the town. The dock accommodated but a single boat at a time; and the usage was to charge wharfage only by the day against the boat which was actually using the wharf for discharging or loading cargo. The libelant's boat arrived about noon of May 5, 1891. Three boats were moored along-side of the wharf. The libelant's boat took position as the fourth boat outside, occupying a position from about 65 to 83 feet away from the dock. She paid no wharfage, and was not liable to pay any, until she should come along-side the dock in turn to unload. The whole width of the stream at high water was about 150 feet; and the middle was the dividing line between East Chester and the town of Pelham. At low water the bottom of the creek was bare, except a space of about 10 feet in breadth near the middle. The libelant's boat occupied at low tide a part of this water, and so much of it that a small row-boat could only be pushed past her with difficulty; there was no room to row.

On arrival the master of the boat was told by some men on the other boats, or on the wharf, but not by any person representing the defend-

ants, that as good a place to moor as anywhere was outside of the three boats. Being in haste to return, he left the boat there, directed his son to examine the ground, and immediately returned to New York with the tug that brought the boat. The son examined with a pole and found the ground uneven with holes, but made no change of position at that time. After the next low water the boat was found somewhat sprung and leaking. Two subsequent changes of place were made, but without getting a good position. The above libel is filed for the damages sustained in the springing of the boat through the unevenness of the bottom of the creek.

I do not think either of the defendants liable for this damage. Neither of them directed the boat to come up at the time she came, or to take up the position which she assumed. Her position was very near the center of the stream. That position was not one appurtenant to the dock, nor was wharfage charged or chargeable for lying there. Those waters were public navigable waters; the bed of the stream had been dredged by the United States government; the town had no direct control of it; and the duty of the town either as wharfinger, or as equitable owner, did not extend to taking care of the bed of the stream, or to making it safe to the center, as a place for vessels to lie in. See *The Robin*, [1892.] Prob. 65. As wharfage was charged only for boats lying right along-side the dock, I doubt whether, in the case of so small a stream, any obligation rested upon the wharfinger as respects the bottom of the creek, beyond supplying a safe berth along-side the wharf where wharfage became chargeable. *The Calliope*, [1891,] App. Cas. 11; *The Moorcock*, 14 Prob. Div. 64. In the latter case the wharfinger was held liable because the vessel was in the berth directly along-side the jetty, which the wharfinger was held bound to make safe, because an essential part of the wharfage. This boat's position is wholly different. As I have said, it was not appurtenant to the wharfage, nor a part of it, but a place chosen by the boat, or her tug, to moor in, without inquiry of the defendants, or either of them, and without any directions from either.

Whether the bottom in mid-stream became uneven after the government dredging through the grounding and pressure of other boats in the mud, or from uneven deposits of silt, is not shown; nor is it material, as in neither case were the defendants bound to keep the bed even away from the docking berth. Vessels that chose to come in and lie outside, and near mid-stream, on the ground at low water, with or without knowledge of an uneven bottom that arose in the ordinary use of the creek, did so, I think, at their own risk. The case is quite different from that of slips of which the wharfinger has control, and where wharfage is chargeable, as in this city, though the vessel does not come along-side the wharf. Within a few minutes, moreover, after the boat took her position, the libellant's son learned the uneven nature of the bottom, its depth, and the holes about him; and he knew that the boat would ground at low water. No attempt was then made to remove her to any other place, nor was there any request for assistance to do so until after she had sprung a leak.

The captain testifies that had he known of the soundings and holes found by his son, he "would not have stayed a minute, but would have towed right away with the tug." He made no inquiries of Mr. Schmidt, the consignee, and did not direct his son to do so. In his hurry to return, he took the chances of mid-stream as a safe place to lie in, and as I cannot find that either of the defendants were under any duty to keep the bed of the middle of the stream level, the libel must be dismissed; but under the circumstances without costs.

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ROBINSON v. RUSSELL.<sup>1</sup>

(District Court, E. D. Pennsylvania. April 6, 1892.)

SHIPPING—CONTRACT OF AFFREIGHTMENT.

The evidence of a master of a vessel and of a member of a firm acting as the ship's brokers was that a shipper had agreed to ship 400,000 shingles on the vessel. The shipper testified he had agreed to ship all he had,—estimated at that many. The firm were pretty closely related to the shipper also. *Held*, the weight of the evidence was against the shipper.

In Admiralty. Libel by Thomas B. Robinson, master of the schooner Charles C. Lister, against Daniel L. Russell, to recover damages for failure to ship a full cargo according to contract. Decree for libellant.

*Henry R. Edmunds*, for libellant.

*Flanders & Pugh*, for respondent.

BUTLER, District Judge. The only question involved is one of fact, to wit: Did the respondent contract for the shipment of 400,000 shingles, as the libel avers, or simply for the number he might have on hand, as the answer states? The testimony is directly conflicting. The only persons present when the contract was entered into, were the master of the schooner, Mr. Robinson, William Harriss, of the firm of George Harriss, Son & Co., ship brokers, and the respondent. Messrs. Robinson and Harriss state the contract to have been for 400,000 shingles and are very positive about it, while the respondent just as positively states it to have been for no given number, but such only as he might have—which he supposed would reach 400,000 or more. George Harriss, Son & Co. were the ship's brokers, and are pretty closely related to the respondent. There are some circumstances referred to in the evidence which tend to shed a little light on the question involved, but its decision depends mainly upon the testimony of the three witnesses named, respecting what occurred on the occasion referred to, when the contract was made. A discussion of the evidence is unnecessary. It is sufficient to say that its weight is clearly, in my judgment, against the respondent. A decree must therefore be entered for the libellant. If the parties cannot agree upon the damages the subject will be referred to a commissioner.

<sup>1</sup> Reported by Mark Wilks Collet, Esq., of the Philadelphia bar.



## THE OCEAN PRINCE.

PRINCE STEAM SHIPPING CO. v. LEHMANN *et al.*

(District Court, S. D. New York. April 12, 1892.)

## CONSTRUCTION OF CHARTER-PARTY—"BAD WEATHER"—"DISPATCH MONEYS."

The words "bad weather" in the charter in this case, must be construed to include weather not fit or reasonably safe for loading by reason of the state of the sea as well as of the atmosphere; dispatch moneys computed accordingly.

In Admiralty. Libel for freight under charter. Counter-claim for dispatch money.

The steam-ship Ocean Prince loaded a cargo of iron ore at Elba, where there is no harbor, but only an open roadstead, in consequence of which the ore was furnished to the ship in lighters. There was a conflict of testimony between the master of the ship and the agent of the shipper as to whether during certain days during which no cargo was furnished the ship the weather was bad or not. The clause of the charter referring to the weather was as follows:

"The act of God, restraint of princes and rulers, strikes of miners or workmen, *bad weather*, quarantine, riots, Sundays, holidays, frosts, stoppage of trains or mines, accidents to machinery, etc., and all unavoidable accidents, and all causes beyond the control of the shippers, charterers, or the consignee, which may prevent or delay the loading or discharging, always excepted."

For prior report, see 39 Fed. Rep. 704.

*Butler, Stillman & Hubbard*, for libellant.

*Benedict & Benedict*, for respondents.

BROWN, District Judge. The amount of freight, \$3,913.27, is not disputed. The charter allowed for the loading and discharge at the rate of 250 tons per day during working days; Sundays, holidays, *bad weather*, etc., being excepted; and it provided for a credit to the charterer of £15 per day, dispatch moneys, for any time saved upon the above allowance. Computation upon the amount of cargo gives an aggregate time allowance of 8 days and 5 hours for loading and the same for discharging. The respondents claim to have used but 5 days 18½ hours in all, and claim a credit, therefore, at the stipulated rate, for the balance of the lay-days. The principal question turns on the meaning of the term "bad weather" in the charter, and upon the actual condition of the weather while the vessel was loading by means of lighters three-quarters of a mile from the jetties, at the island of Elba, in the Mediterranean.

From the evident general intent of the charter, and from the immediate context of the words "bad weather," they must be construed to include, I think, weather not fit for loading or unloading by reason of the state of the sea as well as of the atmosphere. The entries in the master's log, and his testimony, show that he constantly used the phrase in that sense. "Bad weather," as used in the charter, means not merely weather during which cargo could not by any possibility have been

loaded, but such weather as was not reasonably fit or proper. This would exclude days when it was not reasonably safe to attempt loading with the appliances at hand, and when under the practice of the port loading was customarily suspended for that reason by competent men intrusted with the work, and acting upon their judgment of the fitness and safety of loading.

The master of the ship, and the superintendent of the loading, differ considerably as to the days they consider to have been fit for loading. The superintendent, however, was constantly engaged in the business of loading, was upon the spot, and his testimony as to each day relates to the condition of the sea in the shallow water near the jetties, where the lighters were obliged to take their loads from the beach. The master did not go to the jetties at all, though he went ashore almost daily at other points. The superintendent's testimony, therefore, seems entitled to the most weight. That the judgment of the men employed to load was fairly exercised, is confirmed by the further fact, to which the superintendent testifies, that other vessels that were loading at the same time and place, suspended loading during the same time that loading on the libellant's vessel was suspended on account of bad weather. The master, however, testifies positively that loading was going on upon the 28th day of December from 9 o'clock until 4; while the superintendent allows but four hours, saying that the rest of the time was bad. In this respect the master's record is most precise, and the respondents must be charged with the time that they actually worked. Computing the rest of the time upon the basis of the superintendent's testimony, I find the respondents chargeable with 5 days in loading and  $1\frac{1}{2}$  days in discharging, making a saving, out of the 16 days and 10 hours allowed her, of  $9\frac{1}{2}$  days, which, at the stipulated rate of £15 per day, entitles the respondents to a reduction of \$679.80. Decrees may be entered accordingly.

### HARRISON v. ONE THOUSAND BAGS OF SUGAR.

(Circuit Court, E. D. Pennsylvania. May 27, 1891.)

#### 1. CHARTER-PARTY—CONSTRUCTION.

Matter expunged from a printed form, used in drawing up a charter-party, can be considered in determining the intention of the parties thereto.

#### 2. SAME.

A charter-party which provides that "freight" is to be paid "upon the unloading and right delivery of the cargo," "on intake weight," binds the charterer to pay freight on the whole cargo taken on board, although a portion of it was damaged, without the ship's fault, by an excepted peril, and sold on the voyage, when the remaining portion is rightly delivered, especially where the words "on intake weight" are substituted for the printed word "delivered," in drawing up the instrument.

In Admiralty. On appeal from district court. 44 Fed. Rep. 686, affirmed.

The steamer *Weatherby* was chartered by the claimant to carry a cargo of sugar from Hamburg to Philadelphia. On the voyage over half of the cargo was damaged by collision, an excepted peril, without fault of the ship, and was sold for the benefit of the charterer, who was also consignee. The latter paid freight on the portion delivered, but refused to pay freight on the portion damaged, and sold in the district court. A decree was entered against appellant for freight on all cargo taken on at Hamburg.

*Morton P. Henry*, for appellant.

*Curtis Tilton* and *John F. Lewis*, for appellees.

ACHESON, Circuit Judge. This suit is for the recovery of an alleged balance of freight due under a charter-party, whereby the steam-ship *Weatherby* was to be provided with a full cargo of sugar at Hamburg, to be transported thence to Philadelphia, perils of the sea excepted. Part of the cargo having been damaged by an excepted peril, without fault of the ship, was sold on the voyage for the benefit, and with the knowledge and assent, of the owners of the cargo. All the balance of the cargo was delivered at Philadelphia. The question here in litigation is whether freight is to be paid upon the entire cargo shipped, or only upon that portion which was delivered. The case turns altogether upon the construction of the charter-party. In making the contract the parties used the ordinary printed form of a freighting charter-party for the full capacity of the vessel, the printed clause, providing for the payment of freight, reading thus: "The freight to be paid on unloading and right delivery of the cargo at and after the rate of ——— per ton of 20 cwt. delivered." The printed word "delivered" was struck out by running the pen through it, and the words "on intake weight" were interlined in writing, so that the completed clause reads: "The freight to be paid on unloading and right delivery of the cargo at and after the rate of nine shillings per ton of 20 cwt. on intake weight." In the district court it was held that the contract bound the charterer to pay freight on the entire cargo taken in. The authorities bearing upon the subject are cited, and the case is carefully treated by Judge BUTLER in his opinion to be found in 44 Fed. Rep. 686. After an attentive examination of the authorities and serious reflection, I am satisfied that the decision of the district court rests upon a sound interpretation of the charter-party. Undoubtedly, for the purpose of ascertaining the real intention of the parties, it is competent for the court to look at what the printed form originally was, and to consider as well the word struck out as the words introduced. *Strickland v. Maxwell*, 2 Crompt. & M. 539. Now, I can come to no other conclusion than that the printed clause, as originally framed, was intended to limit the payment of the freight to so much of the cargo as was delivered. This, indeed, was the plain effect of the word "delivered," in the connection in which it stood. Why, then, was it stricken out, unless the parties intended that the freight should be paid on the intake weight of the whole cargo? The suggestion that the purpose of the alteration was simply to meet any discrepancy (if such there

should be) between the shipping and delivery weights, and secure the ship-owner freight calculated on the intake weight at Hamburg, seems to me to rest upon a conjecture which is wholly unsupported by any fact. Clearly, that purpose did not require the erasure of the word "delivered." The great difficulty in the way of accepting the construction insisted upon by the respondent is that the court is virtually asked to restore to the charter-party a material word which the contracting parties expunged, it must be presumed, intentionally and deliberately. But this we are not at liberty to do; and, giving to the act of the parties its legitimate effect, we must conclude that the clause, as it now stands, was meant to provide for the payment of full freight on the intake weight of the cargo. Nor does the provision that the freight is "to be paid on unloading and right delivery of the cargo" create any obstacle to a decree in the favor of the libellant; for, in the analogous cases of "lump-sum" freights, the principle has long been established that the cargo is rightly delivered if all of it not covered by any exception in the contract is delivered. *Shipping Co. v. Armitage*, L. R. 9 Q. B. 99. The decree of the district court must be affirmed; but in the decree to be entered in this court credit must be given for any dividend which may have been received by the libellant since the decree of the district court in the proceedings to limit the liability of the owners of the steamer Sultan.

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THE B. F. BRUCE.

LUMBERMEN'S MIN. CO. v. GILCHRIST *et al.*

(Circuit Court, N. D. Ohio, E. D. December 30, 1891.)

1. CHARTER-PARTY—UNQUALIFIED OBLIGATION—EFFECT.

Unqualified charter-parties are to be construed liberally as mercantile contracts, and a party who has by charter charged himself with an obligation must make it good, unless prevented by the act of God, the law, or the other party to the charter.

2. SAME.

Respondents, ship-owners, entered into an absolute agreement with libellant, by charter, that they would, during a season of lake navigation, carry eight cargoes of libellant's iron ore from one port to another in a specified vessel, to be towed by another specified vessel. Two of the eight trips were not performed, and libellant employed other vessels at an advanced freight, and brought this suit to recover the difference of freight between the charter rate and the rate they were obliged to pay. Respondents averred that, after it appeared that the designated vessel could not make the eight trips, they had offered to supply other towage, which offer libellant refused. Also, that during the existence of the charter, one of the specified vessels was at times detained by other business. *Held*, that respondents, having by their charter entered into an unqualified undertaking possible to be performed, must make it good, unless performance was rendered impossible by the act of God, the law, or by the libellant, and hence that libellant was entitled to recover.

In Admiralty. Suit to recover damages for breach of charter. On appeal from district court. Affirmed.

Harvey D. Goulder, for appellants.

Henry S. Sherman, for appellee.

JACKSON, Circuit Judge. The libel in this case was filed to recover the damages which libellant claims to have sustained by reason of respondents' breach of a certain contract of affreightment made and entered into between the parties in February, 1886. The district court found that respondents had failed to perform their contract, and, after a reference to and report by a special master as to the damages thence resulting, gave a decree in favor of libellant against respondents for the sum of \$2,203.20 and costs. From said decree respondents prosecute the present appeal.

It appears from the pleadings and proofs that on February 4, 1886, respondents addressed to J. H. Outhwaite & Co., agents of libellant, the following proposition:

"We will transport for you 30,000 tons of iron ore from the port of Escanaba, Michigan, to Lake Erie ports, (not east of Erie,) in equal monthly quantity, during the season of navigation of 1886, at the rate of (\$1.00) one dollar per gross ton, steam tonnage."

Libellant, through its said agents, accepted the proposition February 9, 1886; its written acceptance being accompanied with a designation of the boats which were to be employed by respondents, as follows: "We accept charter of schooner B. F. Bruce dated February 4 to apply on above [contract;] also charter February 4 with schooner Teutonia; also charter Mch. 23 with schooner S. H. Foster." Thereupon, and in conformity with said accepted proposition, the following formal written agreement was made and entered into between the parties, viz.:

"Vessel charter. Agreement between J. C. Gilchrist, of Vermillion, Ohio, as managing owner of the vessel called the B. F. Bruce, and J. H. Outhwaite & Co., of Cleveland, Ohio, as agents for Lumbermen's Mining Company, made at Cleveland, O., this 4th day of February, 1886: Witnesseth, that the said J. C. Gilchrist, for the considerations hereinafter named, hereby agrees that said vessel shall carry eight (8) cargoes of iron ore for the said J. H. Outhwaite & Co., agents, during the season of 1886, from Escanaba, Mich., to Lake Erie ports, (not east of Erie,) at a rate of freight of one dollar (\$1.00) per ton of 2,240 pounds. It is understood that the above number of trips shall be distributed through the season of navigation 1886 as equally as possible in regard to time. It is also understood that the said vessel shall be constantly towed by the prop. N. K. Fairbanks during the life of this contract. There shall be allowed an average of four days' time for loading said vessel, and for furnishing a dock at which to discharge; the time to be reckoned from the hour when said vessel reported and was ready to load until loaded, and from the time when reported at port of destination and was ready to unload until a dock was furnished; the time of such reporting, in both cases, not to date from an hour earlier than eight o'clock A. M., or later than five o'clock P. M., Sundays, public holidays, and time lost in consequence of heavy seas, strikes, or any other cause beyond the control of Lumbermen's Mining Co., excepted. When each cargo contracted by this vessel is delivered, if it shall be found that the time of detention exceeds four days for each trip, as above stipulated for, the said vessel shall be allowed a compensation for further detention, except for causes above stated, at the rate of five cents per gross ton of one average cargo for each day (of 24 hours) of such excess. The time of reporting, ready to load, and when loaded, with causes of detention, if any, shall be noted on the bill of lading in every instance. A special order for each cargo shall be obtained from the agents of said Lumbermen's

Mining Company at Cleveland. Said J. H. Outhwaite & Co., agents, in consideration of the above, hereby agree to employ said vessel, and agree to pay the freight, as above mentioned.

"J. C. GILCHRIST, Manag. Owner.

"LUMBERMEN'S MINING CO.,

"By J. H. OUTHWAITE & Co., Agts."

The schooner Bruce, mentioned in said contract, belonged to respondents, and J. C. Gilchrist was her managing owner. The steamer Fairbanks was under the control of respondents, as charterer or owner, for the season of 1886. Said Gilchrist and J. H. Outhwaite & Co., agents of libelant, both have offices at Cleveland, Ohio, where said contract was made. The average cargo of the schooner Bruce was 1,360 tons. She carried during the season of navigation of 1886 six cargoes of iron ore for libelant from Escanaba, Mich., to Lake Erie ports, (not east of Erie,) for which the stipulated price of one dollar per ton was paid as each trip was made. She failed to make two of the eight trips which respondents undertook and agreed she should make during said season. When it became evident that she would fall short in making the eight trips stipulated to be performed, libelant, during the month of November, 1886, while navigation for the season was still open, employed other tonnage, to the amount of about 2,700 tons, in place of the Bruce, to transport its iron ore from Escanaba, Mich., to Lake Erie ports, (not east of Erie,) for which it was required and compelled to pay freight at the average rate of \$1.81 per ton of 2,240 pounds.

The failure of the schooner Bruce to carry two of the eight cargoes of iron ore agreed to be carried is the breach of contract set up by libelant, and the damage which it claims as resulting therefrom is the difference between the contract price of \$1 per ton, to be paid respondents, and \$1.81 per ton, which libelant had to pay for other tonnage to supply the place of the Bruce. This difference, amounting to \$2,203.20, was awarded and decreed to libelant by the district court. Respondents admit that the Bruce failed to carry two of the stipulated cargoes before the close of navigation in 1886, but set up by way of avoidance several matters of excuse or defense. They aver that during said season the Bruce was subjected to great and unwarranted delays in obtaining libelant's cargoes at Escanaba, and in discharging the same at destination or ports of delivery, contrary to the understanding of all parties that said vessel was to receive from libelant good dispatch in loading and discharging its cargoes, in order that she might accomplish the eight trips agreed to be made. The proof wholly fails to sustain this defense, which was not seriously insisted upon at the hearing, and need not be further noticed.

The next special matter of avoidance is thus stated in the answer:

"Respondents further aver that, after the Bruce had accomplished several trips, it became apparent that, owing to the great delay to which the vessels were subjected in handling cargoes, she would probably be unable to perform eight trips; that up to about September 1st freights on ore were low, and during July, August, and September both libelant and respondents could have obtained other tonnage at or below the charter rate of freight that fre-

quently during these months respondents pointed out to libelant the evident inability of the Bruce to perform eight trips, and offered to put in other tonnage to make good the deficiency; and they also called the attention to the requirement in the charter that trips be equally distributed throughout the season, and that the Bruce, owing to delays, was falling behind; that respondents then had other tonnage, which they were ready and willing and offered to put in to equalize the number of trips, but libelant refused to employ other tonnage itself, or to permit respondents to put in other tonnage, although between July 13th and October 2d the Bruce, without fault on her part, was able to deliver but one cargo; that, had the libelant permitted the respondents to furnish other tonnage, as they were ready and willing and offered to do, there would have been no loss to either libelant or these respondents."

It is shown by the proofs that some time in August, 1886, respondent Gilchrist had some conversation with Mr. Pollock, of the firm of J. H. Outhwaite & Co., agents for libelant, about putting in other tonnage in place of, or in addition to, the Bruce. Mr. Gilchrist fixes the date of said conversation "in the fore part of August." Mr. Pollock does not remember the time in August at which the interview took place. The offer or suggestion to put in other or substitute tonnage in place of or additional to the Bruce was declined by Mr. Pollock, on the ground that the said schooner had carried her full quota or proportion of cargoes up to that time, and respondents were not entitled to put in, nor libelant under any obligation to accept, extra tonnage, for which it might not be ready, or which might have conflicted with its engagements. Gilchrist appears to have thought that the Bruce was falling behind, if, as he assumed, the season of navigation was counted from April 1 to November 30, 1886. Pollock, however, reached the conclusion that the Bruce was not behind in her trips by taking the season at seven months, and figuring on the 30,000 tons which the three schooners were to transport; it being the understanding of the parties, as admitted in the answer of the respondents, that the Bruce was put in to apply on said contract, by the terms of which said 30,000 tons of ore were to be carried, "in equal monthly quantity, during the season of navigation of 1886." When the season of navigation actually opened in 1886 does not distinctly appear from the proof, but it does appear that the Bruce loaded her first cargo of ore, under the contract, on May 8, 1886, which we may assume was the opening of navigation for her; and, estimating her trips from May 6, 1886, when she first reported at Escanaba for loading, her season of navigation, running to November 30th, covered a period of seven months, on the basis of which Pollock figured, to show that the Bruce was not behind in August, when the request or offer to put in extra tonnage was made by Gilchrist. If this was not so, still respondents could not avail themselves of the failure of the Bruce to carry one cargo in April, on the theory that the season of navigation opened April 1, 1886, and require libelant to accept other or extra tonnage in August, 1886. But, aside from this, the request or offer to put in additional tonnage was not insisted upon by Gilchrist, and the Bruce proceeded with her trips, and with such slow dispatch that she failed to make two of the stipulated eight trips.

The theory upon which counsel for respondents urge the offer of other tonnage in August as a defense is that the charter-party sued on, when read in the light of the accepted proposition of February 4, 1886, to transport 30,000 tons, "in equal monthly quantity, during the season of navigation of 1886," should be regarded or construed as a severable contract for eight separate monthly trips. The contract does not admit of this construction without totally disregarding its terms; but, if it did, it is not perceived how, or in what way, it could operate to make the offer of other tonnage in August a defense for the Bruce's failure to carry the two cargoes as agreed.

It is next urged that, inasmuch as the steamer Fairbanks was mutually selected by the parties as the means or instrument for towing the schooner Bruce to enable her to make the eight trips, and inasmuch as the Fairbanks, by reason of other engagements, and on account of detentions by other parties at the ports of Ashland and Chicago, was unable to make the eight trips to Escanaba, the respondents are therefore excused or relieved from liability. This position cannot be sustained. By the original proposition to transport 30,000 tons of ore, respondents offered steam tonnage for the vessels which were to carry the ore. By the charter-party sued on, they name or designate the schooner Bruce as the vessel which is to carry eight cargoes during the season of navigation, and expressly stipulated that she shall be constantly towed by the propeller Fairbanks, (respondents controlled both the Fairbanks and the Bruce,) and they put both into the service they agreed to perform for the price of one dollar per ton, to be paid by libellant. It is shown by the proof that libellant required that the respondents should provide steam tonnage, and this respondents agreed to furnish. In accepting the Bruce and Fairbanks as the vessels thus to be furnished and provided by respondents, it cannot be properly said that they, or either of them, were so mutually selected by the parties as that libellant should in any way be chargeable or responsible for the acts, defaults, or failures of either or both to perform the stipulated trips. The terms and provisions of the charter-party admit of no such construction. The libellant was a mere contractor for a designated service, which respondents undertook and agreed should be performed by the designated vessels, whose use and navigation they controlled. In permitting respondents to put in the Bruce and Fairbanks to apply on the contract to transport the 30,000 tons of ore, libellant incurred no responsibility for the failure of either of said vessels; and it would be an entire perversion of the true intent and meaning of the contract to say that libellant should, equally with respondents, bear the consequence of the Fairbanks' neglect, refusal, or failure to perform the stipulated service.

In connection with this defense, counsel for respondents contend that libellant or its agents knew that respondents intended to employ both the Fairbanks and the Bruce in the carrying trade during the season between Ashland and Chicago, and from the latter place to Escanaba, and thence to Lake Erie ports, (east of Erie,) and that libellant should be held to have taken the chances and consequences of detentions at Chi-



cago and Ashland in making such triangular trips. It does not appear that libelant or its agents, when the offer to transport 30,000 tons of ore was made and accepted, had any knowledge or notice that the steamer or propeller which might be employed by respondents to tow the Bruce was to have any other engagement. About the time of designating the Fairbanks as the propeller to tow the Bruce, the agents of libelant were informed that respondents intended to employ said propeller in making said triangular trips; but it was intimated, when she was named in the charter-party to apply on the original contract, that she could make with the Bruce the eight trips which the respondents agreed to perform during the season of navigation, and on the basis of that estimate respondents entered into an absolute and unconditional agreement that the Bruce should carry eight cargoes of ore for libelant.

Upon what principle of law or rule of construction is respondents' unqualified undertaking to perform a specific and designated service for libelant with two named vessels, within a given time, subject to the contingency of said vessels performing other engagements which respondents may or might enter into with other parties? The proposition asserted is substantially this: that libelant should be held to have taken the risk of the Fairbanks' performing the triangular service or engagements which respondents had or might enter into for her, and if she was unable, by reason of detentions at Ashland and Chicago, occasioned by accident or the fault of the other parties, to make the eight stipulated trips, that libelant must bear the consequence of her failure. This is radically unsound, and wholly unsupported by authority. Charter-parties like the present are to be construed liberally, as mercantile contracts usually are, in furtherance of the real intention of the parties; and the respondents, having by this undertaking charged themselves with an obligation or service possible to be performed, must make it good, unless performance was rendered impossible by the act of God, the law, or by the libelant. Unforeseen difficulties or obstacles, however great, will not excuse them. They should have been guarded against by express conditions or qualifications in the contract.

In the case of *Antola v. Gill*, 7 Fed. Rep. 489, Chief Justice WATTE held that a vessel delayed in the performance of a new contract, because she was bound by and engaged in fulfilling an old one, furnished no excuse. Time was of the essence of the charter-party sued upon. *Louder v. Bangs*, 2 Wall. 728; *Norrington v. Wright*, 115 U. S. 203, 6 Sup. Ct. Rep. 12; and *Filley v. Pope*, 115 U. S. 213, 6 Sup. Ct. Rep. 19, and cases therein cited. For this failure to carry two cargoes of ore respondents are responsible to libelant. The damages sustained have been correctly ascertained and fixed at the sum of \$2,203.20.

The decree below is affirmed, without interest, but with costs of suit in this court and the court below, to be taxed against respondents. Let judgment be entered accordingly.

## THE S. H. FOSTER.

LUMBERMEN'S MIN. CO. v. GILCHRIST *et al.*

(Circuit Court, N. D. Ohio, E. D. December 30, 1891.)

In Admiralty. Suit to recover damages for breach of charter. On appeal from district court. Modified.

*Harvey D. Gould*, for appellants.

*Henry S. Sherman*, for appellee.

JACKSON, Circuit Judge. The libel in this case is filed to recover damages which libelant sustained by reason of the failure of the schooner S. H. Foster to carry one cargo of iron ore from Escanaba, Mich., to some Lake Erie port, (not east of Erie,) during the season of navigation of 1886. Libelant's contract or charter-party with respondents in respect to the schooner Foster is substantially the same as that made in respect to the Bruce, considered and determined in case No. 1,912, between the same parties. 50 Fed. Rep. 118. The Foster was to be towed by the propeller Tuttle. She fell short one trip, and for her failure to make that one trip, the court, under the report of the special master, awarded the libelant as damages the sum of \$477.70, with costs of suit. The Foster reached Escanaba on her last trip on the morning of November 26, 1886, which was Thanksgiving day. By the terms of the charter-party, libelant was under no obligation to commence loading her upon that "public holiday;" but commenced loading her at 2 P. M. on the 28th day of November, as soon as she could be gotten up to the docks. The ore was frozen hard, and could not be loaded on the boat to any extent. After making the attempt to load her until 12 M. on the 29th day of November, when about 200 tons of the ore were placed on board, the loading was suspended, and the Foster was the next day laid up at Escanaba for the winter. If she could have been loaded before laying up for the winter, she could not have made the trip, as the season for navigation had in fact closed before she commenced taking on the 200 tons. When navigation opened in the spring of 1887, she resumed her loading, and finished taking on her cargo of ore May 3, 1887. The bill of lading given for this cargo recited: "Freight at \$— per gross ton." But the freight actually paid by libelant was \$1.35 on the 1,164 tons carried, being the sum of \$407.40 above the contract price. The claim made by the libelant, and found by the special master, that other tonnage had been obtained prior to November 22, 1886, in place of this last trip by the Foster, is not sustained. Libelant obtained other tonnage between the 1st and 16th of November, but it cannot properly be said to have been secured in consequence of the Foster's default, for libelant requested the Foster to go to Escanaba for her last load at or about the time of procuring such other tonnage, and when the Foster reached Escanaba, though late in the season, libelant commenced loading her under the contract, and finished loading her the following spring. Libelant thereby waived her previous delay, and can only claim as its damage the difference between \$1 per ton under the contract and \$1.35 actually paid.

Respondents offered to let this cargo go under the contract. This was all that libelant could demand under the circumstances. The matters of defense set up in the answer and the relief sought by the cross-libel are wholly unsustained.

The decree of the court below will be modified, so as to limit libelant's recovery against respondents to the sum of \$407.40. A judgment for that amount, without interest, will be entered in favor of libelant against respondents, together with the costs of this court and of the court below to be taxed.

## THE FRANCE.

## NICOLAY v. THE FRANCE.

(District Court, S. D. New York. March 26, 1892.)

**1. PILOTAGE FEES—ADDITIONAL COMPENSATION—VESSEL DETAINED—COMPUTATION BY THE HALF FOOT.**

Section 17, c. 467, Laws N. Y. 1853, in regard to pilotage fees, is not superseded by the provisions of chapter 90, Laws 1884, and a pilot of an outward bound vessel, detained in the harbor beyond the usual time of taking the vessel from her wharf to sea, is entitled to three dollars per day additional compensation. Where the statute specifies a computation by the draft per foot, the amount may be reckoned by the nearest half foot, *pro rata*.

**2. LIBEL TO RECOVER PILOTAGE FEES—WINTER PILOTAGE.**

After the steam-ship France had sailed for London, her cargo shifted, and she returned to New York. Not being able to get into her dock, she discharged a portion of her cargo at an anchorage in the bay. After the rest of her cargo had been restowed, and she had taken on board her pilot, the libellant, she returned to the anchorage to take on the cargo discharged there. This detained her one day. The amount of the pilotage fee was calculated on the draft of the vessel according to the nearest half foot. *Held*, that that mode of computation is allowable after long acquiescence therein; also that libellant was entitled to an additional four dollars allowed in the winter season, (Act 1853, § 16,) and to an additional three dollars for one day's detention in the harbor.

In Admiralty.

*Carpenter & Mosher*, for libellant.

*John Chetwood and Adam Goss*, for claimant.

BROWN, District Judge. In my judgment the provisions of chapter 90 of the Laws of 1884 of this state, in regard to the fees of pilots for piloting inward and outward bound vessels, were not designed to supersede, and do not supersede, sections 16, 17, and 21, c. 467, Act 1853. Sections 13 and 14 of the act last named provide the "fees for piloting inward and outward bound vessels" respectively. Sections 1 and 2 of the act of 1884 cover precisely the same ground as sections 13 and 14 of the former act, and no more, and section 3 repeals only what is inconsistent therewith. But sections 16, 17, and 21 of the act of 1853 relate to other matters evidently not designed to be included in sections 13 and 14. Section 17 provides a compensation of three dollars "to be added to the pilotage for *detention* at the wharf, or in the harbor," etc.; and section 21 provides certain compensation for "services" rendered by pilots "for removing or transporting vessels *in the harbor* of New York." The act of 1884 does not touch the subject of those special provisions. Its scope is co-extensive with sections 13 and 14 of the former act, and no further. Sections 17 and 21 of the act of 1853 are not repealed by the act of 1884, because they are not inconsistent with the act of 1884, any more than with sections 13 and 14 of the act of 1853.

Section 16 of the act of 1853 provides that between the 1st day of November and the 1st day of April inclusive, four dollars "shall be added to the full pilotage of every vessel coming into, or going out of, the port of New York." The previous sections 13 and 14 had determined what that "full pilotage" was; and as I regard the provisions of

sections 1 and 2 of the act of 1884 as a mere substitute for sections 13 and 14 of the former act, it follows that the provisions of section 16 of the act of 1853 remain in force.

The amount of pilotage allowed under both acts is to be computed according to the draft at certain rates "per foot." The practice under both acts has always been to recognize in the computation fractions of a foot, and to reckon to a half foot or to the even foot, to whichever the actual draft in inches might be nearest. In later years upon the demand of the Wilson line the proportions of a foot have been computed and allowed for according to the exact draft in feet and inches.

In the present case the bill was rendered to the master and approved, as for 26½ feet, the actual draft being 26 feet 5 inches. The usual practice is evidently one that carries out equitably the general intention of the law. I know of nothing that forbids computation for fractions of a foot; and the usual practice to make a rest at the half foot, and to compute the rates according to the even foot or the half foot, whichever is nearest the actual draft, is recommended by its practical convenience. The rule works in no way unjustly to the ship, or to the advantage of the pilots; and the difference between the results afforded by that rule and an exact proportionate measurement, is so small as to fall within the maxim *de minimis non curat lex*.

Decree for the libellant for the bill as rendered, with three dollars additional under sections 17 and 21 of the act of 1853, with interest and costs.

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THE ERASTINA.

THE ELM PARK.

HARRIS v. THE ELM PARK AND THE ERASTINA.

(District Court, S. D. New York. April 2, 1892.)

1. MARITIME LIENS—TOWAGE.

Towage services are presumptively a lien on the vessel. It is for the claimant to prove a personal credit only, or to show circumstances that negative a credit to the vessel.

2. SAME.

On the evidence in this case, held, that the towage services were rendered on the credit of the vessel.

In Admiralty. Libel for towage.

*Hyland & Zabriskie*, for libellant.

*Carpenter & Mosher and A. A. Wray*, for claimant.

BROWN, District Judge. The only point litigated is whether the towage service was a lien upon the boats. The service sued for was rendered upon several trips during the month of July, 1891. Similar services had been rendered prior to July under a contract with one

Symonds, who was not the owner of the boats; but Symonds paid the libelant in full up to the 1st day of July. In the month of June the owner of the scows by a written contract with Symonds agreed to take the place of Symonds in the business for which the scows were engaged, and to assume his obligations. The claimant desired the libelant to accept him in place of Symonds as respects the pay for towages, which the libelant, not then knowing that the claimant was the owner of the scows, refused to do, except upon Mr. Symonds' security. On the 11th of July, being informed that the claimant was the owner of the scows, and being told by the claimant that the scows should stand as security for his towage, the libelant agreed to deal with the claimant on the same terms as those on which he had previously dealt with Symonds, dating as from the 1st day of July, and therefore including the intermediate towages; but this agreement was on condition that the claimant should pay the libelant's bill against Symonds up to July 1st, for which the claimant then held a check from Symonds for the libelant's benefit, to which the claimant agreed; and at the same time the libelant released Symonds from his contract and from his personal liability for the previous towages. The claimant, however, instead of delivering to the libelant the check given him for the libelant's benefit, used it for his own benefit; and it was not until long afterwards that the libelant received from Symonds the amount due to him for towages up to the 1st of July. For this reason the written contract between the libelant and claimant, though drawn up, was never executed and delivered; but under the verbal arrangement above recited, the towages were continued upon the claimant's orders. Nothing has been paid on account, and this libel was filed for the towages after the 1st day of July.

Towage services are presumptively a lien upon the vessel. It is for the claimant to prove a personal credit only, or to show circumstances that negative a credit of the vessel. The evidence, however, leaves no doubt that the towages from and after July 11th were on the express credit of the scows. For such services as had been previously rendered between that date and the 1st of July, the claimant had given to the libelant his individual orders for the towage. The claimant was also not only the owner of the scows, but he was in fact the principal in the business for which the scows were used, since he had assumed Symonds' place under the contract previously executed with him. In addition to that, the evidence shows that on the 11th of July the claimant agreed that the scows should be security to the libelant for his towages between that date and the 1st of July, as well as for future towage; and on the faith of this agreement the libelant released Symonds from liability for the prior towages since July 1st. These circumstances are abundant grounds for a lien upon the scows for the services previously rendered between July 1st and 11th, whether there was already a lien therefor or not. The failure to execute and deliver the written contract drawn up between the libelant and the claimant, in consequence of the latter's wrong conduct, does not affect the libelant's claim or lien for what was actually done by him on the faith of the verbal agreement.

The disputed item for demurrage in June can no longer be litigated, as it was settled by Symonds; the item for demurrage in July is not established.

Decree for the libellant for the amount claimed, with interest and costs.

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WHITCOMB v. EMERSON *et al.*

(District Court, D. Massachusetts. April 12, 1892.)

1. **LIMITATION OF LIABILITY—FISHING VESSEL—"FREIGHT PENDING"—SEASON'S CATCH.**  
In the case of a fishing vessel run under an agreement by which the cost of repairs is deducted from the proceeds of the entire catch before division, a season's cruising is to be counted as a single voyage, and the earnings for the whole season's fishing are, equally with the vessel, liable for the cost of repairs contracted on the vessel's account. Hence, when such vessel was wrecked, and her owners, on suit by a material-man, claimed to limit their liability to the value of the wreck, *held*, that their liability was measured by the season's earnings added to the value of the wreck.
2. **SAME—PART OWNERS—"PRIVITY OR KNOWLEDGE"—ACT JUNE 26, 1884.**  
Where repairs were ordered by a ship-master, who was also one of three equal part owners of a vessel, without the privity or knowledge of the other owners, *held*, that the master was liable for the whole debt, and the other two owners were each liable for one-third of it, under Act June 26, 1884, § 18.

In Admiralty. Libel to recover the value of repairs furnished to respondents' vessel.

*Carver & Blodgett*, for libellant.

*Owen A. Galvin*, for respondents.

NELSON, District Judge. This case is a libel *in personam* by a material-man to recover \$165.35 for repairs furnished to the fishing schooner William Emerson, owned in equal shares by the three respondents, Emerson, Whalen, and Rhoderick. The repairs were furnished in the months of January and February, 1890, at Provincetown, on the credit of the vessel, to fit her for shore fishing during the coming season, and were necessary. After being fitted out, the vessel cruised during the entire season, making numerous trips, and selling her fares in the Boston market. The proceeds were divided between the owners and sharemen according to what is known as the "Provincetown lay," by which the costs of repairs is included in the great generals, and deducted from the entire catch in the first instance, before division. At the close of the season the vessel was sent to Provincetown, to be laid up for the winter, her value then being \$5,000. Instead of laying her up, as directed by Emerson, who was the managing owner, the respondent Rhoderick took her out on a fishing trip, and while out she was wrecked on Cape Cod. The wreck was sold for \$303.50. Other debts to a considerable amount are also outstanding against the vessel.

The act of June 26, 1884, (23 St. p. 57,) provides "that the individual liabilities of a ship-owner shall be limited to the proportion of any and all debts and liabilities that his individual share of the vessel bears

to the whole; and the aggregate liabilities of all the owners of a vessel on account of the same shall not exceed the value of such vessels and freight pending." By the act of June 18, 1886, § 4, (24 St. p. 80,) this section, and also sections 4282-4288 of the Revised Statutes, which contain other provisions for limiting the liabilities of ship-owners, are extended to all sea-going vessels, and this includes fishing vessels. The respondents Emerson and Whalen now offer to pay into court the sum of \$303.50, received from the sale of the wreck, and claim that upon such payment they should be exempted from further liability for all the debts of the vessel. But it is clear that this claim cannot be maintained. Their offer makes no allowance for the fares of fish caught and sold during the season. By the terms of the fishing contract, the cost of repairs should have been deducted from the proceeds of the fish caught and sold, and if this was not done, it was through no fault of the libelant. The season's cruising is to be counted as a single voyage, and the earnings during the whole season's fishing are, equally with the vessel, liable for debts contracted on the vessel's account. The amount of the earnings does not appear, and they must be presumed to exceed the debts. As there is no offer to pay the earnings into court, or to apply them to the payment of the debts, there is no exemption from liability from the debts under the statutes referred to.

It appears that the repairs were furnished upon the order of Rhoderick alone, who was also the master, without the privity or knowledge of the other owners, and not under any contract with them, except so far as the master had implied authority to bind them as part owners for necessities. As the liability of Emerson and Whalen for the repairs arises solely from their ownership of two-thirds interest in the vessel, and not on account of their personal intervention, the liability of each is limited to one-third of the debt, by section 18 of the act of 1884. *The Amos D. Carver*, 35 Fed. Rep. 665; *McPhail v. Williams*, 41 Fed. Rep. 61.

The libelant is entitled to a decree for the whole debt against Rhoderick, and for one-third of the debt against Emerson and Whalen, respectively, with costs; and it is so ordered.

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### THE STEAM TUG LUCKENBACH.

**LEWIS LUCKENBACH *et al.* v. THE GEORGIA and Claimants.**

(*Circuit Court of Appeals, Fourth Circuit. April 12, 1892.*)

#### **COLLISION—TUG AND STEAMER—RULE 19.**

A tug rounding Town point, in Norfolk harbor, under considerable speed, suddenly came in sight of a steamer just under way leaving her wharf, and heading out into the harbor towards Portsmouth. The steamer blew one whistle and kept her course. The tug replied with two whistles, and, putting her helm to starboard, attempted to cross the steamer's bow. The steamer promptly reversed, but could not avoid a collision. *Held*, that the tug, having the steamer on her starboard side, was governed by rule 19, (Rev. St. § 4233,) and bound to keep out of the way. *Held*, v.50f.no.1—9

that the danger of the situation arose from the speed of the tug while rounding a point which shut out of view vessels navigating the harbor beyond, and that it was this fault in her navigation which prevented her obeying the rule. *Held*, that the test of safe speed is whether it is such as allows the vessel to comply with the duty imposed upon her. *Held* that, the tug being clearly in fault in running at too great speed, and in failing to obey the rule, the burden was cast upon her to establish some fault on the part of the steamer contributing to the disaster, and, having failed to do so, the decree of the district court, holding her solely to blame, should be affirmed.

*(Syllabus by the Court.)*

Appeal from the District Court of the United States for the Eastern District of Virginia.

In Admiralty.

Statement by MORRIS, District Judge:

These were cross-libels filed by the owners of the steamer Georgia and the owners of the steam-tug Luckenbach to recover damages resulting from a collision in the harbor of Norfolk about 4 o'clock in the afternoon of May 9, 1891. The Georgia had just left her Norfolk wharf, and was proceeding southerly towards her wharf in Portsmouth. The steam-tug was coming down the river in a northerly direction. The collision occurred about 210 yards from the wharf, which the Georgia had just left, and both vessels were seriously damaged. The tug was cut into on her port bow about 30 feet from her stem, and the stem of the Georgia was broken and twisted over from port to starboard. The Georgia is a large passenger steamer, about 300 feet in length and 40 feet in breadth. The tug was built for ocean towing, and is 130 feet long and 25 feet in breadth. The libel of the owners of the Georgia states that the steamer was leaving her wharf on her regular route to Portsmouth, and was proceeding slowly, when the officer in charge saw the tug on his port bow passing close to a steamer lying at a wharf on Town point, which projects into the river; that he signaled the tug with one whistle and the tug answered with two whistles; that, seeing the tug was advancing rapidly, he blew danger signals, and reversed the Georgia's engine to avoid her, but the tug continued approaching under a starboard wheel, and ran violently across the Georgia's stem. The answer and cross-libel of the owners of the tug state that she was moving down the harbor, and heard one blast of a whistle as if coming from a steamer lying at a wharf below Town point and about to move from her wharf; that the tug starboarded and gave two whistles, meaning to go out further into the river; that immediately afterwards the tug passed a steamer lying at the wharf on Town point, and was then able to see the Georgia, which appeared to be hugging the western line of her wharf; that a few seconds later the Georgia was seen suddenly and rapidly to shoot out from her wharf into the stream, and continued to move rapidly in that direction until a collision was inevitable, notwithstanding the tug had put her helm hard a-starboard and had reversed her engines, and before the collision had overcome her forward motion. The district judge found that when the two steam-vessels came in view of each other they were both under way, and that the Georgia was on the



starboard side of the tug; that the situation was controlled by rule 19, (Rev. St. § 4233,) which required the tug to keep out of the way; that the tug attempted to do so by putting her helm to starboard and crossing the bows of the Georgia; and that her failure in the attempt and the consequent collision was due to the fact, which the court found, that while running in the harbor, and near the ends of the wharves, and when about to round a projecting point of land covered with buildings, which shut out her view, she maintained such an imprudent rate of speed that when she could see the Georgia she was so close and going so rapidly that it was doubtful, if not impossible, if any maneuver she could adopt would have enabled her to avoid the collision. The district court found that the Georgia had not been wanting in any proper precaution, and had done nothing to embarrass the tug, and was not in fault. A decree was entered awarding to the Georgia her full damages, and the owners of the tug have appealed.

*Robert M. Hughes*, for appellants.

*White & Garnett*, for appellees.

Before FULLER, Chief Justice, BOND, Circuit Judge, and MORRIS, District Judge.

MORRIS, District Judge, (*after stating the facts as above.*) The appeal proceeds upon the ground that the district court was in error in finding (1) that the speed of the tug was excessive; (2) in holding that the situation was such that rule 19 (Rev. St. § 4233) was applicable, and the Georgia the privileged vessel, and the duty cast upon the tug to avoid her. The appellants contend that the Georgia was moving as fast or faster than the tug, and so near to the wharves on the Georgia's port side that the tug could only avoid her by passing on her starboard side; that the tug attempted to do this, and gave a signal of two blasts, and put her helm to starboard, and would have succeeded had the Georgia done her part by promptly reversing; that because of the nearness of the wharves on the Georgia's port side, and the obstruction of the view by the projecting land called "Town Point," the situation was governed by the special instructions contained in rule 24, (Rev. St. § 4233:)

"In construing and obeying these rules due regard must be had to all dangers of navigation, and to any special circumstances which may exist in any particular case, rendering a departure from them necessary in order to avoid immediate danger."

The testimony contained in the record convinces us that the district court correctly found that the two vessels must have been approaching each other at the rate of 10 miles an hour, or nearly 300 yards in a minute, and we think the decided preponderance of testimony and the necessary inference from proven facts is that the tug was moving at a much greater speed than the Georgia. Aside from the weight of the direct testimony of witnesses apparently disinterested and not connected with either vessel, who state that the speed of the tug in passing Town point was so unusual as to attract attention, it must be conceded that the place of collision was only about 210 yards from the wharf from which the

Georgia had just cast off her stern line. She had been lying in the dock with her bow inshore, and had backed to the end of the dock, and upon a line fast to the end of the wharf had swung around until her bow was in the stream, when she cast off the line and started ahead. As the Georgia is 100 yards long, the distance to the place of collision was only about twice her length, and it is highly improbable, if not impossible, that she could have attained more than steerage way. Witnesses estimate that the tug, in passing Town point, was making 10 miles an hour, but it is, of course, unnecessary to determine how fast she was going to determine whether her speed was imprudent or not. The test of safe speed is whether it is such as allows the vessel to comply with the duty imposed upon her, and to avoid collision with other vessels in the situations in which she may reasonably expect to find them. *The Favorita*, 18 Wall. 598. On a calm, clear day, in a harbor not affected by current or tide, and not crowded, with nothing to embarrass her except the well-known projection in the outline of the wharves, the tug collided with a vessel not over two lengths from the wharf she had just been fast to, and the tug's defense is that coming around the curve she suddenly found herself in such a situation with respect to the other vessel that no sailing rules were applicable, and a collision was inevitable unless the other vessel at once backed into her dock. The explanation of the danger of the situation, in our judgment, is to be found in the imprudent speed of the tug while rounding so near to the wharves on Town point.

The testimony of the master of the tug is not reconcilable with the conceded facts. He testifies that just as he neared Town point he heard one blast of a whistle from around the point, indicating to him that some steam-vessel was casting off her lines to move from her wharf; that presently, when he had rounded the point sufficiently to see the Georgia, he saw her about 800 feet off, apparently lying at her wharf; that he blew two blasts and put his wheel a-starboard to go further out into the river, and saw the Georgia moving along parallel to the wharves and so close to them on her port side that the tug could not pass between her and them; that, notwithstanding his own original course was, as he claims, over 100 feet off from the wharves, and that under his starboard helm he changed his course six points, the Georgia changed her course and shot out into the river at a speed of at least four miles an hour, and ran down the tug. The statement that the Georgia was first seen apparently stationary, and then proceeding along the line of the wharves, cannot be reconciled with the fact that her bow was so quickly afterwards 200 yards out in the river, and there collided with the tug, which claims to have started from a point 100 feet from the wharves, and to have been running away from them under a hard a-port helm. The mate of the tug, who was at the wheel in the pilot-house, testifies that he heard the signal of one blast as they were rounding the point, and presently saw the Georgia coming out from her wharf, and then the tug blew two blasts, and starboarded her helm and stopped and reversed full speed astern; that when he first saw the Georgia her stern

was very near the wharf and her bows a little off in the stream, and apparently just beginning to move out; that she was on the tug's starboard bow, and appeared to keep her course; that she sounded danger signals soon after the tug blew two whistles. He claims, also, that the tug, at the moment of collision, had stopped her headway, and was nearly still in the water. This testimony of the mate of the tug supports the finding that the Georgia was heading out into the stream, and was just under headway, and was on the tug's starboard side when seen by her. It puts the two steamers in the position of crossing vessels with the Georgia on the starboard side of the tug, with a duty imposed upon the tug by rule 19 to keep out of the way. No doubt the tug did reverse, but the statement that she had lost her headway is refuted by the fact that by the collision the Georgia's bow was violently twisted from port to starboard. If, however, we were to adopt the view urged by the appellants, that although the Georgia was on the tug's starboard side this did not arise from the courses upon which the vessel was proceeding, but merely from the fact that the tug was rounding a projecting wharf, and that the two steamers are to be considered as vessels maneuvering at close quarters about the wharves of a harbor, not governed by rule 19, but each equally obliged to avoid the other, we are not able to see that the tug is placed in any better plight. Under such circumstances her speed would be still more imprudent. Special attention is directed to the caution required to be exercised in such a situation by the note to pilot rule 8:

"N. B. The foregoing rules are to be complied with in all cases except when steamers are navigating in a crowded channel or in the vicinity of wharves; under such circumstances steamers must be run and managed with great caution, sounding the whistle as may be necessary to guard against collision or other accidents."

The appellants invoke rule 24 (Rev. St. § 4233) as justifying their not obeying rule 19, but it is apparent, we think, that the only danger of navigation was created by the tug rounding Town point, with notice that a vessel was leaving her wharf, at such a rate of speed that she was unable promptly to control her movements, and was obliged to attempt to run across the other vessel's bows. Further discussion is unnecessary to show that the district court was right in holding the tug in fault.

The appellants contend that the Georgia was in fault in that (1) she did not back promptly as soon as there was risk of collision; (2) that she had no proper lookout; (3) that her signal of one whistle was improper. It is true that the specially designated lookout of the Georgia was aft, attending to taking in the stern line on which the steamer had swung around into the river, but there is no ground for the contention that the tug was not seen by the first officer and by the quartermaster in the wheel-house as soon as she could be seen around the bows of the steamer which was lying up stream at the Town point wharf. The steamer had just then started ahead, and she at once blew a signal of one whistle as soon as they saw the tug, having previously given a short blast when the line was to be cast off. The signal of one whistle must

have been given as soon as it was possible for those on the Georgia to see the tug, because it was heard by the officers of the tug before they fully saw the Georgia. The collision cannot, therefore, be attributed to the want of a special lookout on the Georgia. When the signal of one whistle was given by the Georgia she was gathering headway on her course, which was about S. by W., while the tug was apparently on a course about N. W. by N., and about 300 yards off on the Georgia's port bow. It was the duty of the Georgia to hold her course, and the signal of one whistle meant that her course was to starboard with reference to the tug, and away from the wharves, and that she would keep it. As the space between the Georgia and the wharves was constantly widening, there was no reason for those in charge of her to suppose that, if the tug was going at a prudent speed, there would not be space between the Georgia's stern and the wharves for the tug to pass. There was nothing, therefore, misleading in the signal. Those in charge of the tug were not misled by it, but, after hearing it, and before they fully made out the movement and course of the Georgia, starboarded and blew their signal of two whistles. It was then that the danger of collision was first apparent to those on the Georgia, and they promptly reversed her engines full speed astern. The appellants contend that the direction of the cut into the tug's bow shows that the tug, at the time of collision, had stopped, and that the Georgia was going ahead, and therefore had not promptly reversed, but the direct proof is too strong to be overcome by inferences drawn from the testimony on that subject. The immediate and primary cause of the collision was the imprudent speed of the tug and her want of caution in rounding Town point so close to the wharves. The burden is upon her to establish some fault or neglect on the part of the Georgia contributing to the disaster, and this, we agree with the district court, the appellants have not succeeded in doing. The decree of the court below is affirmed, with interest and costs of the appeal to be paid by the appellants.

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### THE DORIS ECKHOFF.

LOUD *et al.* v. THE DORIS ECKHOFF.

(Circuit Court of Appeals, Second Circuit. January 13, 1892.)

#### **COLLISION—TUGS AND TOWS—RESPONSIBILITY OF TOW.**

A bark and a schooner were each on a hawser in tow of a tug in the East river. Each tow had her master and crew aboard, who, however, were not taking charge of her navigation, but, on the contrary, were receiving and obeying orders from the tugs, and each tow was following in the wake of her tug. The tugs, however, were not proceeding in the middle of the East river, as required by statute, but were near the shore. The bark and the schooner came in collision by reason of fault on the part of the tugs, neither the bark nor schooner doing anything to contribute to the collision. *Held*, that the tows were not chargeable with participation in the fault of the tugs in navigating in a forbidden part of the river. 83 Fed. Rep. 555, affirmed.

In Admiralty. Appeal from a decree of the circuit court of the United States for the southern district of New York, affirming *pro forma* a decree of the district court for said district, which held in fault both tugs and both tows for the collision described in the opinion. 32 Fed. Rep. 555. And see 41 Fed. Rep. 156. Both tows appealed to this court, the tugs not appealing. Reversed.

*George A. Black*, for libelants, appellants.

*Goodrich, Deady & Goodrich*, (*William W. Goodrich*, of counsel,) for claimants, appellants.

Before WALLACE and LACOMBE, Circuit Judges.

LACOMBE, Circuit Judge. On the morning of March 8, 1886, about 10 o'clock, a collision occurred between the bark *Doris Eckhoff*, in tow of the tug *R. S. Carter*, and the schooner *C. R. Flint*, in tow of the tug *John G. Stevens*. The damage to the *Flint* and cargo was about \$12,000 to \$13,000; to the *Eckhoff*, about \$300. The *Flint* brought action against the bark and both tugs. The tugs were not attached, on account of their leaving the jurisdiction, and the marshal only seized the bark. On petition of the owners of the bark, the owners of the tugs *Sherman* and *Hughes* were made respondents, and brought into this action. These two were the joint owners of both tugs, and *Sherman* was master of the *Stevens*, and in charge of her navigation at the time of the collision. After the escape of the tugs from the jurisdiction, they were libeled in Brooklyn, and made default, but lienors for supplies intervened, and contested the priority of the liens, and libelants collected, after a long litigation, from the proceeds of the *R. S. Carter*, about \$2,000. All claimed the benefit of the limitation of liability provided by section 4283, Rev. St. U. S.

The day was fine, with but little wind. The tide was strong flood. The bark, in tow of the *Carter*, on a hawser of 40 fathoms, was going down in the eddy, close to the New York shore. The schooner, in tow of the *Stevens*, on a hawser of 40 fathoms, was going up the East river, about one third of the distance from the New York shore. The river makes a bend at *Corlear's Hook*, which may be roughly stated to extend from Grand street to Jackson street. On the flood tide there is an eddy which commences at Jackson street, and extends, in a V shape, up to Grand street ferry, where it is from 250 to 300 feet wide. The true tide, outside that, runs with great strength, four or five miles an hour, and is broken up into what some of the witnesses call "whirling pools" or eddies, which vary with different conditions of tide and wind, so as to render the navigation of this part of the river somewhat hazardous,—a fact well known to navigators in these waters. The several expert witnesses for both sides testify that the safest course for a vessel coming down the river under these circumstances is to keep out in the middle of the river, so as to avoid striking this tide with the starboard bow. The *Carter* and her tow rounded the bend of the river, passing through the slack water, and, as the bark reached the true tide, she took a rank sheer to starboard, and came into collision with the *Flint*. The district

judge held all four vessels in fault, and the owners of the bark and of the schooner have appealed. As the district judge held both tugs in fault, as neither of them has appealed, and as no one suggests that they were not in fault, that proposition may be accepted without any further discussion of their navigation than such as may be necessary to determine the question raised on this appeal. The answer of the bark charged the schooner with fault, in that, seeing a collision imminent, she did not port her wheel. We do not find in the evidence sufficient to sustain this charge. On the contrary, she did port her wheel, and thus endeavored, though unsuccessfully, to avoid collision. That she was not so far over towards mid-river as to be out of the way of the Eckhoff was a consequence of the navigation of her tug. The district judge, however, held the schooner, because both tug and schooner were not more than one third of the distance from the New York shore, instead of being in mid-river, as required by the state statute, (chapter 321, p. 450, Laws 1848,) in other words, because "she was navigating in an unlawful place." Her master and crew were aboard. She was being moved through the harbor under the ordinary contract of towage, by which "the owners of the tow do not necessarily constitute the master and crew of the tug their agents in performing the service, as they neither appoint the master of the tug, nor employ the crew, nor can they displace either one or the other. Their contract for the service, even though it was negotiated with the master of the tug, is, in legal contemplation, made with the owners of the vessel employed, and the master of the tug continues to be the agent of the owners of his vessel." *The Clarita*, 23 Wall. 11. So far as the proper navigation of the tow itself is concerned, the law is abundantly settled that she is bound to follow the guidance of the tug, to keep in her wake, and conform to her directions. *The Margaret*, 94 U. S. 494. This the schooner did. The district judge, however, held that the master and crew of the schooner were participating in the navigation, and in fault for not controlling the movements of the tug to the extent of requiring her to proceed in mid-river, either by ordering her to do so, or by endeavoring to swing her over in that direction by altering the helm of the Flint, irrespective of the heading of the tug; that there was "at least an acquiescence on the part of the master of the schooner in the illegal course taken by the tug;" and that as he was present, with his crew on board, steering after the tug, he must be held to have participated in the navigation on that course. We do not find that this proposition is supported by the authorities. The tug was, in fact, under the command and direction of her own master, and received no orders or directions from those on board the Flint. On the contrary, those on the tow received and obeyed orders from the tug. We are unable to distinguish this case from that of *The John Fraser*, 21 How. 184. In that case the Fraser was in tow of the steamboat General Clinch, which navigated with her into such dangerous proximity to an anchored vessel that, upon casting off the hawser, the Fraser was unable to avoid collision. Although she had her master and crew on board, and was attending to

her own helm, she was not held to be participating in the navigation. The court said:

"According to the usage of trade at that port, she engaged a steamboat, well acquainted with the harbor and its usages, to bring her in. \* \* \* The General Clinch was \* \* \* under the command and direction of her own pilot. \* \* \* She could select her own course and her own rate of speed. \* \* \* When fastened to the hawser, and in tow, the Fraser was controlled entirely by the steam tug, both as to her course and speed. The steamboat was not subject to the orders of the commander of the John Fraser, but was altogether under the control and direction of her own commander. \* \* \* The Fraser could do nothing more than watch the motions of the steamboat, and use her own rudder, so as to keep as nearly as might be in the wake of the tug to which she was attached."

—And held that the collision was not caused by any fault or negligence on the part of the Fraser, and that she was not answerable for the consequences of the improper navigation of the Clinch. We do not find any qualification of the rule laid down in this case in any subsequent decision.

In *Sturgis v. Boyer*, 24 How. 110, the vessel in tow had on board only her mate and a gang of stevedores, and was held not in fault for a collision. The court said:

"Cases arise undoubtedly when both the tow and the tug are jointly liable for the consequences of a collision, as when those in charge of the respective vessels jointly participate in their control and management, and the masters or crews of both vessels are either deficient in skill, omit to take due care, or are guilty of negligence in their navigation. Other cases may well be imagined when the tow alone would be responsible; as when the tug is employed by the master or owners of the tow as the mere motive power to propel their vessels from one point to another, and both vessels are exclusively under the control, direction, and management of the master and crew of the tow. \* \* \* But whenever the tug, under the charge of her own master and crew, and in the usual and ordinary course of such an employment, undertakes to transport another vessel, which for the time being has neither her master nor crew on board, from one point to another, over waters where such accessory motive power is necessary or usually employed, she must be held responsible for the proper navigation of both vessels; and third persons suffering damage through the fault of those in charge of the vessels must, under such circumstances, look to the tug, her master or owners. \* \* \* Assuming that the tug is a suitable vessel, \* \* \* so that no degree of negligence can attach to the owners of the tow on the ground that the motive power employed by them was in an unseaworthy condition, the tow, under the circumstances supposed, is no more responsible for the consequences of a collision than so much freight; and it is not perceived that it can make any difference in that behalf that a part, or even the whole, of the officers and crew of the tow are on board, provided it clearly appears \* \* \* that from the nature of the undertaking, and the usual course of conducting it, the master and crew of the tow were not expected to participate in the navigation of the vessel, and were not guilty of any negligence or omission of duty by refraining from such participation."

In *The Mabey and Cooper*, 14 Wall. 204, the tow was held in fault as well as the tug; but the ship in that case ordered the tug to take her to sea in an unfavorable state of the wind and tide, and when navigation was dangerous, and the tug consented to go to sea only upon the ship's

owners insisting upon the towing, and upon their agreeing to take the risk of all accident, the collision being a direct consequence of this improvident action, as the ship was unexpectedly caught in an immense field of floating ice, which, in spite of the power of the steam tug, swept her against libelants' ship. "Want of due care," said the court, "is shown in the fact that the ship went to sea at a moment when \* \* \* it was not safe, in view of the condition of the weather and tide."

In *The Virginia Ehrman*, 97 U. S. 309, the tow was held in fault, not for navigating with the tug in too close proximity to anchored dredges, but because she might herself have prevented the collision by a timely starboarding of her own helm.

In *The Civitta*, 103 U. S. 699, 701, the ship had a pilot on board, and it was expressly found as a fact that the tug was subject to his orders. He was in general charge of the navigation of both vessels, and the court held the ship in fault because he failed to give the necessary directions to the tug to avoid approaching danger. See, also, *The Connecticut*, Id. 710; *The Clarita*, 23 Wall. 1; *Jackson v. Easton*, 7 Ben. 191; *The Galileo*, 28 Fed. Rep. 469.

We are therefore of the opinion that the *Flint* can no more be held responsible for faulty navigation, because she followed the course of the tug, and did not undertake to direct its movements, though that course lay, not through mid-river, but east of it, than was the *John Fraser*, because, with her master, helmsman, and crew on board, she followed without undertaking to direct the course of her tug, although that course led her into dangerous proximity with an anchored vessel; and, as no maneuver or omission of her own is shown to have contributed to the collision, we find her free from fault.

For the same reasons, we do not find the *Doris Eckhoff* in fault, because she followed the course of the *Carter*, without undertaking to direct or control it, although the collision was undoubtedly caused by the fact that the course selected by the *Carter* was too close to the New York shore, where her tow was exposed to the effect of tidal currents, which might have been avoided had tug and tow been navigating in the middle of the river. The *Doris Eckhoff* gave no orders to the tug, but, on the contrary, received and obeyed orders from her. The further charge in the libel that the *Carter* was not sufficiently powerful to handle the *Eckhoff* is not borne out by the proof. But it is also contended that improper handling of her own helm co-operated with the set of the tide to cause the sheer which brought her into collision with the *Flint*. The testimony upon this branch of the case is conflicting. Two witnesses, who were on a third tug (the *Allen*) going up ahead of the *Stevens*, testify that the rudder blade of the *Eckhoff*, at the time she took the sheer, was pointing to the port quarter, that is, that she was under a hard astarboard helm, and that it so continued down to the very moment of collision. This last statement is inherently improbable, and was not credited by the district judge, who finds that her helm was ported, but too late to be effectual to avoid the *Flint*. The bark was drawing 14 feet of water, and they claim to have noticed the position of its blade at





a distance of 400 or 500 feet. The very extent of the sheer to port may have led them to infer that her helm must have been hard astarboard. Moreover, there is a suggestion of unfriendly feeling between one of them and the captain of the Doris Eckhoff. We are therefore inclined to give credence rather to the circumstantial statement of the captain and helmsman of the Eckhoff than to the evidence of these two independent witnesses. *McNally v. Meyer*, 5 Ben. 239; *Steamship Co. v. Rumball*, 21 How. 372.

The weight of evidence satisfies us, as it did the district judge, that, after rounding the bend in the river, the Carter, of her own volition, and not through the effect of the cross tide, headed towards the Brooklyn shore, (which is a customary maneuver with vessels making the turn so close to the New York shore,) intending to pass just astern of the Flint, and that, noticing this maneuver, the Eckhoff starboarded to follow her, while herself still in the slack water. While the Carter, no doubt, was in fault, for thus sheering sooner than she should have done, with the Flint so near to herself and her tow, we are not satisfied that the Eckhoff was in fault for following her, in view of the well-settled rule which requires vessels in tow to conform their movements to those of their tugs. *The Galileo*, 28 Fed. Rep. 469. We are further satisfied that, at the moment her bow touched the flood tide, her wheel was heaved hard aport, and kept so, which was proper navigation. That such porting did not operate to counteract the set of the tide was due in part to the fact that it is so strong in that part of the river that, as one of the claimants' expert witnesses testified, it would carry her over towards Brooklyn three or four lengths, no matter how carefully her helm was attended to, but chiefly because, as the tug entered the true tide, its headway was checked, and the hawser slackened, depriving the bark of the assistance she would otherwise have had in checking her sheer. That she was in that part of the river was, as we have found, the fault of the Carter, with participation in which she is not chargeable; that she followed the tug while in the slack water was her duty under the law; and that, as she ran into the true tide with its powerful cross set, she at once hard aported, as she should have done, we are satisfied from the proof. The other averments of fault on the part of the Eckhoff, viz., that she was not properly manned, did not keep a proper lookout, did not anchor, and employed a tug not sufficiently powerful to tow, are not sustained by the proof. We therefore find the Doris Eckhoff free from fault.

The decree of the circuit court is therefore reversed, and the case remanded, with instructions to decree in accordance with the views expressed herein, with costs of the district court to the Flint against the respondents, and no costs of the circuit court or of this court to either appellant as against the other. It should be noted, further, that, as the owners of the Eckhoff filed no libel or cross libel demanding damages, none can be awarded to them; and that as Sherman, who was part owner of the Stevens, was master of her at the time of the collision, he is not entitled to any limitation of liability as respects her share of the loss.

## THE MARTHA BOGART.

MANNING *et al.* v. THE MARTHA BOGART.

(District Court, S. D. New York. March 25, 1892.)

## COLLISION—STEAM AND SAIL MEETING—MISSING STAYS—DRIFTING.

A tug with a tow on a hawser coming down the East river below Corlear's Hook, and working over to the Brooklyn shore, saw ahead of her a schooner beating up stream, and moving towards the Brooklyn side. The tug thereupon gave several whistles, and, going close inshore, came to a stand-still along-side of some boats at the end of a pier. The schooner tacked about 100 feet ahead of the tug, and passed the tug safely, but, losing control of herself, drifted up some 800 feet further, and collided with the tow while lying at rest against another boat, along-side a wharf. *Held*, that the tug was not liable for the collision.

In Admiralty. Libel for collision.

*Carpenter & Mosher*, for libelants.

*Hyland & Zabriskie*, for claimant.

BROWN, District Judge. In the afternoon of October 21, 1891, as the libelants' schooner John Brill was beating up the East river in the flood-tide against a northerly wind, she tacked about opposite Catherine street ferry on the Brooklyn side, or a little below, but came about so slowly that before filling away she drifted with the flood-tide at least 400 feet up to Adams street, where her stern struck a square-headed barge in tow on a hawser from the Martha Bogart, and received some damage, for which this libel was filed.

The Bogart was coming down river, and passing Corlear's Hook in about mid-river, worked over to the Brooklyn side to pass a tug with a couple of vessels along-side off Jay street, and then noticed the libelants' schooner two or three blocks distant heading towards the Brooklyn shore. To avoid coming in contact with the schooner, and in order to go under her stern after she should have tacked from the Brooklyn shore, which she would very soon do, the tug gave several toots of her whistle, hauled in close to the Brooklyn docks, and came to a stand-still immediately along-side four coal-boats at the end of the Washington-Street pier, while the tow came to a stand-still against the end of a canal-boat projecting only 15 feet from the Adams-Street pier. The schooner tacked about 100 feet below and ahead of the tug, and in passing upwards in stays cleared the tug by about 15 feet; but losing control of herself, drifted some 300 feet further against the barge, which, as above stated, was at rest against a coal-boat and only 15 feet from the pier.

The libelants' action is founded upon alleged fault of the tug in not avoiding the schooner. But the tug for the purpose of avoiding the schooner had stopped her navigation and come to a stand-still, in effect making a landing both for herself and for her tow along the ends of the piers. It would scarcely be contended that had the Adams-Street pier been the destination of the barge, the tug would have been in fault for stopping and landing her there precisely as was done in this case; or

that the tug would have been liable for the subsequent drifting of the schooner against her tow. Her landing there was neither forbidden nor imprudent. The drifting of the schooner some 400 feet or more in making her tack was certainly a most unusual occurrence, and beyond anything that the master of the tug was bound to anticipate, or to provide against. It was evidently as unexpected by the schooner, as by the tug, and was in no way caused by the tug.

Considering the difficulties of avoiding vessels beating across the narrow channel of the East river above the bridge in a strong tide, by a tug having a tow upon a hawser, and the actual liability to collision in this case had the tug kept towards the New York shore in the uncertainty that attended the schooner's course, it seems to me that the course actually adopted by the tug was the one which, upon all reasonable expectations, offered the freest course to the schooner, and was most likely to avoid collision. It violated no rule of law, and it seems to me not open to the charge of fault or bad judgment.

The accident seems to me due to the perils of East river navigation; namely, (1) the presence of another tow in mid-river, compelling the schooner to make her previous tack there; (2) the presence of a sloop between that tow and the Brooklyn shore, which served to delay the schooner's last tack; and (3) some conditions attending her final tack not satisfactorily explained by the schooner, the result of which altogether was that she lost control of herself, and drifted in the flood-tide in a manner most unusual and not to be anticipated by the tug, against the barge at rest near the piers 400 feet distant. This was, I think, the schooner's risk and not the tug's.

I must find that those facts do not amount to negligence in the tug, and the libel should, therefore, be dismissed, with costs.

## THE HELEN KELLER.

## THE CONTINENTAL.

CHANDLER *et al.* v. THE CONTINENTAL.

## NEW HAVEN STEAM-BOAT CO. v. THE HELEN KELLER.

(District Court, S. D. New York. April 2, 1892.)

## COLLISION—STEAM AND SAIL—OVERTAKING STEAMER—LUFF—LOOKOUT.

A schooner westward bound, in Long Island sound, ported and went to the northward upon the anchorage ground south of Westchester creek, for the purpose of coming to anchor. A steamer was coming up astern, and overtaking the schooner. The latter, at the time she ported, was 400 or 500 yards distant from the steamer, nearly ahead, and not over one and one-half points on the latter's port bow. Not recognizing the intention of the schooner to anchor, the steamer also ported, and the vessels came into collision within the anchorage ground, and outside of the steamer's ordinary course. *Held*, that the porting of the schooner presented no difficulty to the steamer, had she been properly observed and timely measures taken to go astern, and that the steamer was solely in fault.

In Admiralty. Cross-libels for damages occasioned by collision.

*Wing, Shoudy & Putnam* and *Mr. Burlingham*, for the *Helen Keller*.  
*A. C. Chapin* and *Mr. Kelly*, for the *Continental*.

BROWN, District Judge. In the afternoon of October 23, 1890, in rainy weather and a strong east wind, as the schooner *Helen Keller*, westward bound in Long Island sound, was turning to the northward and eastward into the cove off the mouth of Westchester creek, a few hundred feet to the westward of Old Ferry point, she came into collision with the steam-boat *Continental*, also bound westward and overtaking her; both vessels suffered damages, for which the above libel and cross-libel were filed.

The *Continental* had been previously going at the rate of about 11 knots; the *Keller*, at the rate of about 6 knots. The *Continental* passed Old Ferry point somewhat nearer the shore than the schooner passed; but there is so much difference in the estimates of the different witnesses, that I am unable to determine the distance with any precision, nor does it seem to be material to do so. Shortly before the schooner luffed to the northward in order to go to her anchorage ground, the course of the *Continental* had been directed half a point to the northward of her usual course, for the purpose of passing the schooner on that side. Several of the *Continental's* witnesses, including the master who was in the best place for observation, testify that at the time when they observed the schooner luffing across the course of the *Continental*, the schooner bore about one point and a half on the *Continental's* port bow. The officers of the latter estimate the schooner at that time to be only five or six hundred feet distant. The witnesses on the schooner say that they were from a quarter to a half mile ahead of the *Continental*; and that the *Continental* was so far behind that there

was plenty of room for her to go to the southward and astern of the schooner. The officers of the *Continental*, on the contrary, contend that they were so near the schooner that there was no room for them to go astern, and that their only course was to hard a-port, which they did, hoping that the schooner would keep off, and that nothing more than a harmless side-long blow would ensue. The *Continental* also stopped her engines for a short time, but then went ahead again. The collision was at about right angles; and very soon afterwards, as all the witnesses agree, both vessels went ashore on the flats.

The circumstances leave no doubt that the place of collision was within one of the anchorage grounds prescribed by the secretary of the treasury in the East River under the act of congress approved May 16, 1888; namely, "On the north side of the channel, north of a line between Old Ferry point and Hunt's point." The flats where the vessels grounded were over 600 feet to the northward of the prescribed line; and as the vessels, according to the testimony of the witnesses, could not have drifted that distance after the collision before grounding, it is evident that the collision took place within the limits of the anchorage ground to which the schooner had a right to go. As by the ordinary rules the overtaking steamer was bound to keep out of the schooner's way, the only material question is, whether when the schooner turned to go to the anchorage ground, there was reasonable room for the steamer to avoid her without going within the anchorage limits.

The circumstances show that the estimates of the schooner's witnesses as to the distance of the *Continental* when the schooner luffed, must be more nearly correct than the estimates of the steamer's witnesses. There is much less liability to mistake in the officers' estimate of the *bearing* of the schooner off their port bow than of the number of feet between them. The estimate to which the master of the *Continental* testifies, that the schooner, when he observed her luffing, was 400 or 500 feet off to port of his own course, and from 400 to 600 feet ahead of him, is altogether inconsistent with the bearing stated by him. Upon a bearing of a point and a half to port, the most to port stated by any of the witnesses, the schooner must have been three and one-quarter times as far ahead as she was to port. Supposing her to have been 400 feet to port of the schooner, the smallest distance estimated, her distance ahead must, therefore, have been 1,300 feet, or about a quarter of a statute mile. If she was 500 feet to port, she must have been considerably more than a quarter of a mile ahead. If, however, she bore only one point off the port bow of the *Continental*, and was only 225 feet to port of her, as estimated by Frye, a disinterested witness and captain of the schooner *Olive* nearly abreast of the *Continental*, she must still have been over 1,000 feet ahead of the *Continental*. Frye testifies further that the schooner was directly ahead of him and 400 or 500 yards distant from the *Continental* when she luffed.

The collision was at nearly right angles; and the *Continental* was then heading about N. N. W. It follows that the latter must have changed her course about five points and a half, and the schooner,

about 13 or 14 points. Assuming that the schooner had changed two points before her luffing was discovered by the steamer, when the helm of the latter was put hard a-port, the schooner must have changed about 11 or 12 points while the Continental was changing about five points and a half. Such a change by a steamer of the size of the Continental, some 300 feet long, could not in ordinary experience be made in going less than from 1,000 to 1,500 feet; and the schooner in turning nearly a semi-circle, aided by the flood-tide which there runs to the eastward, herself also approached the steamer before collision. Moreover, the schooner, according to the testimony of the steamer's witnesses, must have been at least 500 feet outside the line running from Old Ferry point to Hunt's point when she began to luff, and according to her own testimony, still more than that. In traveling her semi-circular course to the place of collision, she must have run from 900 to 1,000 feet; and as her speed was diminishing all the time, she must have occupied about one and a half minutes at least; and the steamer during this interval could not have gone less than 1,200 feet.

From the direct testimony, therefore, as well as from the circumstances of the navigation, I have no doubt that when the schooner was seen to be luffing to the northward, she was at least 400 or 500 yards distant from the steamer, and nearly ahead of her, as Frye testifies. In this situation the luffing of the schooner to go to her anchorage ground presented no difficulty to the steamer in the performance of her duty to avoid the schooner, had the latter been properly observed, and timely measures taken to go astern of her. There was no breach of duty on the part of the schooner, therefore, in luffing when she did. Had the steamer even kept her course instead of following up the schooner to starboard, she must inevitably have gone astern of the schooner, as Frye also testifies. For the steamer was not going at twice the schooner's speed, and she could have slowed if necessary; while with a little star-boarding of her wheel, which there was nothing to prevent, she would have given the schooner a wide berth.

The only explanation suggested why the steamer went to the northward instead of the southward is, that she misconceived the schooner's purpose; and this seems certain from the fact that when the order hard a-port was given, the officers did not suppose the schooner was going to anchor. They all testify that they had not observed the taking in of a number of the schooner's sails, which had been going on for some time previous, though this had been noticed by Frye on the Olive, and the intent of the schooner to anchor recognized by him. As there was no necessity for the steamer to take the course to the northward, and as that course carried her, moreover, upon the schooner's anchorage ground, and out of the way of the steamer's proper and natural course, a deviation which the schooner had no reason to anticipate, I must find the schooner exempt from blame, and the fault to rest with the steamer alone. A decree may be entered accordingly, with costs.

LEOPOLD v. GODFREY *et al.*

(Circuit Court, N. D. Illinois. January, 1882.)

## 1. EXECUTIONS—LEVY AND LIEN—STATE AND FEDERAL COURTS.

Where two executions issue from the state and federal courts, respectively, it makes no difference that the former was first placed in the hands of the officer, as the latter, under which levy is first made, will hold the property, there being no lien by either judgment.

## 2. SAME—CLAIMS OF LANDLORD.

In Illinois, where the landlord has no lien upon the personal property of his tenant for rent before the actual levy of his distress warrant, he is not entitled to claim against a prior levy under execution.

In Equity. Bill to set aside a sale of personal property in fraud of creditors. Decree for complainant.

The facts in this case were that the complainant, Leopold, on March 4, 1880, recovered a judgment in this court for \$3,588.54 and costs against Stephen R. Godfrey. The execution was delivered to the marshal, and a levy was made on a stock of goods in a store at Rockford, which had belonged to and been in the possession of Godfrey up to February 28, 1880, when he had made a pretended sale and delivery to his son, William H. Godfrey, and William B. Shaut, who had been an employe. The bill charged that this sale was fraudulent and void, and prayed that it be set aside, and the property applied to the payment of complainant's judgment. Then Mary A. Godfrey, wife of Stephen R. Godfrey, filed a cross bill, alleging that she had recovered a just judgment March 1, 1880, against her husband, in the Winnebago county circuit court, for \$3,500, and issued execution on the same day to the sheriff of that county; that her execution was a lien on the property from the date of its receipt by the sheriff, and a prior lien to that of the federal court judgment; and she therefore prayed that the amount of her execution be first satisfied. Jonathan Peacock, the landlord of the Godfrey store, also filed a cross bill, claiming \$187.50 rent under a written lease dated March 1, 1878. He claimed that under this lease he had a first and valid lien on the property.

*Tenney, Flower & Cratty*, for complainant.

*E. H. Baker*, for Mary A. Godfrey.

*N. C. Warner*, for Jonathan Peacock.

*C. M. Brazee*, for Godfrey and Shaut.

BLODGETT, District Judge. The evidence satisfies me that the sale by Godfrey to his son and Shaut was void for want of consideration; no cash having been paid, and the \$6,000 worth of notes which were given not having been taken up. It will therefore be set aside as a fraud upon the creditors.

As to Mrs. Godfrey's claim, the rule is well settled that when executions issue from the state and federal courts, if there be no lien by the judgment, the one under which a seizure is first made must prevail, and hold the property. Here there was no lien by virtue of the judgment,

and, as the liens of sheriff and marshal were concurrent, the one who perfected his lien by actual levy, as did the marshal, must hold. The cross bill of Mrs. Godfrey must therefore be dismissed.

As to Peacock's claim for rent, the law in this state is that the landlord had no lien, under the statute or the covenants in his lease, upon the personal property of his tenant prior to the actual levy of his distress warrant. As the levy of the marshal was prior to that of the landlord, Peacock's cross bill must also be dismissed. The goods having been sold in the mean time under an interlocutory order, and the proceeds paid into court, a decree will be entered that the fund, less costs taxed, be paid to the complainant.

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UNITED STATES *v.* MEEKER.

(*Circuit Court, D. Washington, W. D.* March 23, 1892.)

**TIMBER LAND—CANCELLATION OF PATENT—EVIDENCE.**

A timber-land patent will not be canceled on the ground that the lands are not in fact timber lands, when the evidence merely renders it doubtful whether they can properly be so classed.

In Equity. Suit in equity to cancel a patent for a tract of land purchased from the United States as timber land under act of June 3, 1878, entitled "An act for the sale of timber lands in the states of California, Oregon, Nevada, and in Washington Territory," (1 Supp. Rev. St., 2d Ed., 167,) on the ground that said tract is not in fact timber land, nor subject to sale under the provisions of said act. Bill dismissed.

*P. C. Sullivan*, Asst. U. S. Atty.

*W. H. Pritchard*, for defendant.

HANFORD, District Judge. A number of witnesses have been called on both sides, and have testified as to the character of the land involved in this suit, all of whom appear to be men of good repute, well informed, and credible. There is no conflict in their statements of facts, but in matters of opinion and estimates they differ. From all the evidence I conclude that the land is of such character that honest persons, capable of estimating the value of land, for agricultural purposes or for its timber, may honestly differ in their opinions upon the question whether said land is chiefly valuable for the timber thereon, and unfit for cultivation, or otherwise. Part of the tract is good land, capable of being made productive, and, by reason of its location, is certainly valuable simply as agricultural land. Other portions, however, belong to the class of lands generally regarded in this country as unfit for cultivation, and in fact they cannot be profitably brought under cultivation, except by a gradual process, requiring years of time. The tract, as a whole, is valuable for the timber it contains. The witnesses who have gone over it and made



careful estimates have testified that the whole tract (160 acres) will yield at least 5,000,000 feet of merchantable lumber, besides an indefinite quantity of fire-wood and fencing material. If the proofs before me were taken for the purpose of determining originally the question as to the proper classification of the land, it would be difficult to determine therefrom whether or not the land is subject to sale under said act as timber land. But in this suit to cancel a patent a different rule must be applied. A United States patent is the highest evidence of a good title to land in this country. Confidence in such evidence ought not to be impaired by the action of courts in annulling and setting aside such conveyances for trivial reasons, or when the evidence is not sufficient to establish clearly the invalidity thereof. In the case at bar the evidence leaves the issue in doubt; therefore it is the duty of the court to uphold, rather than annul, the action of the land department in selling the land to the defendant, and conveying the title to him by a patent. *U. S. v. Budd*, 43 Fed. Rep. 630; 12 Sup. Ct. Rep. 575. A decree dismissing the suit for the reason that the evidence does not sustain the averments of the bill will be entered.

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UNITED STATES *ex rel.* SPITZER *et al.* v. TOWN OF CICERO.

(Circuit Court of Appeals, Seventh Circuit. March 8, 1892.)

1. TOWNS—TAX LEVY—INTEREST ON BONDS.

Act Ind. March 11, 1867, authorized corporated towns to raise money by issuing bonds, and to levy an annual tax in addition to the levy for general purposes, not exceeding 50 cents on each \$100 worth of taxable property and \$1 on each poll, to pay for the same. Act June 11, 1852, authorized town trustees to levy an annual tax for general purposes, not exceeding 50 cents on each \$100 of taxable property and 25 cents on each poll. Act 1852, § 80, provides that town trustees shall levy a tax "to such an amount as they may deem necessary." *Held*, that a town which had levied and properly applied the full amount of taxes authorized by the first two statutes aforesaid could not be compelled to make any additional levy to pay a judgment recovered for interest on bonds issued under the first act.

2. SAME.

Act Ind. 1852, § 27, which provides that town trustees shall add to the tax duplicate of each year a levy sufficient to pay the annual interest on, and create a sinking fund for any debt contracted upon petition of the citizen owners of five-eighths of the taxable property of the town, does not authorize the levy of a tax to pay interest on bonds issued under a different statute, and not on petition of property owners.

Error to the Circuit Court of the United States for the District of Indiana.

Petition for *mandamus*, on the relation of Spitzer & Co., to compel the town of Cicero to levy a tax for the payment of certain judgments. The application was denied, and the relators bring error. Affirmed.

*Sanders & Bowers*, (A. W. Hatch, of counsel,) for plaintiffs in error.

L. A. Clifford, Theo. P. Davis, and Thomas J. Kane, for defendant in error.

Before GRESHAM, Circuit Judge, and BLODGETT and JENKINS, District Judges.

GRESHAM, Circuit Judge. In 1872 the respondent issued its coupon bonds, amounting to \$10,000, to raise money with which to erect school buildings. In 1877 the debt was refunded by issuing other bonds, on part of which the relators obtained two judgments in the court below, one in 1888 and the other in 1890. In March, 1891, the relators made application for a writ of *mandamus* to compel the respondent to levy a tax for the payment of these judgments. The application was denied, and the relators sued out this writ of error.

Each of the first issue of bonds recited that this—

"Is one of a series of bonds of \$10,000, authorized by the town, by an ordinance passed by the board of trustees thereof, on the 11th day of December, 1871, and by an amendment thereto, passed on the ——— day of February, 1872, for the purpose of erecting school-houses in said town, in pursuance of an act of the general assembly of the state of Indiana approved March 11, 1867, and an amendment thereto approved May 15, 1869, authorizing cities and towns to negotiate and sell bonds for the purpose of erecting school buildings."

Each of the last issue recited—

"That this bond is one of a series of \$13,858.53, authorized by an ordinance passed by the board of trustees the 17th day of February, 1877, in pursuance of an act of the general assembly of the state of Indiana approved March 8, 1873. The authority will also be found in the Revision of 1876. An act to authorize cities and towns to negotiate and sell bonds to procure means with which to erect and complete unfinished school buildings, and to purchase ground and buildings for school purposes, and to pay debts contracted for such erection and completion, and purchase such buildings and grounds, and authorizing the levy and collection of an additional school tax for the payment of such bonds."

A municipality cannot be compelled to levy a tax in excess of the limit prescribed by legislative authority; and if the respondent exercised the full power conferred on it by the statutes in force when the relator's bonds were issued, and its power was not enlarged by subsequent statutes, the judgment of the court below must be affirmed. Section 1 of the act of 1867 (the first act referred to in the bonds of the first issue) authorized incorporated towns to raise money by issuing bonds not exceeding \$30,000, to pay for the construction of school buildings, and section 3 of the same act made it the duty of the town trustees to levy an annual tax, in addition to the levy for general purposes, not exceeding 50 cents on each \$100 of taxable property, and \$1 on each poll, to pay the interest and principal of such bonds. The act of 1869, and the other act referred to in the bonds of the first issue, amended the act of 1867 in particulars not necessary to be noticed. Clause 15 of section 22 of an act for the incorporation of towns, approved June 11, 1852, authorized town trustees to levy and collect an annual tax for general purposes, not exceeding 50 cents on each \$100 of taxable property, and 25 cents on each poll. The refunded bonds were issued under an act of March 8, 1873, which authorized towns to issue bonds not exceeding, in the aggregate, \$50,000, to pay for land and the erection of school buildings thereon, and to levy a special school tax for the payment of the same, not exceeding the limit prescribed in the act of 1867. By an act passed

March 1, 1877, clause 15 of section 22 of the act of 1852 was amended by conferring power on towns to tax dogs. These are the only statutes under which the respondent was authorized to raise revenue to pay the interest and principal of either issue of bonds, and it is not disputed that from 1889 to 1891, inclusive, the full limit of the taxing power therein conferred was exercised, and the revenue thereby raised properly applied. Section 80 of the act of 1852 provides that, before the third Tuesday in May of each year, the town trustees shall declare the amount of general tax to be levied for the current year; and the succeeding section provides that, when the assessment roll is completed, the trustees shall levy a tax upon the taxable property "to such an amount as they may deem necessary." It is urged that these sections authorized the respondent to make levies sufficient to meet its liabilities, including the two judgments obtained by the relators. This position is untenable. These sections must be construed in connection with clause 15 of section 22 of the same act, which limits the taxing power as stated.

It is also urged that section 27 of the act of 1852 conferred unrestricted power on towns to make levies to pay their just debts. That section reads:

"No incorporated town, under this act, shall have power to borrow money, or incur any debt or liability, unless the citizen owners of five-eighths of the taxable property of such town, as evidenced by the assessment roll of the preceding year, petition the board of trustees to contract such debt or loan; and such petition shall have attached thereto an affidavit, verifying the genuineness of the signatures of the same; and for any debt created thereby the trustees shall add to the tax duplicate of each year successively a levy sufficient to pay the annual interest on such debt or loan, with an addition of not less than five cents on the hundred dollars, to create a sinking fund for the liquidation of the principal thereof."

This section conferred power on towns to raise revenue to pay the interest and principal of a particular class of bonds, namely, bonds issued on petition of the citizen owners of five-eighths of the taxable property. Neither the refunded bonds, upon part of which the two judgments were obtained, nor the original bonds, which were issued in 1873, were of that class. They were issued under different statutes, and not on petition of property owners. Moreover, so much of section 27 as conferred power on towns to issue bonds, and perhaps all of it, was repealed by the act of 1867. *Clark v. Noblesville*, 44 Ind. 83. The relators have been deprived of no right. They were bound to take notice of the limitations upon the power of the respondent to levy and collect taxes for the prompt payment of the interest and principal of the debt, and they must be held to have bought their bonds knowing just what provision had been made for their payment. They took the chance of that provision being ample, and it is their misfortune that it is not. *U. S. v. County of Macon*, 99 U. S. 582. Judgment affirmed.

## SLATER v. BANWELL.

*(Circuit Court, N. D. Ohio, E. D. April 1, 1892.)*

## 1. DISCOVERY—INTERROGATORIES—REFUSAL TO ANSWER.

A mere statement in argument by defendant's counsel of a reason for declining to answer an interrogatory is not sufficient; the facts which entitle him to protection from answering must be fully stated in the answer.

## 2. SAME.

Notwithstanding plaintiff's statutory right to examine defendant as a witness upon all matters in issue, the court will require defendant to answer interrogatories within proper limits, because evidence thus put in the pleadings is of more advantage to the plaintiff than when contained in depositions.

In Equity. Suit by Jarvis A. Slater against James Banwell for infringement of a patent. Heard on exceptions to answer. Exceptions sustained.

*Hall & Fay*, for complainant.

*J. A. Osborne*, for defendant.

RICKS, District Judge. This case is before the court upon exceptions to the defendant's answer. Attached to the bill of complaint are 11 interrogatories, which the defendant is called upon to answer, and by an amendment to the bill a twelfth interrogatory is attached. The defendant answered all but the third and twelfth, and declined to answer them, on the ground that he was not compelled to do so under the law. The third interrogatory, to which the defendant declines to make answer, is as follows:

"Whether the defendant has, during said term of said patent, and within the United States or the territories thereof, made, used, or sold any machines for making semi-circular handles for sad-irons."

The twelfth interrogatory is:

"If interrogatory numbered three be answered 'Yes,' and if any one or more of interrogatories numbered four to eleven, inclusive, be answered 'Nay,' then what was, in full and in detail, the construction and operation of each and every machine referred to in the answer to said interrogatory numbered 3?"

The defendant, in the third clause of his answer, sets forth that he was in fact the original inventor of the principle set forth in complainant's bill, and that long prior to the time when complainant had knowledge of such invention the complainant and the defendant made a machine according to said invention, which machine was kept secret, and was to be used jointly for the benefit of both parties. The defendant says:

"The said machine, so built under said agreement, is the only machine ever built, so far as respondent knows, according to said invention, which machine is in the possession of the complainant, and is being operated by him, this respondent having no possession thereof, and having no control over said machine."

This is an admission on the part of the defendant that a machine was made by him in accordance with the invention set forth in complain-

ant's patent, but it does not answer fully the third interrogatory. Said interrogatory calls upon him to state whether he made, used, or sold any machines for making semi-circular handles for sad-irons. An averment that the machine referred to in defendant's answer is the only machine made in pursuance to said invention is not an averment that it is the only machine made for making semi-circular handles for sad-irons.

The counsel for the defendant, in argument upon these exceptions, substantially stated that one reason for declining to answer said third interrogatory was that the defendant now has an application for a patent pending in the patent-office, and that under the statute he is not obliged to disclose the nature of that application or invention. But the mere statement of counsel in argument does not put the facts upon record in a way that the court can pass upon the legal question thus presented. I think the complainant is entitled to a full answer to his third interrogatory. I am disposed to encourage this method of discovering evidence in this sort of a case. While it is true that under existing statutes the complainant has a right to call upon the defendant as a witness, and examine him as to all matters in issue, and that this right in a large measure supersedes the original object which was the foundation of the practice of attaching interrogatories to bills, yet it does not entirely justify the court in declining to observe and enforce the original practice. By requiring the defendant to answer the interrogatories in proper form, and within proper limits, the evidence is put in the pleadings in a shape where it is of more advantage to the complainant than it would be in the shape of evidence in a deposition. If the defendant is protected in law from answering this interrogatory by any state of facts, he must fully state such facts in his answer as a reason for declining to cover fully the scope of the interrogatory propounded. The court can then, with these averments in this form, decide whether or not the defendant is protected in law from further disclosure. The exceptions are therefore sustained, and the defendant is given leave to file an additional answer to said interrogatories within 20 days.

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MISSOURI PAC. RY. CO. v. TEXAS & P. RY. CO., (SOUTHERN PAC. CO.  
*et al.*, Interveners.)

(Circuit Court, E. D. Louisiana. April 14, 1892.)

1. EQUITY PLEADING—DEMURRER—PLEA.

While a defendant cannot plead merely the facts averred in the bill of complaint, but must present his objections to their sufficiency by demurrer, yet he may present a good plea by averring, along with the facts contained in the bill, other and additional facts, provided that both together establish a defense to the bill.

2. RES AJUDICATA—SEVERABILITY OF CONTRACT.

In an action in a state court upon one contract contained in an "omnibus agreement" between several railroads, the court held that this contract had not become *res judicata*, by a certain judgment rendered in a territorial court, because it was not included among the litigated contracts, and was separable from the other

contracts, and thereupon adjudged this contract to be void, as contravening a state constitution. Thereafter one of the parties brought a new suit, averring that the contract held invalid was in its nature, and the considerations out of which it sprang, dependent upon other contracts contained in the omnibus agreement, in such manner that its annulment gave rise to an equity either to rescind the whole agreement, or to obtain compensation for the loss sustained by the annulment. *Held*, that the former adjudication as to the severability of the contract related only to the question whether the clause was so dependent as to be *res judicata* by the decision of the territorial court, and did not render *res judicata* the question whether it was not dependent in such sense as to give a right to the relief asked.

In Equity. Bill by the Missouri Pacific Railway Company against the Texas & Pacific Railway Company. Heard on the intervention of the Southern Pacific Company and the Galveston, Harrisburg & San Antonio Railway Company for the rescission of an agreement or compensation for the loss sustained by the annulling of a portion of the agreement.

*Howe & Prentiss*, for cross complainant, Texas & P. Ry. Co.

*Leovy & Blair*, for intervener, Southern Pac. Co.

BILLINGS, District Judge. In this case there are submitted two pleas of the interveners. The first is a supplemental plea to a cross bill filed by the defendant. The second is a plea of the interveners to the amended and supplemental cross bill. The questions are as to sufficiency of these two pleas.

I will first consider the supplemental plea to the cross bill. This plea is to that portion of the original cross bill which seeks to recover from the Southern Pacific Railway Company, as the successor to the obligations of the Galveston, Harrisburg & San Antonio Railway Company, certain pool balances under what is known in the argument as the "pooling contract," which was contained in section 6 of what may be termed the "omnibus agreement," executed on the 26th day of November, A. D. 1881, by Mr. Huntington and Mr. Gould for a number of railroads, which agreement was afterwards ratified by the railroad companies themselves. It seems that, after this plea was filed, an amended cross bill was filed. This amended bill, which is termed an "amended and supplemental cross bill," has taken the place of the original cross bill, and stands as the sole pleadings of the cross complainant in the cause. This state of pleading obviates the necessity of any judgment upon the sufficiency of the supplemental plea to the original cross bill, as the filing of the amended cross bill withdrew the original cross bill, and with it went the necessity of passing upon the sufficiency of any plea to any portion of it. This leaves to be considered the sufficiency of the plea of the interveners to the amended and supplemental cross bill of the defendant.

There is one objection to this plea from its structure, in that it pleads matter which the bill itself avers, to wit, the adjudication of the invalidity of the contract known as the "Pooling Contract." The answer to this objection is that it pleads, not only the adjudication of the invalidity of the contract, but also the severability or separateness or independence of the contract from the other contemporaneous contracts contained in the agreement; for while it is true that a defend-

ant cannot plead merely the facts averred in the bill of complaint, but if he objects to their sufficiency to authorize a recovery must present his objections thereto by demurrer, it is also true a defendant may present a good plea by averring the facts contained in the bill, and, along with them, other and additional facts not contained in the bill, provided that the facts taken from the bill and the new facts together establish a defense to the bill. So that my conclusion is that what may be termed the "structural objection" to the plea is not well taken.

The question, then, is presented, and must be decided, whether the plea is intrinsically sufficient. The bill (so far as relates to the portion thereof answered by the plea) sets up that an omnibus agreement, made up of more or less interdependent contracts or stipulations, was entered into by these parties, or those to whose obligations they have succeeded; that subsequently one of these contracts or stipulations, by a court of competent jurisdiction, between these same parties, was adjudged to be void; that this contract was, in its nature and the consideration out of which it sprung, dependent upon the other contracts and their consideration as a part is upon a whole; and that, therefore, there has arisen an equity to the cross complainant, in accordance with which it has a right to demand, and does demand, either a rescission of the entire agreement, or compensation to the extent of the loss which it has sustained by the annulling of the contract which has been set aside and avoided. The plea sets up that it has already been adjudged between the intervenor and cross complainant, not only that the contract was void, but that it was also a contract independent and separate from the others contained in the agreement. There is a reference in the plea to the record out of which the adjudication came, and that record is made a part of the plea, so that as the case is presented by the plea, and in the arguments of the respective solicitors, the facts which make up the record of adjudication are put before the court, and upon the record of adjudication the court is called upon to decide the sufficiency of the plea. Except that no evidence *aliunde* the record has been submitted, the case is therefore quite like a case where the plea and a replication had been submitted upon proofs made up of the record of the case in which the adjudication took place.

That record shows that a suit was brought in the courts of the state of Louisiana by the cross complainant against the interveners upon the pooling contract. The interveners, defendants in that cause, answered by an exception that the pooling contract was void—*First*, as being against public policy; *secondly*, as being against the interstate commerce act of congress; and, *thirdly*, as being in conflict with the constitution of the state of Texas. Upon this last or third ground the defense was maintained and the pooling contract adjudged void. This judgment was affirmed by the supreme court of the state of Louisiana, (6 South. Rep. 888,) and afterwards was affirmed by the supreme court of the United States, (11 Sup. Ct. Rep. 10;) this last affirmance being on the ground that no federal question was presented in such a way that the federal court could review the cause upon its merits. The opinion of the civil district

court is not given. The opinion of the supreme court of the state of Louisiana is elaborate, and is given in full in the record which has been submitted, and shows that that tribunal did decide that this, the pooling contract, was not only void, but was a separate or independent contract. But that separateness or independence was declared in connection with this state of facts. This entire omnibus agreement had, by consent of all parties, been made the subject of a judgment in two cases pending in the territorial courts of the United States. The supreme court of the state held that the territorial judgments took hold of and made things adjudged of the litigated contracts alone, of which this pooling contract was not one. If all the contracts had become things adjudged, the defendants (the interveners here) could not have interposed the exception of invalidity. The judgment would have cut them off. The court was therefore compelled to decide whether the pooling contract was among those contracts which passed into things adjudged in the decrees of the territorial courts, and decided that it did not, because only those in litigation passed into judgment, and the pooling contract was not in litigation, and provided only for the future transactions between the parties. It was in this connection that the court took up and decided as to the independence of the pooling contract.

The matter presented in the cross bill is that, by reason of the annulling of this pooling contract, an equitable right of reparation has sprung up and vested in it. It is in connection with this claim that the matter of the independence of the contract in this case is to be considered. In the other, the adjudged case, the independence of the contract was considered only in connection with the question whether it was in its terms affected by the terms of the contracts which were in litigation. Where some of the contracts contained in an omnibus agreement were held to be included in an adjudication, and others were held to be excluded from it, the ground of discrimination being whether they were in litigation or not, the question of independence had relation merely to the terms of the contract, which were looked at and compared with the terms of those in litigation. In this respect the question of independence was decided, and whatever was said in the opinion beyond this was said *obiter*. Here the question is as to the independence of this contract with reference to its consideration and that of the other contracts, for the consideration of a contract must be the determining matter with reference to compensation or reimbursement in case of annulment. The law of the case has been most fully presented by the solicitors on either side. All the well-considered cases are harmonious. In ascertaining the extent of the binding force of an adjudication, that is held to be decided which was "necessary" or "essential" to the decision, and that is held not to be decided which was merely "incidental" or "collateral."

Applying this test to this case, it seems to me that the question whether the pooling contract, so far as relates to the consideration which led to its being entered into, was a contract independent of the other contemporaneous contracts, was a question not adjudged in the former



case. If the former decree settled the independence of this contract, it settled it only with reference to whether its terms or provisions were distinct from the terms or provisions of those contracts which were crystallized into the territorial judgments, and not whether the contract was distinct from the others as to its consideration, or as to the motives which induced it, to such an extent that, if either party was deprived of the right to enforce it, he should not have indemnification for his loss arising from such deprivation as a matter connected with the right of the parties arising from the other contracts. It must be borne in mind that the question presented is not whether the cross complainant is entitled to the redress sought by his cross bill, but whether he is prevented from urging his claim for such redress by the force of the previous judgment between these same parties.

My conclusion is that the plea must be adjudged to be insufficient.

The respondents to the cross-bill may have until the next rule day in which to answer the bill.

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### MYERS v. HAZZARD *et al.*

(Circuit Court, D. Nebraska. September, 1881.)

#### 1. CHATTEL MORTGAGES—NEGOTIABLE INSTRUMENTS—BONA FIDE PURCHASE.

A *bona fide* purchaser before maturity of negotiable notes secured by a chattel mortgage given by one having the legal title to the chattels takes both notes and mortgage freed from the claims of the assignee in bankruptcy of a third person, who has an undisclosed interest in the chattels and notes.

#### 2. SAME—BANKRUPTCY.

The chattels being still in the hands of the mortgagor at the time the notes were purchased, the fact that the assignment was made prior thereto does not affect the purchaser's rights under the mortgage, as the property was not *in custodia legis*, so as to affect him with constructive notice.

#### 3. NEGOTIABLE INSTRUMENTS—*LIS PENDENS*.

The doctrine of *lis pendens* does not apply to negotiable paper, and a *bona fide* purchaser thereof before maturity takes a perfect title, although a suit to enjoin negotiating the same is pending at the time.

Bill in equity, brought by complainant, as assignee in bankruptcy of George Hazzard, to set aside as fraudulent certain promissory notes, and a mortgage given to secure them, upon a herd of cattle, and to subject the interest of the bankrupt in said cattle to the payment of the debts of the bankrupt estate. The bankrupt was at the time of his bankruptcy undoubtedly the owner of a large interest in the herd of cattle, and complainant was clearly entitled to recover that interest as against all the parties concerned except respondent Coates, who claimed to be an innocent purchaser without notice of the negotiable promissory notes above mentioned, secured by mortgage upon the cattle, under which mortgage he had taken possession. The cattle being held in the name of the firm of Foster & Struthers, but being in fact in part owned by George Hazzard, were mortgaged to John W. Hazzard to secure a number of negotiable promissory notes, with the understanding that said John W. Haz-

zard should negotiate the notes, and out of their proceeds pay a certain prior incumbrance. These notes and the mortgage securing them were executed January 31, 1879, all the parties to the transaction being at that time aware of the interest of George Hazzard. Notice of application for order of injunction against disposing of the notes and mortgage in this suit then pending was served upon John W. Hazzard at North Platte, in Lincoln county, Neb., on the ——— day of March, A. D. 1879, and was served on George Hazzard at Indianapolis, in the state of Indiana, the ——— day of ———, 1879. Thereupon George Hazzard returned to the state of Nebraska, and procured John W. Hazzard to go to the city of Chicago, in the state of Illinois, and employed one H. W. Babb, of North Platte, Neb., to go with him, and answer such questions as should be put to him in regard to the laws of Nebraska. The purpose of such journey was to make a disposal of said securities, and John W. Hazzard and H. W. Babb left North Platte about the 30th of March, 1879, and arrived at Chicago on the evening of April 1, 1879. Injunction was allowed in this cause, restraining, etc., on the 31st day of March, 1879, but not served on John W. Hazzard. John W. Hazzard sold said notes and mortgage at Chicago on the 3d day of April, 1879, for \$22,000, to Isaac P. Coates, the defendant.

A large volume of proof was taken upon the question whether Coates was a *bona fide* purchaser of the notes before maturity and without notice, and the question was elaborately discussed by counsel. A further question was also presented, to wit, whether, if Coates be a *bona fide* purchaser of the notes before maturity and without notice, he is to be protected in his right to the mortgaged property as against the claim of the assignee in bankruptcy of George Hazzard. The master found that Coates was an innocent purchaser, and that he was entitled to the benefits of the mortgage security. The case was heard on exceptions to the master's report.

*Chapman & Hammond* and *Lamb, Billingsley & Lambertson*, for complainant.

*E. Wakeley*, for respondent Coates.

MCCRARY, Circuit Judge. It will be observed that this case presents an important question of law respecting the rights of the *bona fide* purchaser of commercial paper secured by mortgage. Assuming that Coates was such a purchaser, and that he had no notice of the fraud, (and such the court finds to be the fact,) the case turns mainly upon the question, which has been elaborately argued by counsel, whether he is to be regarded in the light also of an innocent *bona fide* purchaser of the mortgage, so as to have the right to enforce it as against the assignee in bankruptcy of George Hazzard.

The question to what extent, and under what circumstances, the *bona fide* purchaser of negotiable commercial paper secured by mortgage is entitled to the benefits of the mortgage security, unaffected by equities existing as between the original parties, is one of great and growing importance. It is now well settled that the mortgage is only an incident

to the debt, and passes with it to the assignee. No formal assignment of the mortgage is necessary. The debt is the principal thing, and the mortgage an accessory, so that the assignment of the debt passes all the mortgagee's interest in the mortgaged property, whether the assignment be before or after the forfeiture. *Langdon v. Buel*, 9 Wend. 80; *Gould v. Marsh*, 1 Hun, 566; *Johnson v. Hart*, 3 Johns. Cas. 322; *Ellett v. Butt*, 1 Woods, 214; *Gaff v. Harding*, 48 Ill. 148; 1 Jones, Mortg. §§ 813-822, and cases cited. Where there is no question as to the validity or construction of the mortgage, or as to the title of the mortgagor as between the original parties to the instrument, there can be none, of course, as between the mortgagor and the assignee of the secured debt. The cases of doubt and difficulty arise where, as between the original parties to the mortgage, there is a question as to its validity, or as to its force and effect, independent of any question affecting the note, or where a third party claims the mortgaged property and denies the authority of the mortgagor to fasten a lien upon it. In such cases, to what extent can the innocent, *bona fide* purchaser of the note before due be regarded as an innocent purchaser of the mortgage also, and entitled to protection accordingly against equities existing as between the original parties?

We are confronted in the outset by a conflict of authority upon the principal question. In several of the states it is held that the assignee of a negotiable note, secured by mortgage, takes the latter, as he would any other chose in action, subject to all the equities which subsisted against it while in the hands of the original holder. The argument in support of this doctrine is that a mortgage is in its nature a nonnegotiable instrument, and that the rights of the parties to it cannot be fixed and determined by the law merchant. Mortgages, it is insisted, are not commercial paper, and it is not convenient to pass them from hand to hand, so that they may perform the office of money in commercial transactions, as may be done with notes, bills, and the like. It is accordingly held, in the cases now under consideration, that while the purchaser of a note secured by mortgage may be entitled to all the rights of an innocent purchaser of commercial paper, so far as the note is concerned, yet, if he seeks to foreclose the mortgage, he may be met by any defense which would have been good as against the original mortgagee. *Johnson v. Carpenter*, 7 Minn. 176, (Gil. 120;); *Hostetter v. Alexander*, 22 Minn. 559; *Olds v. Cummings*, 31 Ill. 188; *White v. Sutherland*, 64 Ill. 181; *Fortier v. Darst*, 31 Ill. 212; *Sumner v. Waugh*, 56 Ill. 531; *Baily v. Smith*, 14 Ohio St. 396. On the other hand, it is held by the supreme court of the United States, and by the courts of last resort in a large majority of the states, that an assignee for value of a negotiable note secured by a mortgage, before due and without notice, takes the mortgage, as he does the note, free from equities existing between the original parties. It is said, in support of this doctrine, that the note, being the principal thing, imparts its character to the mortgage. The mortgage is regarded as following the note, and as taking to itself the same qualities, so that the assignee takes the former, as he takes the latter, free from any existing equities between the original parties. A leading case upon this subject,

and a controlling one, so far as the federal courts are concerned, is that of *Carpenter v. Longan*, 16 Wall. 271. In that case the rule just stated was laid down by Mr. Justice SWAYNE as follows:

"The assignment of a note underdue raises the presumption of the want of notice, and this presumption stands until it is overcome by sufficient proof. The case is a different one from what it would be if the mortgage stood alone, or the note was nonnegotiable, or had been assigned after maturity. The question presented for our determination is whether an assignee, under the circumstances of this case, takes the mortgage, as he takes the note, free from the objections to which it was liable in the hands of the mortgagee. We hold the affirmative. The contract as regards the note was that the maker should pay it at maturity to any *bona fide* indorsee, without reference to any defenses to which it might have been liable in the hands of the payee. The mortgage was conditioned to secure the fulfillment of that contract. To let in such a defense against such a holder would be a clear departure from the agreement of the mortgagor and mortgagee, to which the assignee subsequently in good faith became a party. If the mortgagor desired to reserve such an advantage, he should have given a nonnegotiable instrument. If one of two innocent persons must suffer by a deceit, it is more consonant to reason that he who 'puts trust and confidence in the deceiver should be a loser, rather than a stranger.' "

In order to understand the scope of this opinion, it is necessary to note that the defense in the case as against the mortgage was, in substance, that, as between the original parties, it had been satisfied. The mortgagor alleged that at the time of the execution of the mortgage she delivered to the mortgagee certain property, which he agreed to sell, and apply the proceeds to the satisfaction of the note, and that, instead of so doing, he converted the property so delivered to his own use. The sole question was whether the equitable satisfaction of the mortgage in this way could be set up as against the assignee. This case is not, therefore, as some lawyers have assumed, authority for the doctrine that the *bona fide* purchaser, without notice, of a negotiable underdue note, secured by mortgage, holds the mortgage precisely as he holds the note, subject to no defenses whatever that would not be good against the latter. In that case there was no question as to the title of the mortgagor at the time that the mortgage was given, nor as to the rights of any third party with respect to the mortgaged property, nor as to the validity or construction of the mortgage itself. It seems manifest that it was not the intention of the court to assert broadly the rule that, because a mortgage is given to secure a negotiable note, which, before maturity, is assigned to a *bona fide* purchaser, therefore no objection can be raised to the mortgage, unless it would be an objection constituting a defense to the note in the hands of such a purchaser. The court decided the case before it, and was careful to qualify its opinion by the words, "under the circumstances of this case." The general rule announced in *Carpenter v. Longan* has been adopted in Massachusetts, Maine, Michigan, Wisconsin, Nebraska, Iowa, Missouri, and other states. See Jones, Mortg. § 834, and numerous cases cited. But the doctrine has not yet been established as the law of New York or Pennsylvania. *Union College v. Wheeler*, 61 N. Y. 88; *Horsman v. Gerker*, 49 Pa. St. 282.

For our present purpose we will assume, as we are bound to do, the soundness of the general rule announced in *Carpenter v. Longan*, and similar cases, and address ourselves to the task of determining, if we can, its true meaning and its proper limitations. Although the general language employed in some of the cases might seem to justify the inference that a mortgage transferred with a negotiable note before due is to be treated for all purposes as commercial paper, it is manifest that the rule thus broadly stated cannot be maintained upon principle. In many of the cases the rule is stated to be that the mortgage is regarded as following the note, and as taking the same character; but it must, of course, be understood that the mortgage takes the character of a negotiable note only in so far as in its nature it is capable of having that character imputed to it, and therefore the rule must be subject to certain modifications or exceptions. In any suit brought by the assignee of the note to foreclose the mortgage, the mortgagor may be heard to assert that the mortgage is invalid as to all or part of the property, by reason of anything that appears upon the face of the mortgage, or by reason of anything that the assignee is bound by law to know, whether the same constitutes a defense to the note or not. A third party may be heard to assert, as against the validity of such a mortgage in the hands of the assignee, that the mortgagor, at the time of the execution of the mortgage, had no power to execute it. The mortgage in the hands of the assignee, like the note, is freed from equities existing as between the original parties. This being so, no defense to the mortgage, on the ground of fraud, duress, or want of consideration, could be admitted as against the assignee; nor could the defense of payment or satisfaction, nor of a release of the mortgage, as between the original parties, nor of any other similar matter, be set up. But there may, beyond question, be defenses to a mortgage in such a case that cannot be defenses to the note,—defenses the force and effect of which cannot be determined by an appeal to the principles of the law merchant. Of this character are objections which relate to, and in the nature of the case can only relate to, the mortgage, its construction, validity, or force and effect. They may be objections which third parties only are interested in raising. We cannot give to the mortgage all the properties of negotiable paper, nor apply to it all the principles of the law merchant, without a disregard of elementary principles. A few examples may serve to illustrate this proposition. There are in most, if not in all, of the states statutes designed for the protection of the homestead rights of the family of the owner. These statutes generally provide that a mortgage executed by the husband alone, without the concurrence of the wife, shall be void. If, in a state where such a statute prevails, the husband executes his negotiable note, and a mortgage to secure the same, without the wife's concurrence, upon the homestead occupied by himself and family, there can be no reasonable doubt that the mortgage would be void, even in the hands of a *bona fide* purchaser of the note before due. The assignee of the mortgage would be bound to inquire whether the property mortgaged was a homestead, and would have con-

structive notice that it was occupied as such; while the purchaser of a negotiable note is not bound to make any inquiries, but, on the contrary, as we shall presently see, is protected unless he acts in bad faith. A similar question may arise where the mortgagor has the legal title, but where a third party is in possession, claiming an interest. In such a case the possession of the third party would be notice of his claims, and a purchaser or mortgagee would take subject to them. Doubtless the assignee of the mortgage debt would take the mortgage with like notice; but, if so, he would not be protected to the same extent and in the same way as a *bona fide* purchaser of negotiable paper before due.

It is probable that another modification of the general rule we are considering must be admitted in cases arising out of the entry of satisfaction by a mortgagee after he has assigned the debt secured by the mortgage. If we are to apply the rule strictly, it will follow that, in the absence of a statute requiring assignments of mortgages to be recorded, the purchaser of the mortgaged property is bound to inquire whether the mortgagee is still the holder of the notes before relying upon a release of the mortgage by him. This upon the ground that in such a case the notes are the evidence of the authority of the mortgagee to enter satisfaction of the lien, and so it has been held. *Cuthwood v. Burrows*, 7 Reporter, 492; *Crosby v. Roub*, 16 Wis. 616; *Martineau v. McCollum*, 4 Chand. 152; *Cornell v. Hichens*, 11 Wis. 353; 1 Jones, Mortg. § 314.

It would seem that the rule laid down in these cases results very naturally from the doctrine that an innocent purchaser of a negotiable note, secured by mortgage, is an innocent purchaser of the mortgage also, and takes it unaffected by any equities between the mortgagor and mortgagee. And yet it has not been adopted with unanimity. On the contrary, it has been held frequently that an assignment of the mortgage by transfer of the debt is effective only as between the parties and those having notice of the transfer of the notes. It is said with much force that a subsequent purchaser of the mortgaged property is not bound to take notice of the assignment by transfer of the notes alone. "The assignee of the notes can easily protect himself by requiring an assignment of the mortgage, and recording it, and thus give notice of his right; and, if he omit to do this, he should be the party to suffer for the negligence." 1 Jones, Mortg. § 820; *Bank v. Anderson*, 14 Iowa, 559; *Ayers v. Hays*, 60 Ind. 452. The doctrine of these cases may well be maintained upon the principles of equity that, where one of two innocent persons must suffer loss, and one of them has been negligent and the other diligent, the former shall suffer. But the application of this rule presupposes that the purchaser of the notes is chargeable with negligence in not obtaining an assignment of the mortgage, and placing the same upon the record, which can scarcely be true if, by the purchase of the notes, he becomes entitled to the mortgage without an assignment, and is to be protected in his rights under it against every defense that would not be good against the notes. The difficulty lies in the attempt to treat a mortgage for all purposes as commercial paper. Perhaps the

question most frequently arises in cases involving the rights of third parties in and to the mortgaged property. These cases generally present, in some form, the question of the title of the mortgagor, or of his right to bind the property by the mortgage, or a question of priority as between the different lienholders. The general rule is that the mortgage binds only the interest of the mortgagor at the time of its execution; but an important exception arises in those cases where the mortgagor, though not the owner in fact, is vested with the legal title and the ostensible ownership of the property mortgaged, so that the real owner is estopped to assert his right to it as against a mortgagee in good faith, for a valuable consideration, and without notice. For the purposes of this doctrine, a mortgagee is a purchaser, and the question whether he is an innocent purchaser, without notice, will be determined by the familiar principles applicable to all other purchasers. It would seem, also, to follow, as a necessary consequence of the prevailing doctrine, that the assignee of the mortgage, whether by a formal assignment or by purchase for value before maturity and without notice, of the note which it secures, is to be regarded also as a purchaser of the mortgaged property within the rule. Keeping these rules in view, we shall have constantly in mind the principles upon which to determine every case in which the title of the mortgagor is sought to be attacked by a third party. The application of this doctrine may be illustrated by the case of a trustee in possession, and having all the insignia of title, but who, in fact, holds in secret trust for a third party. If such a trustee executes a mortgage for a valuable consideration to an innocent mortgagee, who takes it, and advances money or gives credit upon the faith of it, the real owner will be estopped to question the validity of the mortgage in the hands of the mortgagee or his assignee, on the ground that the mortgagor was not the owner. Such mortgagee, as we have already seen, is a purchaser; and it is well settled that where a trustee in possession of the trust estate makes a *bona fide* conveyance of it, for a valuable consideration, to a purchaser who has no notice of the trust, the title of the purchaser will be good both at law and in equity, for he has equal equity with the *cestui que trust*, and the legal conveyance gives him priority at law. Hill, Trustees, 282, 509, *et seq.*

Another numerous and important class of cases arises out of conveyances made without consideration, and with intent to defraud creditors. The grantee in all such conveyances takes the property in trust for the grantor or his creditors; but, inasmuch as he is clothed with the legal title, he may make a valid mortgage, for a valuable consideration, to a third party, who has no notice of the fraud or the trust; and in such a case neither the original owner nor his creditors, though the latter be entirely innocent, can set aside the mortgage on the ground that the mortgagor had no title to mortgage. The original owner is estopped because of his fraudulent act in vesting the title in the mortgagor; the creditors are estopped because their equity is not superior to that of the mortgagee, and for the additional reason that the latter holds under one who had the legal title. If, however, a creditor has, before

the mortgage is executed, taken steps to set aside the fraudulent conveyance and to subject the property to the payment of the debts of the fraudulent grantor, then a question of more difficulty may arise. It is generally, however, one which resolves itself simply into a question of notice, and it will in general be determined by settling the question whether the mortgagee is a purchaser for value and without notice. If the creditor has instituted legal proceedings to set aside the sale before the execution of the mortgage, the question will be whether the mortgagee had either actual or constructive notice of such proceedings. It is held that, where a fraudulent mortgage is given to secure a negotiable promissory note, void as between the parties, if a creditor or assignee in insolvency seizes the property and files a bill to set aside the mortgage before the assignment of the note and mortgage, the assignee, though he takes for a good consideration and without actual notice, cannot hold the property. If, however, the purchaser of the note and the mortgage had acquired title in good faith and for a valuable consideration before any steps had been taken to avoid the mortgage, he would have stood on a different ground. *Jones, Chat. Mortg.* § 508; *Bigelow v. Smith*, 2 Allen, 264.

In making the application of these rules, it will be found necessary to observe the distinction between mortgages of real estate and mortgages of personal property. The general principles above indicated apply alike to all mortgages, but the particular rules by which the questions as to notice and as to what constitutes, as to purchasers or mortgagees, sufficient evidence of title in the mortgagor, may not be the same. Purchasers or mortgagees of real estate may, ordinarily, rely on the record title, while purchasers or mortgagees of personal property must, as a rule, take the chances as to the vendor's title. If a negotiable promissory note, secured by mortgage upon personal property, be assigned for value, before maturity, to a purchaser without notice, to what extent is such purchaser bound to inquire as to the title of the mortgagor to the mortgaged property? As, for example, suppose the case of an insolvent, who, in contemplation of bankruptcy, fraudulently transfers his personal property to another to keep it from coming into the hands of his assignee in bankruptcy, and thereafter goes into bankruptcy; in such a case it is, of course, clear that the assignee could recover the property from the fraudulent vendee; but if he has mortgaged it to secure a negotiable note, which is transferred before due to an innocent purchaser for value, will the latter be protected as against the claims of the assignee? Each case involving questions of this character must be determined upon the rule above stated, viz., that the assignee of the note is to be regarded as a purchaser of the mortgaged property from the mortgagor, and to be protected to the extent that any other purchaser would be protected, and to that extent only. The purchaser of personal property from a fraudulent vendee, in good faith and without notice of the fraud, is unaffected by the equities of third parties of which he has no notice. *Jarrell's Assignee v. Harrell*, 1 Woods, 476; *Pratt v. Curtis*, 6 N. B. R. 139. Applying this rule to the case of the



assignee of a negotiable note, secured by mortgage upon personal property, under such circumstances as to make him the purchaser of the property, we reach the conclusion that in such a case as that last stated he is entitled to protection.

Our conclusions in this case are as follows:

1. The respondent Isaac P. Coates is a *bona fide* purchaser of the notes described in the pleadings, before maturity and without notice, within the rule established by the decision of the supreme court of the United States in *Murray v. Lardner*, 2 Wall. 110, and he is entitled to protection accordingly.

2. The said respondent Coates, as the *bona fide* purchaser of said notes before maturity and without notice, took the mortgage, as he did the notes, freed from equities arising between the previous parties thereto, and also freed from any latent equity existing in complainant at the time of the assignment of the notes of which he, said Coates, had no notice. *Carpenter v. Longan*, 16 Wall. 271; *Murray v. Lyburn*, 2 Johns. Ch. 441.

3. The said Coates, as the assignee of said notes and mortgage, under the circumstances developed in proof, is entitled to the same protection that would be accorded to the purchaser of property from a fraudulent vendee, in good faith and without notice of the fraud. Such a purchaser would be unaffected by latent equities of third parties of which he had no notice. *Jarrell's Assignee v. Harrell*, 1 Woods, 476; *Pratt v. Curtis*, 6 N. B. R. 139.

4. The title of Coates to the notes, and his protection as a *bona fide* purchaser, was not affected by the pendency of this suit. Negotiable instruments are not subject to the rule of *lis pendens*. Wade, Notice, § 372; *Day v. Zimmerman*, 68 Pa. St. 72; *Kellogg v. Fancher*, 23 Wis. 21.

5. Since at the time of the assignment of the notes and mortgage to Coates the mortgaged property was not *in custodia legis*, but was in the possession of the mortgagors, the same was not, in the hands of Coates, subject to the result of this suit, nor was he charged with notice of this suit.

6. Property held in the name of John W. Hazzard at the time George Hazzard was adjudicated bankrupt did not *ipso facto* vest in the assignee in bankruptcy. There existed in the latter only the right to recover it upon making proof that it was in equity the property of the bankrupt. This right the assignee was bound to exercise before the transfer of the property to a *bona fide* purchaser without notice of his claim. After such transfer he cannot recover it from such purchaser. The assignee of the notes and mortgage (Coates) was such a purchaser, or, if not technically such, he is entitled to the same protection.

7. The rights of Coates, as purchaser of the notes in question, are not affected by the fact that said notes were in equity the property of George Hazzard, or of his assignee in bankruptcy, nor by the fact that the notes in lieu of which they were executed may have been indorsed in blank and delivered to said George Hazzard. The purchaser, in good faith and without notice, of negotiable notes before maturity from the payee, is entitled to protection.

8. The failure of Coates to answer, as a witness, certain questions put to him upon cross examination does not justify the court in rejecting his entire testimony on the trial. It was the duty of complainant's counsel to move the court for an order requiring him to answer, or, in case of his refusal to do so, to strike out his entire deposition.

It follows from these conclusions that the exceptions to the master's report must be overruled, and that there must be decree as recommended by him.

### COPP v. LOUISVILLE & N. RY. CO.

(Circuit Court, E. D. Louisiana. April 21, 1892.)

#### 1. LIMITATIONS—APPLICATION OF STATE STATUTES.

Under Rev. St. U. S. § 721, when congress creates a new right of action, without providing any limitation thereto, the state statutes of limitations apply, and are binding upon the United States courts.

#### 2. SAME—INTERSTATE COMMERCE—SUIT FOR DISCRIMINATION.

The right of action created by the interstate commerce act, (24 St. p. 380, §§ 3, 9,) in favor of the party against whom discrimination is made in the charges for the transportation of merchandise, comes within Rev. Civil Code art. 3536, providing a limitation of one year to actions for damages resulting from *quasi* offenses.

At Law. Action by Frank T. Copp against the Louisville & Nashville Railway Company to recover an amount paid for freight in excess of that paid by others for similar service. New trial granted.

*B. R. Forman*, for plaintiff.

*Bayne & Denegre*, for defendant.

BILLINGS, District Judge. The plaintiff has brought a suit under the act of congress known as the "Interstate Commerce Act," (24 St. U. S. p. 380, §§ 3, 9,) to recover the amount of freight paid by him to the defendant in excess of that paid to it by others for similar service. An exception was filed by the defendant, interposing the plea of the limitation or prescription in force under the statute of the state of Louisiana. The statute relied upon is Rev. Civil Code, art. 3536, which provides that "the following actions are also prescribed by one year: That for injurious words, whether verbal or written, and that for damages caused by animals, or resulting from offenses or *quasi* offenses." It is claimed by the defendant that this is an action for a *quasi* offense, and it is controlled by the state statute. Code Prac. art. 28, declares that "personal actions are grounded on four causes: Contracts, *quasi* contracts, offenses, and *quasi* offenses;" and article 32 further defines personal actions arising from *quasi* offenses to be when the ground of action is the injury done to another by one of those faults which are not considered as real crimes or offenses. It has not been questioned, and I think cannot be questioned, that the fault complained of by the plaintiff is included within the definition of "*quasi* offenses."

The question is whether this state statute of limitations applies to this action. The action arises from a law of congress against discrimination in the charges for the transportation of merchandise. Where there has been discrimination, congress has created a right of action in favor of the party against whom it has been made for the excess of the charge collected from him, as compared with that collected from others. It is to be observed that in the act of congress there is no limitation as to time, and that, unless the state statute applies, there is no limitation. On the other hand, the action is authorized in case of discrimination, with or without damage; and to that extent it is a statute in the nature of a statutory provision for an action to protect the interests of the public, *i. e.*, to secure a uniform rate of charge for the transportation of merchandise by common carriers, and giving an action even in case the party discriminated against had paid no more than the value of the service of transportation. Nevertheless it is a purely civil action, and, by denomination or definition, is within the meaning of the state statute of limitations. The question is whether section 721 of the United States Revised Statutes, being a portion of section 34 of the judiciary act of September 24, 1789, includes the limitation or prescription for actions known as "*quasi offenses*" contained in the Louisiana statute. In Angell on Limitations, § 24, the rule is laid down as follows:

"Under the 34th section of the judiciary act of 1789, the acts of limitations of the several states, where no special provision has been made by congress, form a rule of decision in the courts of the United States; and the same effect is given to them as is given to them in the state courts."

This passage from Angell is adopted by the supreme court as a correct statement of the law in *Hanger v. Abbott*, 6 Wall., at page 537. In *Townsend v. Jemison*, 9 How. 414, the supreme court quote approvingly that in the courts of the United States the law of the former governs, and say that "statutes of limitation, unless the plaintiff can bring himself within their exceptions, appertain *ad tempus et modum actionis institutendæ*, and not *ad valorem contractus*." In *McIver v. Ragan*, 2 Wheat. 25, at page 29, Chief Justice MARSHAL says: "It would be going far to add to these exceptions;" *i. e.*, those exceptions made by the legislature. In *McCluny v. Silliman*, 3 Pet. 270, where the act of congress made it the duty of the registers of the land-office to enter, upon application, certain lands, and the action was brought against a register for not having entered lands upon the proper application of the plaintiff,—the action being an action upon the case, and the statute of Ohio (the suit was brought in the United States circuit court in the district of Ohio) limited to six years all actions upon the case,—the supreme court held that the plea setting up the state statute of limitations was a good plea. In that case one of the errors assigned was—

"That no statute of limitations of the state of Ohio, then in force, is pleadable in an action upon the case brought by a citizen of one state against a citizen of another, in the circuit court of the United States, for malfeasance or nonfeasance in office in a ministerial officer of the general government, and especially when the plaintiff's rights accrued to him under a law of congress."

In reply to this objection, the court, at page 277, say:

"Where the statute is not restricted to particular causes of action, but provides that the action, by its technical denomination, shall be barred, if not brought within a limited time, every cause for which the action may be prosecuted is within the statute."

In *Ross v. Duval*, 13 Pet. 45, the supreme court apply the statute of limitations of the state of Virginia to judgments rendered in the United States circuit courts. At page 60 the court say:

"If this, then, be a limitation law, it is a rule of property; and, under the thirty-fourth section of the judiciary act, is a rule of decision for the courts of the United States."

In *Michigan Ins. Bank v. Eldred*, 130 U. S. 693, 9 Sup. Ct. Rep. 690, it is reiterated, as the result of all the decisions of the supreme court, that the statutes of limitations were laws of the several states, and under the thirty-fourth section of the act of 1789, in the absence of special provision by congress, were binding upon the courts of the United States, as they would be upon the courts of the state in which the United States courts sit. In this case the supreme court of this state has held that the United States circuit courts had exclusive jurisdiction over the actions arising under the act of congress under which this action is brought. But I do not see that the exclusive jurisdiction of the United States courts affects the question presented here; for, if the statute would control the matter in the state courts in case they had jurisdiction, the statute is nevertheless the rule of decision. The binding force of the state statute of limitations upon the United States courts in cases where they have jurisdiction comes from section 34 of the judiciary act, and the statute made a rule of decision, in cases to which it applies, equally whether the state courts also have jurisdiction or not. The statute becomes a rule of property in the United States courts, if it would include a similar action in the state court. My conclusion is that the statute of limitation of the state applies to this case.

The motion for a new trial will therefore be granted.

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### RAY v. UNITED STATES.

(District Court, D. Indiana. April 19, 1892.)

#### 1. CLAIMS AGAINST UNITED STATES—LIMITATIONS—ERRONEOUS TAXATION—RECLAMATION—TRUSTS.

In 1872 a statement made by the comptroller of the treasury showed that a certain amount had been erroneously deducted as income tax from the salary of a United States district judge between 1864 and 1869. In 1875 a draft was issued by the government for the payment of the claim, but, remaining unclaimed, it was in 1887 covered into the treasury. No demand of payment was ever made until 1891, and payment was then refused. *Held*, that after the draft was issued the government held the fund in the nature of a trust, and that the six-years limitation as to claims cognizable by the court of claims did not begin to run until the date of the demand.

**2. SAME.**

The two-years limitation prescribed by Rev. St. § 3227, for actions to recover taxes erroneously collected, does not govern, as it applies only when the gist of the claim is the wrongful act of the tax officer, and in this case the original wrong was cured by the action taken by the department to refund the money.

At Law. Action by John W. Ray, as administrator of the estate of David McDonald, to recover an amount deducted as income tax from his salary as United States district judge. Judgment for plaintiff.

*W. A. Ketcham*, for plaintiff.

*Smiley N. Chambers*, for the United States.

BAKER, District Judge. This is an action by the plaintiff as administrator of the estate of David McDonald, deceased, against the defendant, to recover the amount of \$504.71, deducted as income tax from his salary as United States district judge for the district of Indiana between December, 1864, and August, 1869. This claim is founded on the following facts: On the 10th day of May, 1872, a statement was made by the first comptroller of the treasury, showing that the sum of \$504.71 had been withheld from said McDonald's salary as such judge. This statement was referred to the commissioner of internal revenue, who, with the approval of the secretary of the treasury, entered the same on a schedule of claims for the refunding of taxes erroneously assessed and paid, certifying that they had been examined and allowed. Thereupon an account was stated by the fifth auditor of the treasury, which was certified by the first comptroller for payment on the 2d day of August, 1875, and a draft was duly issued for the sum of \$504.71, payable to the order of said McDonald. This draft was held in the office of the commissioner of internal revenue and of the first comptroller until May 31, 1887, when the first comptroller recommended that the amount of said draft be paid from outstanding liabilities, to which it had been covered three years after its issue, and deposited in the treasury, on account of an erroneous allowance made in favor of the draft, which was done by a warrant dated June 30, 1887. On the 19th day of July, 1888, letters of administration were duly issued to the plaintiff by the circuit court of Marion county, Ind., upon the estate of said McDonald. On the 18th day of May, 1891, demand was made by the plaintiff upon the proper officer of the United States for the payment of said money so covered into the treasury, which demand was refused, and this action was brought on the 12th day of November, 1891.

It is contended that this claim is barred either by section 1069 or by section 3227 of the Revised Statutes of the United States. Section 1069 provides that—

“Every claim against the United States, cognizable by the court of claims, shall be forever barred, unless the petition setting forth a statement thereof is filed in the court, or transmitted to it by the secretary of the senate or the clerk of the house of representatives, as provided by law, within six years after the claim first accrued.”

Section 3227 provides that—

“No suit or proceeding for the recovery of any internal tax alleged to have been erroneously or illegally assessed or collected without authority, or of

any sum alleged to have been excessive, or in any manner wrongfully collected, shall be maintained in court, unless the same is brought within two years after the cause of action accrued."

In my opinion, the contention of the learned counsel for the respondent cannot prevail. The section last above quoted embraces claims where the action is grounded on the wrongful conduct of an officer empowered to act as collector of internal tax. The gist of the action is the wrongful conduct of such officer. In no just sense does the present claim arise out of the original wrong of the internal revenue department. That was corrected by the voluntary action of the proper officers of the treasury department in 1875, and thereafter the fund in controversy was held impressed with a trust until 1887. I do not think the section first above quoted presents a bar to the maintenance of this suit. It is insisted that the claim in suit first arose at the time between 1864 and 1869, when the tax was wrongfully deducted and withheld from the salary of Judge McDonald. In this view I cannot concur. The United States, recognizing the wrong done in collecting and withholding the tax, voluntarily stated an account for the amount in controversy, and a draft payable to the order of Judge McDonald was duly issued for the same. The government thereafter held this fund in the nature of a trust, awaiting demand of the payee or his legal representative. Rev. St. 1878, § 307, makes a permanent appropriation for the payment of all such outstanding and unpaid drafts. Section 308 provides for their payment on the presentation thereof, without limit of time. Under such circumstances, the fund became impressed with a trust. *U. S. v. Taylor*, 104 U. S. 216; *Waddell's Case*, 25 Ct. Cl. 323; *Wayne v. U. S.*, 26 Ct. Cl. 274. In the case last above cited the court say:

"We now hold that the statute of limitation does not run against outstanding liabilities so entered in the books of the treasury department for which there is a permanent appropriation and other provisions by Rev. St. §§ 306-308, until the outstanding drafts, etc., are presented, or demand is made without the draft, and its nonproduction is properly accounted for."

I concur in this construction of the statute. The cause of action in this case did not accrue until the trust was repudiated; and six years had not elapsed since such repudiation until this claim was filed. It follows that there must be judgment for the claimant; and it is so ordered.

## UNITED STATES v. GAYLE.

(District Court, D. South Carolina. April 26, 1892.)

1. JUDGMENT—VALIDITY—MARRIED WOMEN.

A judgment rendered against a married woman on an official bond, executed by her as surety for her husband, in South Carolina, in 1867, is void, as she was then subject to all common-law disabilities.

2. SAME—VACATING.

The fact that such judgment was sued on as a cause of action, and judgment rendered against defendant after she became discover, will not prevent the court from vacating the original judgment and all proceedings had thereunder, on a motion made in that cause.

At Law. Action by the United States against Mittie Gayle, as surety on the official bond of her husband. Judgment was rendered for plaintiff, and was afterwards sued on as a cause of action, and judgment again rendered for plaintiff. 45 Fed. Rep. 107. Defendant now moves to vacate the original judgment. Granted.

A. Lathrop, U. S. Dist. Atty.

C. B. Northrop, for defendant.

SIMONTON, District Judge. The defendant, a married woman, signed as surety the bond of her husband, a postmaster at Camden, S. C., on 19th day of November, 1867. At that date a married woman in South Carolina was under all the common-law disabilities, and her legal existence was merged in that of her husband. On 4th day of March an action was begun in this court against her alone, she being still a married woman living with her husband. Default having been made, judgment was obtained and entered up. The declaration is as against a male. Masculine words are used in it altogether, and there was nothing on the record but her first name to excite the suspicion that a woman was the defendant. No steps were taken upon this judgment until 15th October, 1889, when suit was brought against the defendant upon the judgment as a cause of action. She was then a widow. She appeared, and in her answer set up as defenses that she was never served in the original case, and had no notice of the suit. She also averred that the bond was void. After argument it was held, on demurrer to the answer, that the original judgment imported absolute verity, and as long as it remained in force, not reversed or not avoided, it must avail as a cause of action. 45 Fed. Rep. 107. A motion is now made to set aside the judgment as absolutely void. The facts stated as to her coverture are not denied. It is clear that when the first suit was had, and the judgment taken thereon, there was no person legally existing as defendant. The judgment was absolutely void. *Freer v. Walker*, 1 Bailey, 184. Properly, as soon as she got notice of the existence of this judgment after her discover, steps should have been taken to set it aside. No such step could have been taken by her until she became discover. When the second suit was entertained, the court felt bound by authorities, and could not admit the defense set up; but if the original judgment was

void, we cannot preclude her present motion by saying that it was merged in the new judgment. There was nothing which could become merged. This is not a case of error in a judgment. There was no error, as the facts disclosed nothing. It is like a judgment against one dead when suit began,—a nullity. "A judgment which is a nullity on account of being rendered against a corporation that does not exist will be vacated, and, as a general rule, all void judgments will be so treated." *Freem. Judgm.* § 98. It may be that the intervention of the second judgment is a grave difficulty. But the wrong of enforcing a contract like this, and of compelling the widow to suffer for an act void *ab initio*, and incapable of confirmation by mere acknowledgment, (see 14 *Amer. & Eng. Enc. Law*, 619,) is too monstrous to be entertained. Let the judgment and all proceedings under it be vacated.

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COMITEZ v. PARKERSON *et al.*

(Circuit Court, E. D. Louisiana. April 23, 1892.)

1. DEATH BY WRONGFUL ACT—PLEADING—NEWSPAPER ACCOUNTS.

In an action by a widow to recover damages for the killing of her husband by a mob, when the petition fully sets out her cause of action, it is improper to annex thereto an account of the affair as published in a newspaper on the day following the killing.

2. SAME—PARTIES.

As all the parties in any way concerned in the tort are liable *in solido*, it is proper to join, as a party defendant with the individuals who participated in the killing, the city in which the act was committed, on the ground of its negligence in not preventing the killing.

At Law. Action by Annie Comitez against W. S. Parkerson, the city of New Orleans, and others, to recover damages for the killing of her husband. Heard on exceptions to the petition. Sustained in part and overruled in part.

*John Q. Flynn*, for plaintiff.

*Henry C. Miller* and *Chas. F. Buck*, for defendants.

BILLINGS, District Judge. This is a suit brought by the widow of Loreto Comitez for damages for the killing of her husband. The cause is submitted on two exceptions to the petition filed by all the defendants except the city of New Orleans. It is objected that an article from the *Times-Democrat* has been made a part of the petition. The article is not properly an exhibit, to be considered in connection with the petition in the statement of the plaintiff's complaint. The averments of the plaintiff are made without this article, and then follows the averment as follows:

"To more particularly set forth the facts of this case as herein charged, and detailing more particularly the events which transpired on the morning of said memorable March 14, 1891, petitioner annexes hereto copies of the



Times-Democrat of March 15, 1891, which contains a full and complete account of the transactions of the day previous, the 14th March, 1891, and makes same part of this petition."

I think the journalistic account is superfluous, when considered in connection with the averments of the petition, which contains, without this article, the complete statement of the plaintiff's case. It could not be read to the jury without producing an effect distinct from and in addition to the mere statement of the case which the plaintiff intends to offer proofs in support of. It would produce an effect which should come from proofs adduced in the manner which the law directs, viz., from witnesses giving their testimony under oath, and liable to cross-examination. It is therefore not only superfluous, but unauthorized, and the exception to it is maintained.

The other exception urges the improper joinder of the exceptors with the city of New Orleans as joint defendants in the same action. The individuals are sued for the killing, and the city for not preventing the killing. At the common law, in a trespass all are principals, and all and each of the trespassers are liable for all the injury done. 5 U. S. Dig. p. 537, tit. "Trespass," 159. Among those who must make reparation for a trespass are "all who contributed to the action either by doing what he ought not, or by omitting what he ought to have done," (3 Puff. Law Nat. par. 4, p. 216;) and when several persons have been jointly concerned in the commission of the wrongful act, they may all be made defendants, and charged as principals, or the plaintiff may sue one or more of them, at his election, (Add. Torts, p. 67; 1 Chit. Pl. 86.) Our own Code provides (Rev. Civil Code, art. 2315) that every act whatever of man which causes damages obliges him by whose fault it happened to repair it. Article 2316: That every person is responsible for the damage he occasions, not merely by his act, but by his negligence, etc.; and in the concluding article on offenses and *quasi* offenses, (article 2324,) there is the provision as to solidary liability of wrongdoers as follows: "He who causes another to do an unlawful act, or assists or encourages in the commission of it, is responsible *in solido* with that person for the damages caused by such act." While it is possible that the strict meaning of the words "causes," "assists," or "encourages" might not, if employed under other circumstances, include failure or omission to prevent, it is also clear that it was the intention of the legislature in article 2324 to make all who were liable for an unlawful act liable *in solido*. In *Vredenburg v. Behan*, 33 La. Ann. 627, where the suit was against the members of a club whose agent had been guilty of negligence, the court affirmed a judgment given *in solido*.

The city of New Orleans is sued along with the individual defendants for damages for an unlawful killing. It is averred in the plaintiff's petition that the individuals committed the unlawful act, and that the city contributed to it by an antecedent default, in that it did not prevent it. The damages are for an act in which all the defendants in law, according to the pleadings, joined. They are therefore, according to the general rules of pleading, as well as by the provisions of the Civil Code,

properly joined as defendants in this action. The exception as to the newspaper article is therefore maintained. The exception of misjoinder is overruled, and the defendants have 10 days in which to answer the plaintiff's petition.

### LAPSLEY v. UNION PAC. R. Co.

(Circuit Court, N. D. Iowa. October 10, 1891.)

1. ACCIDENTS AT RAILWAY CROSSINGS—RINGING BELL.

Under the statutes of Iowa, in cities the employees of a railway company, operating its trains are required to commence to ring the bells 60 rods before reaching the crossing, and to continue to ring it until the crossing is reached, and the omission to comply with this statute is negligence.

2. SAME—RATE OF SPEED AT CROSSING.

There being no statute regulating the rate of speed at crossings, the common-law rule applies, which is that the duty and obligation rests at all times upon the railroad company to use ordinary care and prudence in the management of its trains in approaching crossings, so that no unnecessary risk or hazard shall be cast upon the public, who have the right to pass over said crossing, taking into consideration their location and surroundings.

3. SAME—FLAGMAN AND GATES AT CROSSINGS.

The question of whether the railroad company should have flagmen or gates at crossings, in the absence of statutes, depends likewise on the circumstances, such as the amount of travel over the crossing, the obstructions, etc., and is a matter of fact to be determined by the jury.

4. SAME—IMPUTED NEGLIGENCE.

Where a woman is riding on the back seat of a two-seated spring wagon, which is driven by her brother, who owns the team and wagon, and over which she has no control, and she is injured in a collision at a crossing by a railway train, if the negligence of the brother in driving upon the crossing contributes to said injury, *held*, that said contributory negligence cannot, as a matter of law, be imputed to her.

At Law. Action by James J. Lapsley, administrator of the estate of Eliza J. Lapsley, against the Union Pacific Railroad Company, to recover damages for causing the death of his intestate. Verdict and judgment for plaintiff in the sum of \$1,000.

*A. S. Wilson and S. H. Marsh*, for plaintiff.

*Wright & Hubbard and Wright & Baldwin*, for defendant.

SHIRAS, District Judge, (*charging jury*.) In this case the plaintiff, as administrator of the estate of Eliza J. Lapsley, seeks to recover against the defendant company for the amount of damages it is claimed was caused to the estate of Eliza J. Lapsley by reason of the fact that in November a year ago Miss Lapsley was killed by an accident happening upon the track of the defendant company. In order to entitle the plaintiff to recover under circumstances of this kind, it is not sufficient simply to show that an accident has happened, and that injury or death has resulted therefrom, the accident being caused by a collision with the train of the defendant upon the road of the defendant company. The burden is upon the plaintiff of going further, and showing, in the first instance, by a fair preponderance of the credible testimony in the case, that the accident was caused by negligence upon the part of the railway company. In other words, this action is one that is

based on the charge of negligence, and the burden is upon the plaintiff of establishing it in the first instance. In this case there are three allegations of negligence made against the defendant company. Before passing to them, however, I will say, gentlemen, that the main facts in the matter are not in dispute between the parties. The evidence shows without contradiction that in November a year ago Miss Lapsley was in a wagon, being driven along the line of Leech street in this city, and that that street intersects or crosses the line of the defendant company; that while the wagon was being driven over the track of the defendant company it was struck by a train belonging to the defendant company, and that Miss Lapsley was thrown out, and received injuries which caused her immediate death. It is charged in the petition that the defendant company was guilty of negligence in three particulars. In the first place, it is said that there was no proper signal given of the approach of the train. Now, gentlemen, before passing to the particular facts, I should say to you that under the law of Iowa railroad companies have the right to place their tracks and run their trains upon a level with other highways; in other words, under the law of Iowa, a railway track and a public highway, like a street in the city, may be legally placed upon the same grade and intersect each other; so that as a necessary consequence it follows that in passing trains along the track of the railway company and persons driving vehicles along the street, where the street and railway track intersect each other upon the same level, there will be therefore necessarily danger of collision unless proper care is exercised by both parties to prevent a collision at any given time. Therefore, under this law, the railroad company had a right to have its track where it was, and to run its trains over and along that track. Also, the public had a right to pass over Leech street,—to drive vehicles over the same; but by reason of the fact that there would be danger of a collision unless proper care is exercised on the part of both the railway company and the persons using the street or highway, the law imposes upon both parties the duty and obligation of using and exercising proper care,—such care as a reasonable and prudent man should exercise in view of the circumstances that surround them at the time that either or both parties purpose to make use of the legal right that they have,—on the part of the railway company of running its train on its line of track over the highway, and on the part of the citizens of passing over the street across the track of the railway company, when they know that there is a liability or a possibility of trains coming along that track. Now, the amount of care or duty that is required by the law is the same as to both. The same rule is applied to both the railway company and to the individual citizen; and that is, as I have already said, the duty of exercising the amount of care and caution and skill that ordinarily prudent men should exercise in view of the circumstances that surround them at the particular time. Furthermore, it is a principle of law that when human life, or limb may be put at risk or danger the care and caution and the skill that should be exercised is higher or greater than under circumstances where human life and limb may not be put at risk or danger.

As I have before stated to you, the plaintiff makes in this case three charges of negligence against the defendant company in the running and management of its train at this particular time when the accident happened. The first is that no proper signal was given of the approach of the train. The statute of Iowa requires that, when approaching a crossing where a highway intersects or crosses a railway track, it is the duty of the company to cause the whistle upon the engine to be sounded by two sharp blasts of the whistle, and that the bell must be rung continuously from that time, and from that point, to wit, 60 rods from the crossing, until the crossing is reached, with a proviso that in the case of cities the blowing of the whistle may not be required. In other words, the railway companies, in case of cities, where they are within the limits of cities, may be excused from giving the signal by the blast of the whistle. Therefore, so far as this case is concerned, as the evidence shows and it is admitted that this accident happened within the limits of the city of Sioux City, the question, so far as statutory obligation is concerned, comes down to the ringing of the bell. Therefore I charge you that the law is, under the statute of Iowa, that the duty and obligation rests upon the railway company of giving a signal when a train approaches within 60 rods of a street or highway crossing by the ringing of the engine bell, and the ringing should be continued, under the statute, from that point up to the time that the locomotive may reach the crossing or highway. Now, it is charged by the plaintiff that this signal was not given, and that, as a consequence thereof, the plaintiff and the person who was injured failed to receive notice of the approach of the train, and thereby the accident happened that caused the death of Miss Lapsley. Of course, as you understand, gentlemen, the purpose and object of requiring a signal of any nature to be given when a train is approaching a crossing or highway is that thereby warning may be given to the parties who are about to pass over the railroad track of the approach of the train, so that they, on their part, may be warned of the approach of the train, and exercise due care for their own protection. Now, gentlemen, it is a question of fact to be determined by you, under the evidence in this case, whether or no this train which struck the wagon, and which caused, in that sense, the death of Miss Lapsley,—whether or not, as that train approached this crossing or intersection of Leech street, the bell was rung in accordance with the requirements of the statute, and in such manner as to accomplish the purpose of its requirement. The evidence is in conflict upon that subject, and it is for you to determine what the fact is. All I can say to you is that the statute of Iowa requires that notice be given by the ringing of the bell. If the evidence satisfies you that the bell was rung, then negligence in that particular is not shown against the defendant company. On the other hand, if the evidence satisfies you by a fair and reasonable preponderance that the bell was not rung, then that justifies you in finding that in that particular the railroad company, through its failure to observe this statutory requirement, was guilty of negligence; and, if that contributed to or aided in causing the accident, that justifies you in finding that the

charge of negligence in this particular is made out against the railway company. It is for you to decide what the facts in that particular are.

The next charge of negligence is that the train was run at a high and unnecessary rate of speed. Now, gentlemen, there is no law in this state that fixes the rate of speed—that is, the number of miles per hour—that a train may run under the circumstances surrounding this transaction. The rule, therefore, to be applied is the common-law rule—the common-law rule that the duty and obligation rests at all times upon the railroad company to use proper care—ordinary care and prudence—in the running and management of its trains, so that no unnecessary risk or hazard shall be cast upon the public. So you see, therefore, that the question as to the rate of speed, whether it is negligence to run a train at a given rate of speed, depends upon the facts and circumstances surrounding the case. As has been said by counsel, when a train is running out upon the open prairie,—in the open country,—where there is not much liability to meet people crossing a track, and other sufficient signals are given, the cars may be run at a high and rapid rate; and there is no law that would require them to check the rate of speed when they are approaching the crossing, if the circumstances and surroundings of that crossing are such that, with the signals that they have given, reasonable warning of the approach of the train is given to the public. You see that is the test. The train must be run at such rate of speed, and accompanied by such signals, as that, as they approach these crossings or highways, a reasonable warning may be given to the public in order that any person desiring to cross may receive reasonable warning of the approach of the train, and be able to take proper care for his own safety. When trains are run into a city or place where there is a large amount of travel that may be expected to cross the railroad track at a given point, at the intersection of a given street, then the speed at which the train may be rightfully run there depends, as you see, on the circumstances that surround that particular crossing. Now, in determining that, you must take into account the surroundings of the crossing, the opportunities that parties may have who are coming down upon the street for the purpose of crossing the railroad track of observing and seeing trains. If there are no obstructions in the way, no buildings about the corners, so that persons driving along the street or highway have a full opportunity of seeing the trains as they come in either direction for quite a distance, and in that way, by the use of reasonable care on their part, may receive warning of the approach of trains, why then, in the exercise of ordinary care, the railroad company would be justified in running its trains at a more rapid rate of speed than it would be if the crossing was not so situated. Now, if you have a case in which, by reason of buildings or other natural obstructions, like trees or embankments, or the shape of the ground from a cut or embankment, or whatever it may be, the fact is that persons driving down and along the highway have their view obstructed, and they would be unable, by reason of these obstructions, to see the cars at any distance, then the railroad company must run its trains and determine the speed of trains

with reference to those facts; the test being always, as I said, that the running and management of the train must be with reference to this rule, that no unnecessary risk or hazard must be thrown upon the public who are there rightfully in the use of the highway. The public have a right to be on the highway; the railroad company has a right to run its trains upon its track; but both of them must use this right that they have with reference, you see, to the duty which it owes to the other party. Therefore the duty and obligation upon the railroad company is to run its train at such rate of speed as will not cast any unnecessary risk or hazard upon those who are using the highway. Therefore, with reference to the speed of the train, it is for you to determine under the evidence whether or no that charge of negligence is or is not made out, the burden being on the plaintiff. Does the evidence satisfy you that the train was running at this particular place at such rate of speed as that, taking into account the signals that were in fact given and intended to be given by the company, and provided for,—was the rate of speed at which that train was run of such character as to thereby cast unnecessary risk and hazard upon the persons rightfully in the use and occupancy of the street or highway at the crossing? If the evidence satisfies you that the train was run at a speed that cast this unnecessary risk and hazard upon those who were using the highway rightfully, that justifies you in finding that in this particular the railroad company was negligent, and, if that negligence aided or caused the accident, it would justify you in that regard in finding that issue in favor of the plaintiff. Of course, if the evidence fails to satisfy you of that fact, as I have said, the burden being on the plaintiff, then on that issue your verdict would be for the defendant, or your finding would be for the defendant upon that issue.

The third charge of negligence contained in the petition is that there was no flagman or other means of warning placed at this intersection of Leech street with the line or track of the defendant company. Now, there are circumstances that may surround railroad companies, such as the amount of business, the amount of travel over the street, the obstructions that surround the intersection of the street or the highway, that may require of the railroad company, not alone the giving of signals by the ringing of the bell or the sounding of the whistle or means of that kind, but may also require of them, in the exercise of proper care and prudence upon the part of the railway company, the placing of flagmen at the crossings, or the placing of gates, or some means by which the public will be warned of the approach of the train by signals that are given either by flagmen or the lowering or raising of gates, so that the persons who come down and along the highway are warned thereby that there is danger by reason of the coming of a train. The law does not define the way that should be done, excepting under the same general rule that I have already given you. The duty and obligation, as I have already said, is upon the railway company to take all reasonable care and prudence to so manage the running of its train, including the care of crossings,—the protection in that sense of the crossings,—as that the cars and trains may be passed over the

highway without casting any unnecessary risk or hazard upon the people who use the crossing. Now, then, if the surroundings of the crossing are of such a nature, the obstructions about it are of such a nature, and the amount of travel upon the highway is of such a nature, as that in the exercise of this duty, which the railroad company owes to the public, of the exercise of ordinary care for the protection of the public against danger from the passage of trains, as to require the placing of flagmen, or the placing of gates, or other like means of warning; if the evidence satisfies the jury that that was required of the railway company, and it was not done,—then that justifies the finding that in that particular the railway company had failed to exercise the degree of care which the law required of them, and of course justifies the finding of a verdict of negligence in that particular. Of course, before you can find that, you must be satisfied from the evidence that the facts and circumstances surrounding the parties at the place were such as to require of the railway company the exercise of this degree of care for the protection of the public upon the highway.

Now, gentlemen, in deciding all questions of this kind you must remember that you are to place yourselves as near as may be in the position that the parties occupied just prior to the happening of the accident. It is a familiar and common saying that hindsight is better than foresight. It is not that we can look back and, in the light that is now thrown upon the transaction, say that now, looking at it in view of the accident as it happened, that, if thus and so had been done, or this and that had not been done, the accident would not have happened. That is not a fair way of viewing the position of the parties. The question is, taking the position of the parties and the situation of affairs as it was just prior to the accident, as the matters then stood, what was then and there required of the parties in the exercise of ordinary care and prudence? Now, then, looking at that crossing before this accident happened, we will say on the morning of that day,—looking at that crossing, its nature, its character, and the obstructions that were round about it, whatever they may have been, taking into account the speed at which the railway company expected to run its trains over that crossing, taking into account all of those circumstances,—it is for you to say then whether, as the company then stood, and as the circumstances then appeared, the company did or did not exercise proper care and prudence on its part, whether it required the placing of flagmen or the placing of gates or any other means of warning at this crossing. These remarks that I have made apply to these other questions of negligence. We are to look at it as it would appear to reasonably fair and prudent men immediately prior to the time of the happening of the accident. If the evidence has failed to satisfy you that the defendant was guilty of negligence in any of the three particulars that I have named before you, that ends the case. Then the plaintiff has failed to make out the charge of negligence against the railroad company; and, that being the case, then your verdict must be for the defendant. If, however, under the evidence, you find that the defendant, under the instructions that I have given you, was guilty of

negligence in any one or more of the three particulars that I have named to you, and that by reason thereof the accident was caused which resulted in the death of Miss Lapsley, then, so far as this question of the negligence of the defendant is concerned, your finding would be for the plaintiff, and you would be required to determine the questions that arise under the defense of contributory negligence.

Now, it is a principle of law that where the negligence of both parties combine to produce the accident, then neither one can recover as against the other. The law does not attempt to separate out the consequences of the negligence of the one party, as distinguished from the negligence of the other. If the negligence of both parties contribute to or aid, as the proximate cause or causes in the producing of the accident, then neither one can recover from the other, and this is what is known in law as the defense of contributory negligence. As I have said to you, gentlemen, the law places upon the party—the citizen, the individual—who is about to use a highway or street which crosses over a railway track the duty of using due care, ordinary prudence, foresight, and caution for his own protection. A person is not justified, when he is approaching a railway crossing, in simply driving over it without taking any precautions at all to see whether there is a train approaching. It is his duty to know and he is bound to know that there may be trains coming down upon that track. As you drive down along a street or highway, and you see that there is a railroad track laid down across that street or highway, as you approach it, your own common sense tells you that may be a place of danger. You know the purposes for which those rails are laid there. It is intended that trains should pass over them, and you know that railroad trains are run at a very considerable rate of speed, and in many instances at a high rate of speed, and that they may rightfully run, under proper circumstances, at a high rate of speed. You know that trains are composed of many cars; that they are very weighty; and that it is impossible, in the nature of things, to always stop a train promptly; and that, therefore, as you approach that crossing, if there is a train coming upon the track, if you attempt to pass over it you may be subjected to risk and danger by so doing. Hence the law places on you, as you approach the crossing, the exercise of due care and caution for your own protection; just as, in the case of a railroad company, what a party should do as he approaches one of these crossings would depend on the surrounding circumstances. If you are driving in an open country, and the railroad track is in sight for a long distance on either side of you, the law expects you to exercise your senses of sight and hearing, and that you will be careful to see whether or no there is a train approaching, and whether you can or cannot safely attempt to make the crossing; and you are not justified in attempting to make the crossing if the train is approaching so close as that, if you attempt to make that crossing, you will thereby run the risk or danger of injury. Now, then, when a crossing is obstructed— I may say, however, further, as you approach a railroad track in an open country, and you have full opportunity of seeing the tracks for quite a distance, and if you fairly use your senses of



sight and hearing, the law places no obligation upon you unnecessarily to stop. If you can fairly see the track, and use fair caution and prudence for your own protection without stopping your horses, you are not obliged to do that. So, when you approach a crossing in the city or the town, the question whether you should or should not be required to stop your horses before you get upon the track depends upon the facts and circumstances that surround you at the time. You have a right to use the highway. You have a right to pass over the crossing. You have a right to assume that the railroad company on its part will give all necessary and usual signals and warnings of the approach of the train. You have a right to go towards the track expecting that those signals and warnings will be given. Then, taking into account all of the circumstances that surround the particular crossing, the law requires you now to use that amount of caution and skill and prudence for your own protection that ordinarily prudent men should exercise under like circumstances. If there are obstructions in the way of such character as that they prevent your seeing the track as you come close up to it,—that it is impossible by the use of your sight to ascertain whether or no in fact a train is or is not approaching,—does not then common prudence upon your part require you to approach that track more carefully, being more upon your guard in that particular, than if you were driving down upon a track in an open country, where your sight is unobstructed, and where you can see a long distance, and be satisfied in that way that there is in fact no train approaching close to you? If, however, the obstructions are of such a nature that quite a distance before you reach the track you cannot see a train, what assurance have you, as you approach the track, that a train may not be coming there? The law does not say absolutely that you should stop your horses, or that you should not stop your horses. It says that you must do whatever ordinarily prudent men should do under the circumstances that surround you at that time, in order that you may fairly ascertain whether, in the exercise of reasonable care upon your part, you can pass upon that track in safety. The law imposes upon you the duty of using the same degree of care that the railroad company is expected to exercise for your own protection; and if you fail in doing that, and drive upon the track, and you are injured, and your negligence in that way contributed to your injury, you cannot recover from the railroad company, even though the railroad company may be negligent in the management of its train. Then we would have a case where the negligence of the two parties contributed to produce the accident, and, as I have said, in that case neither party can recover from the other.

Now, gentlemen, the evidence in this case shows that the deceased, Miss Lapsley, was in a wagon, driven by her brother, and that there was one or two other members of the family in the wagon. The evidence has shown you the facts and circumstances as to how they came to be there; how they passed down on Leech street, and drove towards this crossing, and, as the horses and wagon passed over and upon that track, that they were struck by a train or locomotive upon the defendant's railway;

that Miss Lapsley was thrown out of the wagon, and received the injuries that caused her death. There is no dispute over those facts. The question is, on this defense of contributory negligence, whether or no proper care and prudence was or was not exercised in the manner in which that wagon approached that crossing. You have had before you, gentlemen, the evidence that shows what the circumstances were. Now, the first question for you to determine under the evidence is whether or no the parties who were in charge of that wagon approached that crossing using due and proper care,—that amount of care and prudence which the facts and circumstances that surrounded them at the time required at their hands. The whole evidence is before you. The rule of law is that persons are required to use ordinary prudence—ordinary care—for their own protection, and that one is not justified in driving down recklessly or carelessly without exercising a lookout, to use the senses of sight and hearing to the best ability that the circumstances surrounding will permit at the time. He must do that, and, if he fails in doing that, he is guilty of negligence. Now, then, what do you say under the facts as developed by the evidence in this case? Was or was not due care and prudence exercised in the mode in which that wagon was driven down to and across the track of the defendant company? If it was,—if due care was exercised,—why then the defense of contributory negligence is not made out; the burden of establishing it being upon the defendant. If the evidence fails, therefore, to satisfy you that due care,—or, rather, if this defense is not sustained by a fair and reasonable preponderance of the testimony, the burden being on the defense, then the defense of contributory negligence fails. That is, I mean to say if, under the evidence in this case, you are not fairly satisfied that there was a lack of the exercise of proper care and prudence and foresight on the part of those having charge of that wagon, why, then, you cannot say that this charge of negligence is made out in the mode in which the wagon approached this crossing and passed in front of the train. If there was no negligence, then in that there was no contributory negligence, and there is no defense then to the claim of the plaintiff, providing you find the other issues for the plaintiff. If, however, gentlemen, you are satisfied that in the mode in which the wagon was driven down to this crossing, and in front of the train upon the defendant's road, there was negligence; that the parties in the management of that wagon did not use due care; that, failing to exercise the care and skill and foresight that the law imposes upon them, the wagon was carelessly or recklessly driven upon that track when that train was approaching, and under such circumstances as that it would be apparent that there was danger of accident,—then the question arises whether or no the deceased is or is not to be held liable for the consequences of that negligence.

Some discussion has been had in this case in regard to the negligence on the part of the driver, and the relation that he maintained to the deceased. The uncontradicted evidence in the case shows that the wagon was driven by the brother, and upon the part of

the defendant company it is claimed that the negligence of the brother is, as a matter of law, to be imputed to the deceased. Now, there are certain circumstances, gentlemen, in which as a matter of law the negligence of a driver of a carriage in that way may be imputed to another person who occupies the vehicle with him; as, for instance, a father is driving, and has a child in the carriage, or a husband is driving, and has his wife there with him, or a guardian is driving with a ward that he has under his care. The relations that exist between the parent and child, and husband and wife, or guardian and ward are such that the law may impute as a matter of law the negligence of the father or husband or guardian to the wife or the child or the ward, because there is a relation there existing where the one controls the other, and where ordinarily, in the ordinary affairs of life, we recognize the fact that the one trusts the other, and relies upon the other for protection; that is, a husband exercises protection, and the wife looks to the husband for protection. So in the case of the child with the parent, and so in case of the ward with the guardian. Again, there may be the relation of master and servant, or principal and agent, which may exist under such circumstances as that the negligence of the driver would be imputed to the master. For instance, you own a team. It is yours. You have a man that is your driver. You are going out with him, driving along the highway. He is under your control. He is bound to obey your directions that you give him. You have the right of control and the power of control over him. You approach a crossing, and he is driving, and you are in a position where you can supervise and control him. Now, then, if you allow him to drive negligently and recklessly down upon the railroad track without stopping, if that would be required, or without exercising proper care, why, then, the negligence of that driver is imputed to you, because he is your servant, because he is under your control and under your management, and you have opportunity of controlling and managing him. Under those circumstances and in that case the law would impute to the master the negligence of the servant, and if an accident happened, and the master is injured, he cannot recover.

There may be other circumstances, gentlemen of the jury, in which it becomes a question of fact to determine whether a party is or is not to be held liable for the negligence of another one who accompanies him. If there are a number of us together in a common enterprise, and we are in a carriage or wagon, and one is holding the reins and driving, and the others have the right of control over him, and in fact exercise it over him, although this relation of husband or parent or guardian or of master and principal may not in fact obtain as a matter of law, yet, if the relation is such that a person does in fact have the right of control, and does in fact exercise the right of control, then a jury would be justified in finding that the negligence of the driver would be imputed to the other, but would not be justified in imputing it without the parties in the particular instance did in fact exercise this right of control under such circumstances as that it would justify you in finding that the driver was

under the control of the other party. Now, take the facts of this case. The relation here was that of brother and sister. The evidence shows that the sister who was killed was older than the brother. They were both of mature age. The evidence shows that the sister was accustomed to manage affairs for herself; that to a greater or less extent she was in the control or management of her father's farm or business before his death, and after that she was appointed administratrix of his estate. Now, under those circumstances, is there anything to show that the brother exercised over her a control, or owed her a duty of protection and care, such as a husband would ordinarily exercise over a wife, or a parent over a child? It seems to me, gentlemen, that there is nothing in the case that will justify you in finding that—there is nothing here that would tend to show that—simply the relationship of brother and sister—nothing under these circumstances that would justify you in finding that the brother controlled the actions of the sister, or the sister the actions of the brother, in such sense as that the negligence of the one would be imputed to the other as a matter of law. Now, then, what is the fact? It may be that this sister did exercise a control over the management of the wagon. If the evidence satisfies you, in the driving of the wagon and in the carrying out of the business in which they were engaged, that Miss Lapsley did exercise control over the management of it, then, of course, that would justify you in finding that if there was negligence in the management of the wagon, and she in fact exercised a control over it in that sense, and there was negligence upon the part of the driver, that would justify you in finding as a matter of law that the negligence of the brother was to be imputed to the sister; but you must be satisfied from the evidence in the case that it was an actual control upon her part; that she stood in such position that she could and did in fact exercise a control and management and direction over it, so that you can say from all of the evidence in the case that she exercised a control over the mode in which that wagon was driven down to the crossing, in order to impute to her the negligence of her brother. If you find that the brother was negligent in the mode in which he drove that wagon upon that track, so that, if he had been injured, and he brought a suit to recover damages, he would be defeated by reason of his contributory negligence, then that negligence upon his part will defeat the right of recovery in this case, providing you find that the sister, Miss Lapsley, who was killed, exercised a control over the management and driving of the wagon in such sense that she should be held responsible for what in fact the brother did; but, unless that actual control existed, then you would not be justified in finding that you could impute to her the negligence of her brother, if you find such negligence did in fact exist.<sup>1</sup>

If you find, gentlemen, however, that the circumstances were such

<sup>1</sup>The following authorities are cited in support of the doctrine contained in the instructions in reference to imputed negligence: *Little v. Hackett*, 118 U. S. 863, 6 Sup. Ct. Rep. 391; *Noyes v. Boscawen*, 64 N. H. 361, 10 Atl. Rep. 690; *Nesbit v. Town of Garner*, 75 Iowa 314, 39 N. W. Rep. 516; *Robinson v. Railroad Co.*, 66 N. Y. 11; *Railway Co. v. Creek*, (Ind. Sup.) 29 N. E. Rep. 481; *Cahill v. Railway Co.*, (Ky.) 18 S. W. Rep. 2; *Randolph v. O'Riorden*, (Mass.) 29 N. E. Rep. 583.

that negligence of the brother, if any existed, is not to be imputed to the sister, if the brother did not represent the sister in driving and in the management of the wagon, and, if she exercised herself no control—no direct control—over the brother, then she was not freed in law from the duty and obligation that was upon her of exercising for her own protection due care and prudence when she approached that crossing. You see, it will not do to hold that the sister was entirely freed from the exercise of caution and care for her own protection because the brother was driving the team, and then turn around and hold that she is free from the consequences of that brother's negligence because he drove the team; that cannot be done. If the sister was there in an independent relation, having no control over the brother, so that his negligence could not be imputed to her, then she simply stands there as any other citizen would, charged by the law with a duty and obligation of exercising due care for her own protection. Determine the question of contributory negligence upon what she did or may have omitted to do. Now, she being in that wagon, with the opportunities of seeing, according to the testimony, the wagon being an open wagon, being driven down towards that crossing, what did common prudence upon her part require her to do? She must exercise,—the law says she must use ordinary care and prudence,—exercise her senses of sight and hearing, as to whether or no the train was approaching, for her own protection. She is not justified in driving or permitting herself to be driven recklessly or carelessly upon that track, and thereby subjecting herself to danger by an approaching train. She must exercise due care and prudence upon her own part for her own protection. If she did do that, and the accident happened, then the charge of negligence against her is not made out. If she failed to exercise proper care and a proper lookout for herself, and failed to do that, and the accident happened thereby, her own neglect contributing to it, then the defense of contributory negligence would be made out against her, and your verdict would have to be for the defense.

You have got to apply these general rules that I have given to you in the exercise of sound common sense, with the facts and circumstances that are developed in the evidence. All that the law can do is to give you general rules, and it is for the jury to apply those rules of law with reference to the facts and circumstances as they are developed in each particular case,—as those facts and circumstances are brought before you in the evidence in the case. Upon this charge of contributory negligence, as I have said to you, a duty and obligation would be upon this deceased, either through herself or her brother, if she had control over him in the management of that wagon, so that he was her representative in that particular, to exercise due care in the approach to that crossing; and, if he was her representative, and she had control over him, so that his negligence could be imputed to her, and he was negligent, then a recovery cannot be had in this action. Or, on the other hand, if the relation and position that the parties occupied to each other was not such as that the negligence of the brother could be imputed to the sister, then the negligence of the brother would not

defeat the right of recovery. The right of recovery would not be then defeated, unless you find under the evidence that the sister herself was negligent. As I have said to you, under those circumstances the law charges the sister with the duty of exercising due care for her own protection, and to exercise her senses of hearing and seeing, in view of the circumstances that surrounded her when she was thus being driven towards that crossing. If, under the instructions that I have given you, you find that the charges of negligence in any one of the particulars that I have named to you are not made out against the defendant company, or if, in other words, you find that there was no negligence upon the part of the defendant company, then, of course, your verdict will be for the defendant. If, on the other hand, you find in any one or more of the particulars that I have named to you the defendant company was negligent, and that negligence aided or was the proximate cause in producing the accident, then your verdict would be for the plaintiff, unless the defense of contributory negligence is established. But if the defendant was negligent, and the deceased was negligent, or was responsible for the negligence of her brother, and he was negligent, and that negligence aided in causing the accident, then the plaintiff cannot recover, because the defense of contributory negligence would be established.

If upon the issues you find for the plaintiff, your next duty will be to determine the amount of damages. In cases of this kind, gentlemen, the rule is compensation for the pecuniary loss that is caused to the estate of the deceased by the death of the party. You are not entitled, in cases of this kind, under the law, to take into account the injury to the feelings of the members of the family or the relatives that are left. The law does not attempt to weigh that, or give damages therefore. The measure is the pecuniary loss caused to the estate of the deceased party. Now, that is a money loss. Of course, it is impossible for testimony to be brought before you to show the exact amount of that pecuniary loss; that is to be intrusted to the good common sense and good judgment of the jury; but that is what you are to allow. The theory is this: that, when a person is killed, then the estate suffers a loss in money,—what the person may accumulate had he continued to live for the probable extent of his lifetime. The Carlyle tables have been admitted before you, showing the expectancy of life of the party who was killed,—I believe, some 22 years, or a little over. Remember, gentlemen, that you are not to assume it as a fact that Miss Lapsley would have lived 22 years, and then figure up what she might have earned in 22 years, and allow that as damages. That is not the rule, because you know these tables are merely based upon the average expectancy. Notwithstanding her expectancy of life would be 22 years, and although this accident might not have happened, she might have lived only a year; she might have died from a variety of causes, and she might have lived longer than her expectancy. Therefore, all you can do in a case of this kind is to give weight to the probabilities. You know that the probabilities are that a person who is young will live

longer than a person who is old. The older we get, the more certain you know we are approaching the time of dissolution, and that is true in a general sense. You take into account, therefore, the age, the health, the strength of the party, and the ability to earn money, as it may be developed in evidence before you, and fix such fair sum that, being now paid, and paid in a lump, and being freed from all the contingencies and uncertainties that inhere in human life, will fairly compensate the estate of the deceased for what the estate has been deprived of in the way of accumulations the party might have made had they lived. You cannot figure that out in a mathematical way. You can only take the reasonable probabilities, and that must be determined by the jury in the exercise of good common sense and judgment on your part.

Verdict and judgment for plaintiff for \$1,000.

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KERLIN v. CHICAGO, P. & ST. L. R. Co. *et al.*

(Circuit Court, D. Indiana. April 21, 1892.)

1. MASTER AND SERVANT—VICE PRINCIPAL—CONDUCTOR AND BAGGAGE MASTER.

In Indiana, a baggage master on a railroad train is considered a coservant with the conductor of another train, through whose negligence a collision occurs. *Railway Co. v. Ross*, 5 Sup. Ct. Rep. 184, 112 U. S. 377, distinguished.

2. SAME—FOLLOWING STATE DECISIONS.

The control of the relation of master and servant and other like relations is reserved to the states, and the federal courts, when administering the state law upon such subjects, should follow the decisions of the state courts.

3. SAME—PLEADING.

A declaration which, among other allegations of negligence, avers that a conductor was not a careful, skillful, and attentive conductor for a passenger-train, which was known to the company, and that the death of a baggage master was caused by the conductor's negligence, contains all the allegations necessary to constitute a good cause of action, and a demurrer on the ground of insufficiency should be overruled.

At Law. Action by Anna J. Kerlin, administratrix, against the Chicago, Pittsburgh & St. Louis Railroad Company *et al.*, for damages for the death of an employe in a collision. Heard on demurrer to the complaint. Overruled.

*Finch & Finch*, for plaintiff.

*S. O. Pickens*, for defendants.

BAKER, District Judge. Complaint in two paragraphs, to each of which the defendants severally demur for want of facts.

The first paragraph, so far as material to the present inquiry, alleges that the plaintiff's intestate was in the employ of the defendant as baggage master, having charge of a baggage car of one of the passenger trains run by defendant between Chicago, Ill., and Indianapolis, Ind.,

known as "Louisville No. 14;" that another one of the defendant's passenger trains, running between Chicago, Ill., and Cincinnati, Ohio, of which Thomas Lamb was conductor, was known as "Cincinnati No. 13;" that said defendant's railway between Logansport and Kokomo, in the state of Indiana, consisted of a single track; that at the time of the collision causing the death of plaintiff's intestate the train known as "Louisville No. 14" was running from Logansport to Kokomo at the rate of 40 miles an hour, having the right of way over the train known as "Cincinnati No. 13" between said points; that said conductor, Lamb, knew that the train known as "Louisville No. 14" had the right of way between said points, and, without ascertaining whether it had passed Kokomo or not, he carelessly and negligently proceeded with his train upon said single track from Kokomo towards Logansport, and when about one mile from Kokomo, and while running at the rate of 40 miles an hour, his train came in collision with the train known as "Louisville No. 14," causing the intestate's death without fault on his part. The sufficiency of this paragraph hinges on the question whether the baggage master of the train known as "Louisville No. 14" was the fellow servant of the conductor of the train known as "Cincinnati No. 13." It is argued by the counsel for the plaintiff that the averment that the conductor was placed in charge of the train known as "Cincinnati No. 13" shows that he was the representative or vice principal of the defendant in such sense that, as to the employees of the defendant on the train known as "Louisville No. 14," his negligence was the negligence of the defendant. It is settled, wherever the common law prevails, that the common master is not responsible to one servant for an injury caused by the negligence of a fellow servant. *Railway Co. v. Ross*, 112 U. S. 377, 5 Sup. Ct. Rep. 184; *Taylor v. Railroad Co.*, 121 Ind. 124, 22 N. E. Rep. 876. Few questions, however, have given rise to more conflicting opinion than when and under what circumstances an employee engaged in the service of a common master stands in the place of the master as his vice principal, or, *alter ego*, as to other employees. Courts and text writers are generally agreed that the fact that one employee is the superior of the other is not controlling. The question is not one of rank, and it cannot be solved by the inquiry, is one employee superior to the other? *Railway Co. v. Adams*, 105 Ind. 151, 5 N. E. Rep. 187; *McCosker v. Railroad Co.*, 84 N. Y. 77. Regardless of rank, whenever the employee is engaged in the performance of duties which the law has devolved upon the master, and has required him personally to perform, such employee, in every such case, stands as the master's representative as to other employees. The master is constructively present and acting through such representative.

Among the duties which the master is required personally to perform are those of providing for the employee reasonably safe tools and appliances with which to work, reasonably careful and competent fellow servants, and a reasonably safe place in which to work. In providing these the master is required to exercise ordinary care and diligence, and for failure, causing injury, he is responsible to an employee free from



contributory negligence. When the master chooses to delegate the performance of these duties to another, the delegate stands, *pro hac vice*, for the master. His negligence is the negligence of the master. It is also generally agreed that, where an employe is placed in charge of the entire business of the master, he represents the master as vice principal. So, also, where an employe is placed in charge of an entire department, so that, in respect of that department, he has full control, he is a vice principal, and not a fellow servant, as to his subordinates, and his negligence is that of the master. Thus it has been held that the general superintendent of a railroad, the superintendent of a division, the superintendent of bridges, the road master, the master mechanic having general charge of the machine shops, represent the master as to subordinate employes, and their negligence as to such employes has been held to be that of the master. *Taylor v. Railroad Co.*, *supra*. And in the case of *Railway Co. v. Ross*, 112 U. S. 377, 5 Sup. Ct. Rep. 184, it has been held that the conductor of a train of which he has entire charge, as to his subordinates on the same train, is to be deemed to be the representative of the company. This is put upon the ground that he is clothed with the general superintendence of the train and its movements, and has confided to him the power to command and control the entire train crew. It is held by some courts, where the master places one employe in a position of authority over other employes, who are under his control, although all are engaged in a common service or undertaking, that such superior stands for and represents the master as to such subordinates. It is too firmly settled in this state to be longer open to serious debate that the mere fact of superiority and subordination among employes engaged in a common service or undertaking does not make the superior a vice principal. If such were the law, every boss or foreman having charge of workmen would stand for the master. The exigencies of every considerable business enterprise require the employment of men charged with different duties, and occupying positions of different power and responsibility. So long, however, as they are all engaged in a common service or undertaking, each in his place contributing to the accomplishment of a common object, they are all fellow servants, if the service or undertaking is one which the law does not require the master personally to perform. If it were conceded, however, that the superior represented the master so far as he was empowered to command or control his subordinates, this would not be controlling on the question under consideration. The death of the plaintiff's intestate was not caused by his obedience to any order or command of a superior clothed with power of control. The fatal injury was caused by the negligence of Conductor Lamb in running his train on the time of the train on which the plaintiff's intestate was employed.

It is claimed that the case of *Railway Co. v. Ross*, *supra*, is decisive of the question here involved. It is difficult, if not impossible, to harmonize that case with the current of the authorities in England and in this country. If sound, it reaches the border line, and ought not, in

my judgment, to be held to be controlling, except in cases presenting the same facts. *Howard v. Railway Co.*, 26 Fed. Rep. 837. In that case the engineer whose death was caused by the negligence of the conductor was employed on the same train with the negligent conductor. Here the conductor and baggage master who was killed were employed on different trains. It has been held that this circumstance ought not to make any difference in the rule of decision. *Ragsdale v. Railway Co.*, 42 Fed. Rep. 383. That might be true in states where such an application of the rule would not be in conflict with the settled law of the state where the injury occurred. Where the rule of decision in the case last cited is in harmony with the rule of decision in the state courts, I should think it ought to be followed. It seems to me that there is sound reason for holding that the *Ross Case* is not controlling on the question in hand. The law requires that railroad companies shall adopt and promulgate general rules and regulations for the government of their employes and for the operation of their railways. It is matter of common knowledge that the duties of every employe on all passenger trains are regulated by general rules, except when temporarily changed or modified by special orders. Every employe on the train, from conductor to brakeman, in running the train is acting under the orders of a common superior, charged with the control, direction, and movement of all trains on the entire road, or of some integral portion of it. All conductors, engineers, firemen, brakemen, and others employed in the movement of trains are acting under, and are engaged in carrying out the general or special orders of, a common superior, who stands as the representative of the common master. While the exigencies of the business require that some employe should have charge of the actual running of each particular train, all are nevertheless engaged in the same common undertaking, under the direction and control of a common superior, who represents the common master. On principle it would seem that all employes thus engaged in a common service, acting under the control and direction of a common superior, ought to be deemed to be coemployes. These considerations distinguish the present case from the case of *Railway Co. v. Ross*, *supra*. The relations, and the rights and duties, of husband and wife, parent and child, guardian and ward, master and servant, and other like relations, in our dual form of government, are matters of local and state regulation. The control of such relations was reserved to the people or to the states, respectively, with anxious solicitude. The harmony of the relations between the operations of the state and national governments can alone be maintained by mutual respect for and recognition of the rights of each. In this case, the relation of the conductor and baggage master, and the relation of each to the defendant, was purely a matter of state concern, and was wholly dependent on state law. The right of action for the death of the plaintiff's intestate is given solely by the law of the state. Such considerations prove with convincing force that there should be no conflict, touching these matters, between the state courts and the federal courts when administering the state law on the same state of facts. I think the plaintiff's intestate was the co-

servant of the negligent conductor. It results that the demurrer to the first paragraph of the complaint must be sustained.

I think the second paragraph of the complaint is sufficient. It contains all the formal allegations necessary to constitute a good cause of action. Among other grounds of negligence it avers that Lamb was not a careful, skillful, and attentive conductor for a passenger train, which was known to defendant, and that the death of plaintiff's intestate was caused by the negligence of the conductor. While the paragraph is not very artistically drawn, I think it contains enough facts to withstand a demurrer. The demurrer to this paragraph is therefore overruled.

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O'NEILL v. CHICAGO & N. W. RY. Co.

(Circuit Court, D. Iowa. May, 1881.)

**MASTER AND SERVANT—PERSONAL INJURIES—NEGLIGENCE.**

A carpenter in a railroad yard was standing upon a ladder which leaned against the car he was repairing, when a locomotive came against the train, threw him to the ground, and injured him. The fireman saw him in ample time to notify the engineer, but said nothing until the locomotive was about a car-length away, when he cried out "Whoa!" Thereupon the engineer reversed the engine, and almost stopped; but, receiving a signal to proceed from the switchman, who did not see the carpenter, he again turned on steam. *Held* that, on this state of facts, the question whether it was the fireman's duty to specifically notify the engineer that a man was in danger was one of fact for the jury.

**At Law.** Action by John M. O'Neill against the Chicago & Northwestern Railway Company to recover damages for personal injuries. A verdict having been returned for plaintiff, the case was heard on motion for a new trial. *Granted.*

This suit was brought by plaintiff to recover damages on account of personal injuries, caused, as alleged, by the negligence of the servants of the defendant. The plaintiff was in the employ of the defendant as a car carpenter, and was directed, in the course of such employment, to repair a car which was standing upon one of the numerous tracks in the defendant's yard at Clinton, Iowa. He was directed to place certain lamp brackets upon said car, and in order to do so it was necessary for him to place a ladder against the car, and to stand on the same while doing the work. While engaged in this duty, standing upon the ladder, a locomotive came in upon the track, and collided with the line of cars upon which plaintiff was at work, with such force as to throw him to the ground and injure him. The locomotive was in charge of an engineer, and was attended by a fireman, named Riggs, and by a switchman. The fireman, Riggs, saw plaintiff in his perilous position in ample time to inform the engineer of his peril, but gave no notice, and made no effort to stop the engine or prevent the accident, except as shown in the tenth instruction to the jury, hereinafter quoted. The case was tried before a jury, and there was a verdict for plaintiff. The mo-

tion for new trial is urged upon the ground that the court erred in charging the jury. The tenth instruction given to the jury is as follows:

"(10) The evidence tends to show that the fireman, Riggs, who was with the approaching engine, could see plaintiff at work on the car, and that he did see him for some distance, and in ample time to have informed the engineer; that he gave no alarm until the engine was within about one car-length of the standing cars, and that he then called out 'Whoa!' to the engineer, who reversed his engine, and nearly stopped the train, when the switchman, who did not see plaintiff, signaled the engineer to move on, when he again put on steam, and moved up against the standing car, thus causing the injury. If you find these facts, the court instructs you that it was the duty of the fireman to notify the engineer that there was a man on the side of the car and in danger, and to give such notice in time to enable the engineer to avoid the collision; and, if so notified, it would have been the duty of the engineer to disregard the signal of the switchman to move on. In such a case he would be bound to presume that the signal had been given in ignorance of the danger, and he would be bound to act upon his knowledge of the danger, or upon any information he had received from the fireman, or from any other source, that there was a man in danger."

*W. A. Foster and John J. Mullaney*, for plaintiff.  
*Hubbard & Clark*, for defendant.

McCRARY, Circuit Judge. I am inclined to the opinion that the tenth instruction given to the jury was erroneous, in that it did not leave it for the jury to say whether, under the circumstances, it was the duty of the fireman (Riggs) to have given to the engineer more definite and explicit warning concerning the plaintiff's peril. It is doubtful whether the circumstances of this case bring it within the rule that, the facts being established, the court may determine the question of negligence as a question of law. It probably belongs to that other class in which, although the facts be undisputed, different minds might honestly draw different conclusions therefrom; and, if so, the question is for the jury. As the verdict is for less than \$5,000, and therefore a judgment rendered thereon could not be reviewed upon writ of error by the supreme court, I am constrained to resolve my doubts in favor of a new trial. The motion is sustained. *Railroad Co. v. McElwee*, 67 Pa. St. 315; *Railroad Co. v. Stout*, 17 Wall. 659; *Railroad Co. v. Van Steinberg*, 17 Mich. 99; *Gillespie v. City of Newburgh*, 54 N. Y. 468; *City of Rockford v. Hildebrand*, 61 Ill. 155.

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### FLOWER v. GREENEBAUM.

(Circuit Court, N. D. Illinois. June, 1880.)

#### BANKRUPTCY—COMPOSITION—SECURED DEBTS.

At a meeting of creditors to effect a composition in bankruptcy, plaintiff, owning notes secured and unsecured, voted for the settlement on the latter, and did not vote on the former, and the securities were not in any way considered: subsequently he converted them into money, but they proved insufficient to pay the debt. Held that, if the debtor desired to have the composition operate upon the secured

notes, it was his duty to have the securities valued, and failing to do so he was liable for the same percentage of the deficiency as was paid to the unsecured creditors.

**At Law.** Action on two promissory notes by James M. Flower, receiver of the German National Bank, against Henry Greenebaum. Judgment for plaintiff. For prior report, see 2 Fed. Rep. 897.

This suit was brought upon two promissory notes given by defendant to the German National Bank of Chicago, the first being for the sum of \$25,000, dated November 13, 1877, and payable, with interest, at 8 per cent., 60 days after date; the other for the sum of \$15,000, dated November 17, 1877, payable, with interest, at 10 per cent., in 60 days after date. Both notes were secured by certain collaterals, which had been converted into money by the plaintiff, and the proceeds duly applied, and this suit was brought to recover the balance remaining due after the application of the proceeds of the collaterals. The defense set up was a discharge under a composition in bankruptcy. The admitted facts were that on the 17th of December, 1877, defendant, Henry Greenebaum, together with Elias Greenebaum and David S. Greenebaum, who had been and then were copartners composing the firm of Henry Greenebaum & Co., of this city, and Greenebaum Bros. & Co., of New York city, filed their voluntary petition in bankruptcy in the district court of this district, and were duly adjudged bankrupts; that they afterwards, as copartners and individually, submitted to a meeting of their creditors, duly called by the court under section 17 of the act amendatory of the bankrupt law approved June 22, 1874,<sup>1</sup> a proposition for a composition by the payment of 25 per cent. of their indebtedness, 5 per cent. to be paid in cash within 60 days after the ratification of the composition by the requisite number and amount of creditors, and 10 per cent. in one year, and 10 per cent. in two years, from such ratification, without interest; that the creditors duly accepted and ratified such composition, and the same was confirmed and approved by the court. It was also admitted that, at the time of the creditors' meeting called to consider such proposition for composition, the German National Bank was in liquidation, under the management of a committee of its directors; that the bank held, not only the notes in question, but divers other claims not secured; that defendant, Henry Greenebaum, presented to the meeting of the individual creditors a statement of his assets and debts, in which statement the notes in question were classed as secured debts; that the bank was represented at said meeting by a duly-authorized attorney, who voted in favor of the composition upon the unsecured claims held by the bank against defendant, but did not vote upon the notes now in suit, and the notes in suit were not reckoned in any action of creditors, either for the adoption of the resolution of composition at the creditors' meeting, or for its confirmation by the signature of creditors. The composition was ratified and became operative by the confirmation of the court on the 25th day of May, 1878.

<sup>1</sup> 18 U. S. St. at Large, 182.

*Tenney & Flower*, for plaintiff.

*Adolph Moses*, for defendant.

BLODGETT, District Judge. It is now insisted by the defendant that the bank assented by its action, or the action of its representative, at the creditors' meeting, to be considered and treated as a fully secured creditor in the composition proceedings; that by voting for the composition on its unsecured debts it misled, or may be held to have misled, the defendant into the belief that it relied solely for payment of the notes in question on the security which it held for the notes, and that it ought not be allowed to collect the balance of these notes, after exhausting the security, from the defendant; that, if defendant had understood at the time of the meeting that the bank would claim any balance on these notes, he could not have made the offer to his creditors which was made and accepted; that the bank could have had the value of these notes above the security estimated by the court at the time of the composition proceedings, and, having neglected to do so, it cannot now be permitted to collect such balance, but must be held to have elected to rely only on its security for payment of those notes. The plaintiff claims that the bank was not bound to have the securities valued, and that, if defendant wished to ascertain what balance would be due after exhausting the securities, he could have had the securities valued on application to the court for that purpose. The question thus presented is not a new one.

In the late case of *Cavanna v. Bassett*, 9 Biss. 435, 3 Fed. Rep. 215, heard before Judge DYER at the present term of this court, the same point arose, and it was there held by the learned judge that a secured creditor "could not be compelled to surrender her security, and come in and prove her claim, nor was it incumbent on her to have her security valued, and then to make proof of any balance; nor should her failure to do this be taken as evidence that she intended to rely wholly for payment of her demand upon her security." The learned judge further said: "The bankrupts knew, or should have known, that there was a liability that the security would not pay the indebtedness. They were chargeable with notice that such a contingency might arise, and, if they desired to put complainant in a position where the composition proceedings would operate upon her, they might have applied to the court for proceedings compulsory in their nature, to have the security valued. Not having done so, there remained a liability that, in case the security should prove inadequate, complainant would have the right, as to any deficiency, to compel payment of the same to the extent of the percentage paid to unsecured creditors under the composition." And the cases of *Paret v. Ticknor*, 16 N. B. R. 315, decided by Mr. Justice MILLER and Judge DILLON, and *Ex parte Hodgkinson*, 1 Ch. Div. 702, are to the same effect.

The learned circuit judge of this circuit also held the same principle in *Re Engel*<sup>1</sup> on review from the district court. A judgment will therefore be entered for the plaintiff for the balance due on these notes,

<sup>1</sup>Not reported

conditioned that the same shall be satisfied by the payment of 25 per cent. of the amount due on said notes, after deducting the proceeds of the collaterals; treating the deduction as made at the time the composition was confirmed.

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EAGLE MANUF'G CO. v. DAVID BRADLEY MANUF'G CO.

(Circuit Court, N. D. Illinois. July 18, 1891.)

PATENTS FOR INVENTIONS—RES ADJUDICATA.

Where a suit for alleged infringement of a patent is brought against a firm that is a branch of the firm that manufactures the alleged infringing device, and the latter firm conducts the defense, a decree for the complainant is binding upon the firm that conducted the defense, not only upon all the questions that were raised and determined in the suit, but upon all that might have been raised and determined therein.

In Equity. Bill by the Eagle Manufacturing Company against the David Bradley Manufacturing Company to enjoin the infringement of a patent.

*Nathaniel French and W. T. Underwood*, for complainant.  
*Bond, Adams & Jones*, for defendant.

BLODGETT, District Judge. This is a bill for injunction and accounting by reason of the alleged infringement by defendant of letters patent No. 242,497, granted June 7, 1881, to E. A. Wright, for a cultivator. The invention covered by this patent consists of a peculiar spring, so arranged and adjusted with the operative parts of the machine that it will aid in lifting the cultivator beams or plow beams out of the ground with an increasing force as the cultivator rises, rather than with a decreasing force, as is usual with such springs; this peculiar effect being produced by increasing the leverage of the spring upon the beam, to be lifted as the beam rises, although the spring is at the same time losing some part of its tension and lifting force.

Infringement is charged of the first, second, and third claims of the patent, which are:

"(1) In a cultivator, the combination of a vertically swinging drag bar or beam and a lifting spring, which acts with increasing force or effect on the beam as the latter rises, and *vice versa*.

"(2) In a wheeled cultivator, the combination of a vertically moving beam and lifting spring, substantially as described, whereby an increasing upward strain is communicated to the beam as the latter rises.

"(3) The combination of a wheeled frame, a vertically moving beam or drag bar attached thereto, and a lifting spring, substantially as described, which exerts a greater strain or effect upon the beam when the latter is elevated than when it is depressed."

The defenses interposed are want of patentable novelty and noninfringement.

The bill avers, and the proof fully shows, that in the month of December, 1887, complainant brought suit in the United States circuit court v.50F.no.2—13

for the southern district of Iowa against David Bradley & Co. for an infringement of the same patent; that the said David Bradley & Co. was a branch house of the defendant in this case, and was engaged in selling the identical class of cultivators which are charged to infringe the complainant's patent in this case; that the defendant herein undertook and managed the defense of said suit, employing counsel for that purpose, and conducting the defense in the name of David Bradley & Co., the said branch house; and that such proceedings were had in said case that the same was brought to hearing upon the merits at the May term of said court for 1888, and the said court did then and there adjudge and decree that the said David Bradley & Co., by the sale of said cultivators, had infringed the complainant's patent, and enjoined the further use of said patented device by the defendants in said cause.

It is further alleged in said bill, and shown by the proofs, that the cultivators which the defendants in the said Iowa case were charged with selling, and thereby violating the complainant's patent, were manufactured by the defendant in this case.

It is contended that upon the facts alleged in the bill and shown in the proof, in regard to the prior case, defendant herein is estopped from any further controversy in regard to the validity of complainant's patent or the fact of infringement. An examination of the record in the Iowa case, which is in evidence in this case, and of the opinion of the court in that case, (35 Fed. Rep. 295,) shows that all the questions now made in this case were made in the Iowa case, and fully considered and passed upon by that court, and held against the defendant; that the proof upon the issues made in this case, upon the questions of novelty and noninfringement, is essentially the same as was placed before the Iowa court, excepting that the defendant in this case has introduced proof tending to carry the invention in the patent to C. A. Hague, under which defendant is working, granted June 21, 1881, back to an earlier date than that of the invention covered by complainant's patent. But a careful examination of this new proof, introduced by the defendant, fails to satisfy me that the Hague invention antedates the invention covered by the complainant's patent; it being a well-established rule of evidence that the fact of priority of invention, in order to defeat a patent, must be so clear and convincing as to leave no reasonable doubt. *Coffin v. Ogden*, 18 Wall. 120; *Shirley v. Sanderson*, 8 Fed. Rep. 908.

Aside from the rule of comity which this court has always endeavored to observe, especially in patent cases, it seems quite clear to me that the defendant in this case was so far a privy to the litigation in the Iowa case as to make the decree in that case binding upon the defendant here.

The rule laid down in *Robbins v. Chicago City*, 4 Wall. 657, seems to me fully applicable to this case. There the court said:

"The conclusive effect of judgments respecting the same cause of action, and between the same parties, rests upon the just and expedient axiom that it is for the interest of the community that a limit should be opposed to the continuance of litigation, and that the same cause of action should not be brought twice to a final determination."



Parties in that connection include all who are directly interested in the subject-matter, and who had a right to make defense, control the proceedings, examine and cross-examine witnesses, and appeal from the judgment. And this same rule is restated and followed in numerous cases, among which are *Beloit v. Morgan*, 7 Wall. 619; *Miller v. Liggett, etc., Co.*, 7 Fed. Rep. 91; *Clafin v. Fletcher*, Id. 851; *American Bell Tel. Co. v. National Imp. Tel. Co.*, 27 Fed. Rep. 666; *Morss v. Knapp*, 37 Fed. Rep. 352; *Lea v. Deakin*, 11 Biss. 23, 13 Fed. Rep. 514; *Wilson's Ex'r v. Deen*, 121 U. S. 525, 7 Sup. Ct. Rep. 1004.

The proof in this case shows beyond doubt that the defendant in this case, with the consent of the defendants in the Iowa case, made itself the *dominus litus* in that case; it controlled the defense; appeared by its own attorneys; it was the manufacturer of the plows in which the alleged infringement was found; and may, I think, with entire propriety, be held to be bound, not only upon all the questions which were raised and determined in the former case, but upon all which might have been raised and determined in that case. The Hague patent itself was considered by the Iowa court, and not held to be an anticipation or protection as against the complainant's patent. The defendant, may, I think, be considered as bound, not only by all the evidence which was considered in the Iowa case, but all which it could have appropriately put into the record in that case, including the testimony, which it is claimed would carry the Hague invention back of the Wright invention.

I am therefore of opinion that all the defenses which are urged here have been anticipated and are cut off by the decree in the Iowa case. A decree will therefore be entered, finding that the defendant infringed as charged, and for an injunction and accounting.

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EAGLE MANUF'G CO. v. MOLINE PLOW CO.

(Circuit Court, N. D. Illinois. July 13, 1891.)

In Equity. Bill by the Eagle Manufacturing Company against the Moline Plow Company to restrain the infringement of a patent.

*Nathaniel French* and *W. T. Underwood*, for complainant.

*Bond, Adams & Jones*, for defendant.

BLODGETT, District Judge. The bill in this case charges the defendant with the infringement of the same patent involved in the preceding case, against the David Bradley Manufacturing Company, (50 Fed. Rep. 193,) and the defense interposed is the same as in that case. The bill in this case also charges that in December, 1887, complainant brought suit in the southern district of Iowa, by bill in chancery, against the Moline, Milburn & Stoddard Company, for an alleged infringement of the same letters patent; that the defendant in that case was a branch house of the Moline Plow Company, the defendant in this case, and was engaged in selling the identical cultivators manufactured by the defendant herein, and which in this case complainant charges in-

fringed complainant's patent; that such proceedings were had in that case as that a decree was entered, finding the defendant in that case guilty of the infringement charged, and an injunction against such further infringement duly entered, (35 Fed. Rep. 299;) that the defendant in this case took the control and charge of the defense in that case, and by its own attorneys, and at its own expense, conducted such defense, and that, therefore, this defendant is estopped by the decree in that case.

The proofs fully sustain this allegation in the bill, and bring the case wholly within the rule laid down in the prior case of this complainant against the David Bradley Manufacturing Company. A decree will therefore be entered, finding that the defendant infringed, and for an injunction and accounting.

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**KENNEDY v. CHICAGO CITY RY. Co. & al. SAME v. BOUTON FOUNDRY Co. & al. SAME v. TOBIN & al. SAME v. EXCELSIOR IRON WORKS & al. SAME v. BEE. SAME v. HAFFNER & al.**

(Circuit Court, N. D. Illinois. May 2, 1892.)

**1. PATENTS FOR INVENTIONS—BOILERS—INFRINGEMENT.**

The third claim of letters patent No. 224,685, issued February 17, 1880, to Haselton and Kennedy, for a new and improved sectional boiler, consisting of the combination of horizontal hot-water pipes and steam pipes set inside of a fire chamber, with vertical drums and mud drum set outside of the fire chamber, is not infringed by a device consisting of a "porcupine" boiler having a central standpipe in which numerous hollow tubes are inserted so as to radiate horizontally, and having three larger tubes riveted to the standpipe, and extending horizontally through the brickwork surrounding the fire chamber, since the said claim covers merely the particular combination described therein.

**2. SAME—BOILER DEFLECTORS—NOVELTY—PATENTABLE INVENTION.**

Letters patent No. 349,720, issued September 28, 1886, to Edward S. T. Kennedy for an improvement in boiler deflectors, consisting in the combination with a porcupine boiler and its jacket of horizontal flame deflectors of segmental form, placed within the combustion chamber in position for protecting the exposed ends of the tubes and deflecting the heated products of combustion towards the boiler cylinder, are void for want of patentable invention and novelty.

**In Equity.**

Bills by Edward S. T. Kennedy to restrain the alleged infringement of certain patents.

*Banning, Banning & Payson*, for complainant.

*Bond, Adams & Pickard*, for defendants.

GRESHAM, Circuit Judge. These suits for infringement of patents, No. 224,685, issued February 17, 1880, No. 247,910, issued October 4, 1881, and No. 349,720, issued September 28, 1886, were heard together. The complainant purchased a half interest in the two first inventions, the patents issued to him and the inventor jointly, and the latter assigned his interest in both patents to the complainant. The third patent issued to the complainant. All the defendants are charged with infringing the third claim of No. 224,685; and the Chicago City Railway Company, the Bouton Foundry Company, and Joseph Bee with infringing the 1st, 2d, 5th, and 6th claims of No. 349,720. It is not shown that any of

the defendants infringed No. 247,910, and no decree is asked on that patent.

The Hazelton patent, No. 224,685, is for a new and improved sectional boiler. The specifications show a stationary steam boiler, composed of hot-water, steam, feed-water, and air tubes laid horizontally, in coils or sections, one above another, in a brick fire chamber, with all the tubes, coupling, and connections outside the brickwork, so that they may be readily got at for examination or repair, and with steam and mud drums also entirely outside the brickwork. The hot-water tubes, which are set in the lower part of the fire chamber, all connect at one of their ends with the feed-water pipes, and at their other ends with vertical drums, which in turn connect with a mud drum below them. The feed-water pipes are provided with check valves which permit the water to flow into the tubes below them, but do not allow escape upward. The steam pipes, which are a mere continuation of the water pipes below them, have outside couplings terminating in a steam drum, from which steam is taken by a pipe for use. It is claimed by the complainant's counsel that the vertical outside drums are virtually the upper part of the mud drum, and that the placing of the latter "outside of the fire chamber," in a boiler having horizontal steam and water pipes inside the fire chamber, is the novel and distinguishing feature of claim 3, which reads:

"(3) The horizontal hot-water pipes, B, B, and steam pipes, G, G, set inside of a fire chamber, in combination with the vertical drums, D, D, and mud drum, E, that are set outside of the fire-chamber, substantially as herein shown and described."

It is urged in support of the claim that by locating the vertical drums and mud drum outside the fire-chamber, thus removing them from the heat of the furnace, ebullition is prevented or very much lessened, and the sedimentary matter in the water is allowed to deposit in the mud drum, where it may be readily removed without letting down the fire or emptying the furnace, in the old way. The alleged infringing boiler is of the "porcupine" type, having a center upright tube or standpipe, with the lower end extending 2½ feet below the grate bars, and resting on the floor of the ash pit. Its diameter is uniform to a point five or six feet from the bottom, below which it is smaller. Above this lower smaller end, numerous hollow tubes, with their outer ends sealed or closed, are securely inserted in the shell of the standpipe, so that they stand out or radiate horizontally from it. Three tubes of larger diameter than those just mentioned are riveted or otherwise firmly inserted into the stand pipe just above the point where its diameter begins to diminish, and extend horizontally through the inclosing brickwork surrounding the fire chamber, with manhole plates bolted to their outer ends. From these three tubes, others of the same diameter extend at right angles through the wall of the brickwork to the level of the lower end or base of the standpipe. Two or more tubes, somewhat larger than the numerous radial tubes, are flanged or riveted to the standpipe at the water line, and extend outwardly at right angles. Three feet from the top

of the standpipe, and riveted to the inside of it, is an iron plate with three holes in it to separate the water from the steam. There is a hole in the head of the standpipe for steam connection, and other holes for connection with the water column and steam gauge. The standpipe just below the grate bars is tapped for feed and blow-off pipes and bottom connection of the water column. The water circulates freely through the standpipe, the horizontal and perpendicular pipes at the bottom, and the radial tubes. Further description of this boiler is not necessary for our present purpose. It is urged by the complainant's counsel that the numerous radial tubes and the three horizontal tubes or pipes near the base of the standpipe are equivalent to the hot-water pipes, B, B; that the upper radial pipes are equivalent to the steam pipes, G, G; that the three perpendicular pipes or legs standing like a tripod at the bottom are equivalent to the vertical drum, D, D; that their three lower hollow ends are equivalent to the mud drum, E, of the third claim; and that the difference between the defendants' boiler and the combination covered by the third claim is structural, and not functional.

The water in water-tube boilers circulates in the tubes, while in tubular boilers the heated products of combustion pass into or through the tubes. Hazelton did not invent water-tube boilers; and the difference between the combination covered by the third claim and prior combinations consists in locating the hot-water pipes and the steam pipes in the fire chamber,—that is, within the inclosing brickwork,—and the connecting pipes or drums and the mud drum entirely outside. The vertical drums which make the outside connection of the hot-water tubes are of greater capacity than any single tube, and the drums are themselves connected by the mud drum in a manner to produce circulation between the ends of all the water tubes and the mud drum; thus equalizing the water supply when the tubes in one section become hotter than the others. It is this water circulation, and the location of the vertical drums and the mud drum outside the brickwork “for convenience of examination and repairs,” that was allowed as a real contribution to the prior art. The location of the hot-water pipes inside the masonry or brickwork, and the other parts outside, are described and claimed as essential parts of the invention. The Baker patent of 1863 shows a water-tube boiler arranged in sections, and a single horizontal pipe, outside the brickwork, at the line of connection between the water and steam tubes, instead of at the line of the lower tubes of each section; also, a pipe outside the brickwork, in connection with the ends of the bottom water tubes. These upper and lower pipes are connected by vertical pipes, thus securing connection between the upper and lower water tubes, but not between the intermediate ones, as in the combination of the third claim of the Hazelton patent. To the end of the lower pipe of the Baker boiler, which is one inch in diameter, and through which water is constantly supplied to the lower pipe of the bottom water coil, is attached a blow-off pipe. The chief superiority of the Hazelton boiler over this boiler consists in the intermediate connection. It is urged for the defendants that a mud drum is simply an enlarged pipe, and that,

by increasing the diameter of the lower pipe in the Baker boiler, its outside connection would make it an efficient mud drum. This boiler certainly narrows the scope of the third claim. The Lynde patent of 1878 shows a boiler composed of water tubes extending horizontally across the fire chamber, and a mud drum and vertical circulating pipes entirely outside the jacket. The specifications say:

"It is found that in a rapidly circulating boiler the sediment seeks and is deposited in the quietest place at the bottom of generator. To provide such a place, from which the deposit could be readily removed, the receiver, N, is placed so as to attach the blow-off pipe, O, at bottom, the feed pipe, P, to one side above the center, and on the opposite side, on the same line, the pipe, Q, connecting the receiver, N, with manifold, B. A pipe, R, is inserted at the top of N, connecting manifold, J, to the receiver, N. The pipes, Q and R, now are the blow-off pipes to the whole generator. By use of stopcocks, S and S', either part is blown off at will. The sediment first finds a semi-quiet place in J, from which a constant stream flows through pipe, R, to the receiver, N, carrying the sediment, and depositing it in the still water at bottom of N, from which it is easily blown off daily, or as required."

Although the manifold, B, with which the outside receiver, N, is connected, is located in the wall of the furnace, with one side somewhat exposed to the heat, the receiver and its co-opening manifold and pipe operate as a mud drum. If the defendants' boiler is covered by the third claim of the Hazelton patent, that claim is anticipated by the Lynde patent. The defendants' boiler shows no pipes extending across the fire chamber provided with connections like Hazelton's pipes, B, B, and G, G; it shows no vertical or other drums connecting the ends of the pipes outside the fire chamber, as do Hazelton's drums, D, D; and it shows no drum or pipe corresponding to drum, E, of his third claim. The vertical drums of that claim connect the horizontal pipes, but the three pipes near the base of the defendants' boiler perform no such office. Hazelton was a mere improver, and not a pioneer, and the third claim covers a combination, not of any pipes and drums, but of the pipes and drums arranged as shown and described; and thus limited the claim is not infringed.

Kennedy patent, No. 349,720, is for an improvement in boiler deflectors. It shows a vertical standpipe with tubes connecting with and radiating from it, and segmental or annular plates so applied to the tubes as to deflect the flames from a direct course, all inclosed within a casing or jacket. "The object of this invention," says the specification, "is to provide an improvement especially applicable to vertical cylindrical boilers having radiating tubes,—boilers of the so-called 'porcupine' type,—the improvement being designed to effect very considerable economies of fuel and steam; to assure the quick 'getting up' of steam; to prevent undue heating of the boiler jacket; to insure a better circulation of water in this type of boiler; to prevent priming, and also to prevent the burning of the outer ends of the tubes, and consequently to increase the durability of the boiler, and reduce the frequency and cost of repairs. The invention consists, in combination with the boiler and its jacket, of horizontal flame deflectors of segmental form, placed or fixed within the

boiler combustion chamber, in position for protecting or shielding, as far as may be desirable, the exposed ends of the tubes, and at the same time deflecting the heated products of combustion chiefly towards the boiler cylinder, all of which will be hereinafter fully set forth." The four claims which it is charged are infringed read:

"(1) The combination with a boiler having a vertical cylinder with radiating tubes of a segmental or annular deflector, adapted or arranged to deflect the products of combustion from one part of the combustion chamber to another, substantially as herein shown and described. (2) As a means for protecting the exposed ends of the radiating water tubes of a vertical boiler, of the character herein shown and described, a horizontal segmental or annular deflector arranged in place by being laid on the tubes, as set forth." "(5) As a means for protecting the exposed ends of the radiating water tubes of a vertical boiler, of the character substantially as herein shown and described, a segmental or annular deflector, riveted to the boiler jacket, and extending horizontally therefrom, as set forth. (6) As a means for protecting the exposed ends of the radiating water tubes of a vertical boiler, of the character substantially as herein shown and described, and directing the flame to the boiler cylinder, a segmental or annular deflector built into and extending horizontally from the brick boiler jacket, substantially as set forth."

The third claim shows a deflector suspended from the tubes, and the fourth a deflector riveted to the boiler cylinder. Clark, the complainant's principal expert, first testified that the combination covered by one of the claims was the equivalent of all the others, but, on being recalled, stated that he did not think a deflector secured to the central cylinder or standpipe was the full equivalent of a deflector projecting inwardly from the jacket or boiler casing; that the effect of one was somewhat different from the other; and that the plates shown in the patents set up in the answer were unlike the Kennedy deflectors, because those patents were not for boilers containing a water cylinder and radial tubes. The supposed invention consists, not in the elements of the combination separately considered, for they were old, but in the combination of segmental or annular deflectors with a Porcupine boiler, admitted by the patent to be old. Kennedy testified it was only after repeated experiments that he ascertained the proper proportion, form, and width of deflectors to secure the requisite draft and distribution of heat; and yet the patent is silent as to width of the plates, and their special arrangement with reference to the flue space. Did it require invention to change the form of the deflectors in use "under boilers of various types," and apply them to a boiler of a particular but well-known type? It would seem that by the exercise of skill and judgment alone an engineer familiar with deflecting plates and their use would have understood how to change their form, and adapt them to use in a boiler of the Porcupine type. It is not clear from the evidence that Hallett, one of Kennedy's employes, did not make the improvements for which the patent issued; but, assuming that Kennedy made them, he simply changed and adapted an old device to an old and well-known boiler. He applied old deflecting plates to an analogous, if not the same, use.

But there are objections to the validity of the patent other than those



appearing upon its face. While the Wren patent of 1880 does not show a central water standpipe and radial tubes, it describes a boiler composed of hollow steam-generating rings, one some distance above the other, but all connected. Annular deflectors are attached to and project inwardly from the jacket or casing between each two rings, and deflect the products of combustion, and cause them to follow the surface of the rings. It is true this boiler is not of the Porcupine type, but that type is admitted to have been old, and the jacket and deflectors could be applied to other boilers found in the prior art, and the deflectors operate as the Kennedy deflectors. The Ahrens patent of 1883 is for an improvement in steam fire engines. It shows a boiler, composed of tubes arranged within a shell, their ends connected, and cylindrical and annular deflectors attached to and extending horizontally inward from the shell, as in the 1st, 5th, and 6th claims of the Kennedy patent. It also shows an annular deflector at the bottom of the combustion chamber, just above the fire, corresponding in position to the brick deflector in the drawings of the Kennedy patent. The tubes in this patent are not arranged as in a porcupine boiler, but the jacket and the tubes could be substituted for the Kennedy tubes and jacket without change in mode of operation or function. The English Newton patent of 1871 describes a vertical boiler with annular deflectors built into the jacket and extending horizontally inward, but it does not show the Kennedy radial tubes. It would not require invention, however, to add such tubes. The English Brooman patent of 1865 shows a vertical boiler with fixed deflectors at one side, and movable deflectors laid on the tubes on the other side. Other patents in evidence show that it was common to vary the form of deflectors to adjust them to particular uses. The tracing in the record, taken from a practical treatise on boilers and boiler making by N. P. Burgh, and published in London and New York in 1873, shows baffle plates in boilers operated substantially as the Kennedy deflecting plates. Kennedy's lower brick deflector, "built into and extending from the brick boiler jacket for the purpose of deflecting the flame towards the boiler cylinder," is not materially unlike the construction shown in the prior Harris patent and the Baker patent. The lower brick deflector covered by Kennedy's sixth claim is the equivalent of the other deflectors sued on, and the Harris patent shows a Porcupine boiler with a furnace throat extending inwardly beyond the ends of the tubes, and protecting them, substantially as in the Kennedy patent. If Kennedy understood that the chief merit and distinguishing feature of his invention consisted in the protection afforded to the outer ends of his radial tubes by deflecting the heat from them inwardly upon the standpipe, why did he show in his patent, and illustrate in his drawings, plates riveted to the cylinder, deflecting the heat to the circumference and upon the exposed ends of his radial tubes? The bills are dismissed for want of equity.

LEE *et al.* v. NORTHWESTERN STOVE REPAIR CO. *et al.*

(Circuit Court, N. D. Illinois. May 8, 1892.)

## 1. PATENTS FOR INVENTIONS—STOVE FIXTURES—NOVELTY.

Letters patent No. 289,802, issued December 11, 1883, to Philo D. Beckwith, for improvements in a heating stove designed to convert a wood-burning stove into a coal burner, and consisting of a flaring ring cast in two sections, which fit into the top of the fire pot, in which the coal basket, cast integral, is suspended, the ring having legs which rest on an annular flange at the base of the fire pot, and having holes in its periphery, into which pintles, cast on the underside of the coal basket, pass, so as to hold the ring together, are not void for want of novelty.

## 2. SAME—INFRINGEMENT.

It is an infringement of said patent to sell the different fixtures included in said patented device, although a complete set of the fixtures is not sold to any one person, and no stove is sold with them.

In Equity. Bill by Fred E. Lee and William G. Howard against the Northwestern Stove Repair Company and others to restrain the infringement of a patent.

*Howard & Roos and Banning, Banning & Payson*, for complainants.  
*Offield, Towle & Linthicum*, for defendants.

BLODGETT, District Judge. An injunction and accounting is sought for by the bill in this case for the alleged infringement of patent No. 289,802, granted December 11, 1883, to Philo D. Beckwith, for a "heating stove." The patentee, Beckwith, several years before the granting of this patent, obtained three or more patents, under which he manufactured a heating stove which obtained a wide reputation and sale as a wood burner, by the name of "Round Oak Stove." It consisted of a vertical sheet-iron cylinder, mounted on a cast-iron base and fire pot supported by legs, in the usual manner, the fire pot resting on the base, and a door above the fire pot for putting in the fuel, with an ash pit and a shaking grate at the bottom of the fire pot, and the usual air inlets for a draught up through the grate and fire pot. In April, 1874, he obtained a patent on a modification of his stove to convert it into a coal burner; but, however well this may have operated as a soft-coal burner, it was not, as the proof shows, well adapted to the burning of hard coal, and the purpose of the device now in question was to change his form of stove into a hard-coal burner. The patent in question is upon a set of fixtures which, being inserted in the cylinder of a Round Oak stove, change it from a wood or soft-coal burner to a hard-coal burner. The patentee says in regard to his device:

"My present invention consists in the arrangement of a basket, a shaking grate, and the means employed for supporting the parts within the fire pot of the stove; also, in the construction of the parts that enables me to use a coal basket cast integral, one that may be readily inserted or taken out through the ordinary stove door, as set forth in the following specification."

"This invention is designed as an improvement upon my letters patent dated April 28, 1874, No. 150,277, and is designed for burning hard and soft coal."



Briefly described, the device consists of a flaring ring cast in two sections, which fit into the top of the fire pot in which the coal basket cast integral is suspended, this ring having holes in its periphery into which pintles cast on the underside of the flaring ring of the coal basket pass, so that, when the coal basket is seated in the ring, the ring, although cast in two sections, is made integral or held together by these pintles. This sectional ring is also provided with legs which extend downward to and rest on an annular flange at the base of the fire pot. A grate rests on shoulders or notches cut in the lower ends of the legs of the annular ring, so that it forms the bottom of the coal basket, with reciprocating shaking bars resting upon it. The claims of the patent are:

"(1) The sectional flaring ring, fitting within the top of the fire pot of the herein-described stove, being adapted to encircle and support the basket, (cast integral,) as and for the purposes set forth. (2) In a heating stove, the combination of the sectional ring, having leg supports attached thereto, being adapted to fit within the fire pot of the stove, said leg supports resting upon the horizontal flange of the fire pot, substantially as set forth. (3) The coal basket, cast integral, having a flaring flange with a series of pintles projecting downward from said flange, for the purposes specified. (4) The combination of the sectional ring with leg supports attached thereto, said supports resting upon the flange of the fire pot, being also provided with horizontal supports for receiving and retaining the reciprocating grate, substantially as set forth."

Infringement is charged as to all these claims.

The defenses are: (1) That the patent is void for want of novelty; (2) that the sole business of defendant is that of furnishing repairs or parts of stoves to replace parts which have been worn or burned out by use, and that it does not sell, as a rule, the entire set of fixtures called for by this patent to a customer at the same time.

It is conceded, but if it were not the proof shows, that defendant obtained a complete set of the parts or fixtures called for by the patent, and has made castings from them, which it offers for sale to customers as ordered, so that the charge of infringement may be considered as established. To sustain the defense of want of novelty, defendants have put in evidence a large number of prior patents on stoves, and have also examined at considerable length a well-known expert in the art, who testified that, in view of the art, all the patentee did in the production of this device was in the line of improvements by the exercise of mere mechanical skill on older and well-known devices. A careful study of the older patents put in evidence fails to show to my satisfaction that there was no invention called for to produce the device covered by this patent. It is true that annular rings and coal baskets and fire pots are severally shown in these old patents, but in no such relations nor with the functions they bear in the device in question. The problem this patentee set himself about was to devise a set of fixtures which, when coacting, would convert his wood-burning stove into a successful stove for burning hard coal. His patent of 1874 was, I conclude from the proof, a partial success, burning soft

coal as well as wood, but it was a failure for burning hard coal; the main cause of the failure in that regard probably being the oval openings left between the upper part of the fire pot and the coal basket, which prevented a sufficiently strong draft through the hard coal to secure combustion. To remedy this defect in the 1874 patent, he devised the flaring sectional ring, fitting closely to the top of the fire pot; and as this ring was of the same diameter as that of the fire pot at the top, and so would not pass into the door entire, he was obliged to have it made in sections, so that it could be readily put in place through the stove door, and then so arranged the holes in the ring and the pintles on the underside of the flaring rim of the coal basket that they connected with the ring through these holes, and thereby held the ring firmly together in place. This sectional ring had to be supported in its position at the top of the fire pot, and to do this legs are attached to its underside, which extend down to and rest on the annular flange at the base of the fire pot, and notches in the feet or lower ends of these legs furnish a seating for the grate at the bottom of the coal basket. The expert argues that this flaring sectional ring could have been held at the top of the fire pot by an inwardly extending flange at that point; but the structure of the stove as a wood burner not only did not require such a flange, but such a flange would undoubtedly have been objectionable in that place as a wood burner, as it would have been an obstruction to the placing of the wood in the fire pot. What Beckwith was seeking to do was to adapt his wood-burning stove so that the burning of hard coal could be accomplished by the use of these fixtures, and yet the stove be readily restored to its old function of a wood burner by the removal of these fixtures; and, to meet this requirement, he supported the ring upon these legs, instead of reconstructing his original stove by casting an inwardly projecting flange at the top of the fire pot, as the expert says he might have done. As a device, then, for suspending the coal basket in the fire pot, it seems very clear to me this sectional ring involved invention. In construing this patent, due consideration must be given to the object the patentee was seeking to accomplish, which was not to make a new stove, but to impart a new function to an old one; and this, it seems to me, he did by the introduction of these fixtures into his old wood burner. The first claim of the patent is on this sectional ring, adapted to encircle and support the coal basket. This, as I construe it, necessarily reads into this claim the legs, as without them, or their equivalent, the ring could not support the basket. The second claim is substantially the same as the first, being in terms for the ring and the leg supports. And the fourth claim is, in my estimation, only another form of statement for the first and second claims. The third claim is for the coal basket cast integral with flaring flange, and a series of pintles projecting downward from the flange. The proof shows coal baskets cast integral, and in the Johnston patent shows a coal basket for a grate or open fire, with a pintle projecting downward from the ring for the purpose of holding it in place. But this coal basket does more than hold itself in place by its pintles, it holds the sectional

ring in which it is seated in place by its series of pintles; and while it may be said that one pintle would suggest more, if more were needed, I do not think it would suggest a series of pintles to make a sectional ring practically integral. I therefore, though with less confidence than in regard to the other claims, feel constrained to hold this claim also valid.

As to the second point, that defendants do not infringe because they only sell such of these fixtures as each customer may call for, and that they do not infringe unless they sell them all to one customer, it seems enough to say that these four claims are, with some variations in phraseology in the first, second, and fourth, for the sectional ring with its supporting legs and the coal basket cast integral, with flaring ring and the pintles, as separate parts. If defendants sell a sectional ring such as is described in this patent to a customer, they infringe upon the claims which cover this ring. If they sell a coal basket such as is described in the patent, so arranged as to be seated in this ring with pintles to hold the ring together, they infringe on the claim which covers the coal basket; that is, these claims are upon these separate fixtures, the sectional ring and the coal basket, as described in the patent, and the patent is infringed by the making or selling of either of these fixtures covered by these claims, respectively.

As to the argument advanced at the hearing, that a stove must be read into each of these claims to make the fixtures covered by this patent operative, and hence that defendants do not infringe, because they do not make Round Oak stoves, I will only say the patent covers these fixtures specifically, and it is no more necessary to read a stove into these claims than it would be to read a railroad into a patent on a car truck or a locomotive. Of course, we all know that these fixtures are only adapted to certain uses; but the presumption is that, if defendants make and sell them, they do so only that the purchaser may apply them to such uses. The Howe sewing machine needle was only useful in connection with a sewing machine, but that did not make it necessary that a man should make an entire sewing machine in order to infringe the Howe patent. A decree may be prepared, finding that defendants infringe, and for an injunction and accounting. No decree as to individual defendants.

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ELLBERT v. ST. PAUL GASLIGHT CO.

(Circuit Court, D. Minnesota. April 28, 1892.)

1. PATENTS FOR INVENTIONS—NOVELTY—WATER GAS APPARATUS.

Letters patent No. 386,458, to Vincent L. Ellbert, for an improvement in an apparatus for manufacturing water gas, describe, in claim 1, the combination of a combustion chamber, a superheater chamber, an arch located between the two, and provided with a series of legs forming separate passages leading from the combustion chamber to the superheater chamber, and a series of oil pipes opening through the outer wall of the cupola into the separate passages between the legs of the

arch, substantially as described. *Held*, that this claim is void for want of novelty, in view of the prior state of the art, as shown by patents 253,120, 257,100, and 263,984, issued to Theodore G. Springer, January 31, April 25, and September 5, 1882, respectively; and by the "Jumbo Cupola" used by the West-Side Works, at Chicago, from 1888 to 1888.

2. SAME—INFRINGEMENT.

If this claim were held to have any validity, it must be limited to inserting the oil pipes in the passages between the legs at the point specified, namely, "just below the lower brick of the superheater," under the crown of the arch; and it would not be infringed by an apparatus in which the oil was injected into the superheater, and not over the passages, but directly over the solid legs of the arch.

In Equity.

Complainant, Vincent L. Ellbert, filed his bill against the St. Paul Gaslight Company for infringement of letters patent No. 386,458, for improvements in the apparatus for the manufacture of water gas, and prayed an accounting and an injunction. The answer denied infringement, and alleged that the improvements claimed had been in public use in Chicago more than two years before complainant's application for a patent thereon, and had been described in various patents. Bill dismissed.

*Paul & Merwin*, for complainant.

*Flandreau, Squires & Cutcheon*, for defendant.

Before SANBORN, Circuit Judge, and NELSON, District Judge.

SANBORN, Circuit Judge. The improvements in the apparatus for manufacturing water gas, which the complainant claims he invented and defendant infringes, relate exclusively to the apparatus for introducing liquid hydrocarbon into the cupola used in the manufacture of water gas for illuminating purposes. The claims of the patent are:

"(1) The combination, in an apparatus for the manufacture of illuminating gas, of a combustion chamber, 7, a superheated chamber, an arch located between said combustion chamber and said superheater chamber, and provided with a series of legs forming separate passages leading from said combustion chamber into said superheater chamber, and a series of oil pipes opening through the outer wall of the cupola into said separate passages between the combustion chamber and the superheater, substantially as described. (2) The combination, in an apparatus for the manufacture of illuminating gas, of a combustion chamber, 7, a superheater chamber, a series of passages connecting said combustion chamber with said superheater chamber, and a series of oil pipes opening through the outer wall of the cupola into said passages, with a series of steam pipes extending through said oil pipes, substantially as described, whereby a vaporized crude oil or liquid hydrocarbon may be thrown into the passages, and mingled with the gases after they leave the combustion chamber, and before they reach the superheater, for the purpose set forth. (3) The combination, with the cupola, 2, having the combustion chamber, 7, the superheater chamber arranged above said combustion chamber, and an arch located between said chambers, of an oil pipe, 17, extending around said cupola, and provided with a series of branch pipes, 25, opening through the wall of the cupola into the passages formed by the legs of said arch between said combustion chamber and said superheater, substantially as described, and for the purpose set forth. (4) The combination, with the cupola, 2, having the combustion chamber, 7, the superheater chamber arranged above said combustion chamber, and an arch located between said chambers, of an oil pipe, 17, extending around said cupola, and provided with a series of branch pipes,

25, opening through the wall of the cupola into the passages formed by the legs of said arch between said combustion chamber and said superheater, and the series of steam pipes, 27, extending through said oil pipes, 25, all substantially as described."

The third and fourth claims of this patent are not important here, because, so far as they are not embodied in the first and second claims, they are not infringed by the defendant, inasmuch as it has not made use of the particular arrangement of oil and steam pipes there described, and, if it has not infringed the first and second claims of the patent, it is not liable in this suit. The process of manufacturing water gas for illuminating purposes, and the combination in an apparatus for that purpose of the combustion chamber, superheater chamber, an arch located between said superheater chamber and combustion chamber, with a series of legs forming separate passages leading from the combustion chamber into the superheater chamber, and pipes opening through the outer wall of the cupola, through which the liquid hydrocarbon was introduced, had long been in public use, and described in many patents and publications before complainant applied for this patent. But he claims that no one had ever used or described a series of oil pipes opening into the separate passages between the legs of the arch and between the combustion chamber and the superheater chamber until he discovered and used these pipes in the manner described in his patent, and that by their use in the way there described crude oil can be successfully used in the manufacture of this gas, while it is impracticable to so use it in any other way. Generally speaking, the apparatus to which the complainant applied this improvement consisted, before his improvement, of a cupola made of a casing of metal lined on the interior with fire brick, and divided about midway between its upper and lower ends by an arch consisting of from 4 to 24 legs, as desired. The portion of the cupola above the crown of the arch called the "superheater" or "fixing" chamber was loosely packed with brick, or other indestructible material, capable of being highly heated, and retaining heat while the chamber below the arch, termed the "combustion chamber," was provided with a grate on which the coal or coke might rest, and beneath this grate with an air blast pipe and a steam blast pipe. Pipes for the injection of crude oil, or naphtha, had been let into the cupola in numbers varying from one to six to the cupola, and at various heights from the extreme top, to a point a few feet above the surface of the coal or coke, as the judgment of the engineer dictated; and the cupola was provided with two outlets, one to carry away the products of combustion, and the other to lead out the gas when manufactured, with proper apparatus to close either when desired.

In operation the combustion chamber was filled with coal or coke, and, after having been fired, was blasted with the lower or primary blast, until the brickwork lining and superheater were raised to a red heat. The secondary blast was then turned on, which fired the gases formed by the lower blast, which had passed through the incandescent fuel, and formed carbonic oxide. This made an intense heat, and raised the brick

of the superheater to a very high temperature, one witness testified to about 1,500 deg. Fahrenheit. When the proper temperature had been reached in the superheater, and the fire had burned sufficiently, the flue of the superheater and the air blast pipes were closed, and the apparatus was ready for the manufacture of water gas. A blast of steam, under high pressure, was then forced up through the incandescent fuel in the combustion chamber, making a hydrogen and carbonic oxide gas. This gas, if consumed with no addition, would be non-illuminating, and, to make it of any value as an illuminating gas, must be enriched by adding to it hydrocarbon vapor. Oil or naphtha was therefore injected through the casing of the cupola at one or more points above the surface of the fuel, was vaporized by the intense heat or by treatment before its introduction, and this vapor mingled with the gas ascending from the coal, and, as it circulated through the superheater, they became "fixed," or made into a permanent gas for illuminating purposes. This apparatus and this process, it is conceded by the complainant, were old, and had long been used when he made his invention; but the improvement he claims to have invented consists in inserting a number of pipes for the injection of the liquid hydrocarbon in the proper locations relative to the two chambers and the legs of the arch. In his specifications he says:

"If the crude oil is thrown directly into the superheater, it fails to come in contact with the gases in all parts thereof, and no benefit would be obtained from parts of the superheater. If too much oil is thrown into one part of the superheater, the bricks at that part will be cooled, and the oil will be deposited on them in solid carbon. I obviate these objections, and make a practical success in using crude oil for enriching the gas by introducing it in small quantities, preferably in the form of vapor, into separate passages between the combustion chamber and superheater. The hydrocarbon thus comes in contact with all the gases after they leave the combustion chamber, and becomes intimately commingled therewith, and in this condition they pass into the superheater, and then become a fixed gas."

Speaking of the location of these oil pipes, he says:

"These pipes are just below the top of the upper arch, or just below the lower brick of the superheater, and there is preferably one pipe for each space between the legs of the arches."

And, referring to these spaces between the legs of the arches, he claims "a series of oil pipes opening through the outer wall of the cupola into said separate passages, between the combustion chamber and the superheater." And again:

"A series of oil pipes opening through the outer wall of the cupola into said passages, \* \* \* whereby a vaporized crude oil or liquid hydrocarbon may be thrown into the passages, and mingled with the gases after they leave the combustion chamber, and before they reach the superheater."

The arch shown in the drawings accompanying complainant's patent has eight legs, and an oil pipe is shown in each space between the legs of the arch.

Mr. Ellbert testified that the oil must be injected at some point in the passageways between the combustion chamber and the superheater, in

order to reach the results he wished, and that the improved results of his construction could not be obtained by the injection of the oil into the superheater brick, because the oil would not get into the superheater so as to mingle with the gases, but would strike two or three brick, and form carbon, cool the brick very suddenly, and plug and clog the superheater, so that it would receive no result from the injection. Complainant's witness, H. W. Brown, testified that in complainant's construction there is a perfectly clear space from the injectors to the fire,—an unobstructed space,—and that this is absolutely essential. Looking now specifically at the state of the art of inserting these oil pipes and introducing the liquid hydrocarbon, at the time the complainant made his discovery, we find that the mingling of the hydrocarbon vapor with the gases rising from the incandescent fuel in a passage or passages between the combustion and "fixing" chambers was not new. Theodore G. Springer, in his patent No. 253,120, dated January 31, 1882, shows the two chambers separated by an arch, with a single flue, through which alone the hydrogen and carbonic oxide gases can pass to the fixing chamber, and an oil pipe through which a liquid hydrocarbon is conducted into this passage, and he claims "a cupola or gas generating apparatus having a decomposing chamber wherein steam and solid hydrocarbon may be mutually decomposed, a fixing chamber wherein mixed gases and hydrocarbon vapor may be fixed, and a connecting flue wherein the liquid hydrocarbon and the hydrogen and carbonic oxide gases may be mixed before entering the fixing chamber, and the heat of the cupola thoroughly utilized; the respective chambers being located one above the other." Again, in patent 257,100, April 25, 1882, Mr. Springer shows the introduction of liquid hydrocarbon through pipes into a small chamber located between the combustion chamber and the superheater, through which all the gases and vapors rising from the fuel pass, and says: "As the mixed gases and vapor pass into the chamber above, they are met by an incoming current of hydrocarbon vapor, and the whole then passes into the chamber above."

Nor was the idea or practice of introducing the volume desired through a number of small pipes, rather than through one large pipe, new. Mr. Springer, in patent No. 263,984, September 5, 1882, shows several pipes for use on one cupola, conducting the liquid hydrocarbon into the fixing chamber, one of which is at the same relative height above the arch as are defendant's oil pipes, and says: "The letter 'H' indicates the pipes by means of which the hydrocarbon fluid is admitted to the fixing chamber, a series of any desired number being employed, so as to admit the hydrocarbon at different points;" and the proofs in this case conclusively show that in the West-Side Works at Chicago, Ill., from 1883 until 1888, a cupola called the "Jumbo Cupola" was in open public use, for the manufacture of water gas, which was provided with six injection pipes for oil, each of which entered the cupola between two of the legs of a spider-leg arch at least eighteen inches above the spring of the arch, and not more than two or three feet below the crown of the arch through which the crude oil and naphtha were alternately and suc-

cessfully used in making water gas for illuminating purposes. These six pipes were inserted in that cupola at points relatively not more than four feet below the points where complainant inserted his pipes. It therefore conclusively appears that there was no novelty in many pipes instead of one; no novelty in inserting them at different points in the superheater; no novelty in inserting them between the legs of the arch; no novelty in inserting them in the passageway between the combustion chamber and superheater; no novelty in inserting them between the combustion chamber and superheater, between the legs of the arch, two feet below its crown, (for at this point they were inserted and used five years in Chicago;) and the claim of the complainant, which is material in the suit at bar, is narrowed to this: that he has discovered that, if one raises the oil pipes used on the Jumbo cupola from two to four feet higher, they will use heavy oil more satisfactorily. His own expert, Mr. Bates, testifies that, disregarding the points at which the oil is introduced, everything shown in complainant's patent is in the Jumbo.

The patents in evidence not referred to above show that the liquid hydrocarbon had been introduced into the superheater at the top, midway between the arch and the top, just over the arch, and at nearly every point in the superheater, so that the insertions of the pipes at any point above the arch was a common device. Complainant's witness, Harvey W. Brown, who had occupied all positions from the coal pile to the president's chair, and who was general manager of the Minneapolis Gaslight Company at the time complainant first constructed his improvements, well states in the present tense what the proofs in this case show was equally true at the time the complainant conceived and constructed the improvements he claims. He says:

"There are all sorts of devices or contrivances for the purpose of feeding oil into cupolas. Some have put it through the lower course of brick of the superheater, and let it run through and drop down; others have made part of the arch brick in a hollow form, and sent it through there; others have put a pipe over the whole cupola, and let it in at the top, and had side feeds at the top of the superheater. I will say that when our oil is injected into the cupola from the injector there is a perfectly clear space from there to the fire. I regard it as absolutely essential for the successful and economic working of the process that such should be the case."

To increase the six injection pipes used in the Jumbo cupola, and there inserted between the legs of the arch, eighteen inches above the spring of the arch, to eight, and insert them relatively two or four feet higher, "just below the lower brick of the superheater," under the crown of the arch, is not invention. Mr. Ellbert was trying to improve a cupola in which the oil was introduced through a single pipe entering near the surface of the incandescent fuel. The heavy oil, introduced in large volume on one side of the superheater, was not well mingled with the rising gases in all parts of the superheater, and fell upon and ran down through the coal before it was sufficiently vaporized to be carried up into the superheater. If heavy oil introduced near the surface of the incandescent coal fell upon and ran down through the coal



before it could be vaporized, it was certainly well known to those skilled in the art that this oil would be more completely vaporized if it was introduced further above the coal, and was subjected to the action of the intense heat and rising gases for a longer time, and while passing through a greater space before reaching the fire surface. If, when introduced in one volume through a single pipe, the oil was not properly mingled with the rising gases in all parts of the chamber, it was certainly well known to any mechanic skilled in the art that, if the same volume was divided and introduced through several smaller pipes at different points equally distant around the circumference of the cupola, the oil would be more completely mingled with the rising gases and more completely vaporized. To arrive at these conclusions required no invention,—no discovery. They would surely occur to any mechanic, skilled in the art, seeking to obviate the difficulties referred to, and could be embodied in the form of an apparatus or machine to inject the oil directly under the superheater, and between the legs of the arch, by the common mechanic. They had occurred to Mr. Frederick Egner in 1883, who constructed the Jumbo cupola, and had them embodied in an apparatus which the proofs show obviated all the difficulties the complainant was seeking to avoid, and differed from his construction only in the number of injection pipes and the height of their insertion. We do not consider or determine the validity of those claims of complainant's patent which relate to the particular arrangement of the main oil pipe and its branches around the cupola, or the extension of steam pipes through the oil pipes, as shown in his patent to vaporize the oil, because it is conceded that defendant uses the common steam injection pipes which were in use long before complainant's patent, and does not use the steam pipes extending through the oil pipes, or the arrangement of the main and branch pipes shown in complainant's patent; but we hold that complainant's claim for inserting a series of oil pipes opening through the outer wall of the cupola into separate passages between the legs of the arch between the superheater and the combustion chamber cannot be sustained for want of novelty, in view of the state of the art. *Atlantic Works v. Brady*, 107 U. S. 192, 199, 2 Sup. Ct. Rep. 225; *Vinton v. Hamilton*, 104 U. S. 485, 491; *Slawson v. Railroad Co.*, 107 U. S. 649, 653, 2 Sup. Ct. Rep. 663.

Turning now to the machine constructed and used by the defendant, we find that in that machine are four legs to the arch, each constructed of two courses of brick laid solidly together; that the oil is injected into the checker work or loose brick of the superheater by common steam injectors at four points, one directly over each of these four solid legs, above the third row of brick in the superheater, and 18 or 20 inches above the crown of the arch. There is a channel in the checker work of the superheater opposite the point of insertion of each of these injection pipes, two inches wide, extending from the casing of the superheater to its center. In operation the oil is not heated or vaporized, but thrown in cold, strikes against the brick in the superheater, and so clogs and plugs up the superheater that the defendant is obliged to remove the

brick and clean the superheater after from four to six months of continuous use. If the first claim of complainant's patent could be sustained for the improvement of inserting oil pipes in the passages between the legs of the arch, and just beneath the superheater, (and certainly no broader claim could be sustained in view of the Jumbo cupola and the general state of the art,) the apparatus of the defendant does not infringe it. The complainant is not the original inventor of this apparatus for the manufacture of water gas, and, if his first claim was sustained, would be the inventor of but a slight improvement upon it, and his position under the law applicable to infringement would be entirely different from that of the original inventor. The difference in their positions is clearly stated by Mr. Justice GRIER in *McCormick v. Talcott*, 20 How. 405. He says:

"If he be the original inventor of the device or machine called the 'divider,' he will have a right to treat as infringers all who make dividers operating on the same principle, and performing the same functions, by analogous or equivalent combinations, even though the infringing machine may be an improvement of the original, and patentable as such. But if the invention claimed be itself but an improvement on a known machine by a mere change of form or combination of parts, the patentee cannot treat another as an infringer who has improved the original machine by one of a different form or combination, performing the same functions. The inventor of the first improvement cannot invoke the doctrine of equivalents to suppress all other improvements which are not mere colorable invasions of the first."

Defendant's construction is not a mere colorable invasion of complainant's improvement. That improvement consisted in inserting the oil pipes below the first course of brick of the superheater, so that the oil would not strike the brick of the superheater, cool them, and plug and clog the checker work. Defendant inserts them above the third course of brick of the superheater, and throws the oil directly into the checker work, where it does strike the bricks and clog the superheater. Complainant's improvement consisted in inserting these oil pipes between the legs of the arch, and below the superheater, so that there would be a free and unobstructed space between the points of insertion and the incandescent coal below, and deemed this essential to the attainment of the result he desired. Defendant inserts his oil pipes in the superheater directly over the solid legs of the arches, at the very points where there is the greatest obstruction between the points of insertion and the incandescent coal, and at the only points where there are solid brick walls, consisting of two courses of brick, between the superheater and the combustion chamber. Complainant's improvement consists in inserting the oil pipes in the passages between the legs of the arch, through which the ascending gases and vapors pass from the combustion chamber to the superheater, passages divided from each other and made by the legs of the arch, and by these alone. Defendant inserts its pipes directly over the legs of these arches, and hence between these passages. The defendant has not appropriated or used any of the improvements claimed by the complainant, and the oil injection pipes inserted in the superheater above the legs of the arch, as they are used in defendant's apparatus, perform no function that can be attributed to complainant's im-

provements,—no functions not performed by the oil injection pipes, shown to have been described in patents or known and in public use in this country more than two years before complainant's application for a patent. The bill must be dismissed. Let a decree be entered accordingly.

## AMERICAN AUTOMATON WEIGHING MACH. CO. *et al.* v. BLAUVELT.

(Circuit Court, E. D. New York. April 29, 1892.)

### 1. PATENTS FOR INVENTIONS—OPERATIVE DEVICE—AUTOMATIC WEIGHING MACHINE.

Letters patent No. 336,043, issued February 9, 1886, to Percival Everett, claims: "A weighing machine, having an aperture for receiving a coin, a weighted lever, a dial, and index hand, and intermediate mechanism connected with the same, and whereby the coin, when deposited in the receiver, shall operate the lever, and cause the hand to indicate the weight of the person or body being weighed." *Held*, that the claim is for the machine as a whole, having the parts mentioned, and, as the patent refers to all parts necessary to make it complete and operative, the claim is to be read with reference to such known and described parts, and therefore covers an operative machine.

### 2. SAME—INVENTION—NOVELTY.

The patent possesses both invention and novelty, for, although a weighted lever, operated by a coin put through a slot, had been used for various other purposes, these elements had never been combined with mechanism to form a weighing machine.

### 3. SAME—INFRINGEMENT—EQUIVALENTS.

The patent is infringed by a weighing machine having the elements claimed, even though the intermediate mechanism by which the weighted lever operates the index is very different from that of the patent, since, both being old, one is merely the equivalent of the other.

In Equity. Bill by the American Automaton Weighing Machine Company and the National Weighing Machine Company against James M. S. Blauvelt, for infringement of a patent. Decree for complainant.

*Edwin H. Brown*, for complainant.

*Theron G. Strong* and *Charles F. Mathewson*, for defendant.

WHEELER, District Judge. This suit is brought for infringement of the first claim of letters patent No. 336,043, granted February 9, 1886, to Percival Everett, for a weighing machine that will indicate weight on a dial, only when a coin is put into a slot, and falls upon a weighted lever, and by intervening mechanism carries an index over the dial until it is stopped by the weighing mechanism, where it will indicate the weight. This claim is for—

"A weighing machine, having an aperture for receiving a coin, a weighted lever, a dial, and index hand, and intermediate mechanism connected with the same, and whereby the coin, when deposited in the receiver, shall operate the lever, and cause the hand to indicate the weight of the person or body being weighed."

The defenses, in substance, are lack of patentable invention, want of novelty, and noninfringement. The patent is not for any weighing apparatus, nor for the slot, or weighted lever, or dial and index, or

mechanism between the lever and index, but is for a weighing machine as a whole, having those parts, with such other known parts as are necessary to constitute such a machine. If no parts were to go into the machine but those mentioned in this claim, it would, as argued, be wholly inoperative. But the patent describes or refers to all such other parts as are necessary to make it complete and operative, and the claim is to be read with reference to such other described or known parts. *Loom Co. v. Higgins*, 105 U. S. 580. When so read, it seems to well set out and cover an operative machine containing these several parts working together to accomplish the result sought. It appears to be as specific, and to as well describe these parts as operating in this machine for its purposes, as either of the four claims sustained in *Morley S. M. Co. v. Lancaster*, 129 U. S. 263, 9 Sup. Ct. Rep. 299, did the patented parts of the machines there for their purposes. Each of these parts was old, was referred to as known, and had been in use before; but no such machine had ever been made before, and they had never been brought together for that or any other purpose before. They were not merely made to act as they had separately done before, but were made to act together in this new machine to accomplish its purposes as they had never done before. Contriving such a machine from these and other things seems clearly to have been invention, and making it, if new, a patentable invention.

The prior things relied upon to show want of novelty are chiefly ancient vessels, from which holy water would be released by a coin put through a slot, and falling upon a weighted lever and opening a valve; and vending machines, in which the coin, by operating a weighted lever, releases a drawer. In all of them there were the weighted lever operated by a coin put through a slot, and other necessary parts for such contrivances; but no weighing mechanism, index, or dial. None of them was, or was at all like, a weighing machine; and causing such simple movements as those by a coin and weighted lever was very different from so connecting weighing mechanism with an index and dial as to show varying weights on the dial by a coin put through a slot and moving a weighted lever. Neither of them, nor anything else produced, seems to come anywhere near anticipating the invention covered by this claim.

The defendant's structure is a weighing machine, having a slot for a coin, a weighted lever, a dial and index, and intermediate mechanism connected with them whereby the coin operates the lever and causes the index to indicate the weight on the dial, the lever releases a part of the intermediate mechanism, which by gravity follows the weighing mechanism as it is moved downward by what is being weighed, and by the other intermediate mechanism carries the index over the dial. The machinery by which the weighted lever operates the index is very different in form from that of the patent; but the claim is not for any particular intermediate mechanism there. Neither is new, and for this purpose one appears to be the equivalent of the other. As a weighing machine, the defendant's structure accomplishes the same thing in sub

stantially the same way as that of the patent, and embodies all the elements of this claim of the patent. Upon these considerations it appears to be an infringement. *Morley S. M. Co. v. Lancaster*, 129 U. S. 263, 9 Sup. Ct. Rep. 299. And on the whole the orators appear to be entitled to a decree for an injunction and an account, according to the prayer of the bill. Let there be a decree for the orators that the first claim of the patent is valid, that the defendant has infringed, and for an injunction and an account, with costs.

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THE SABINE.

(Circuit Court, E. D. Louisiana. April, 1881.)

DECISION ON APPEAL—EFFECT OF MANDATE—COMPROMISE.

A decree was rendered upon a bond against the principal and against two sureties for certain limited amounts in which they were bound. The sureties compromised their liability, but the principal afterwards appealed to the supreme court, where the decree was affirmed in all respects. *Held*, that the circuit court was not bound by the mandate, so as to allow execution to go against the sureties, either for the whole of the decree against them or for the excess over the sums paid in satisfaction of the whole.

In Admiralty. Heard upon motions to quash executions. Granted.

The original case was a suit in admiralty, brought February 16, 1872, by the owners of the Sabine against the steamboat Richmond, to recover damages sustained by the Sabine resulting from a collision between her and the Richmond, near Twelve Mile point, on the Mississippi river, on February 11, 1872. The owners of the Richmond filed an answer, and also a cross libel against the owners of the Sabine. In the latter they claimed a decree for damages sustained, in consequence of the collision, by the Richmond, they alleging that the collision was caused by the fault of the Sabine. Upon the filing of the cross libel the district court, by the authority of the admiralty rule No. 53, ordered that all proceedings upon the original libel be suspended until the original libelants gave bond to respond in damages to the cross libel. In pursuance of this order, on March 14, 1872, the owners of the Sabine, with Alfred Moulton, Jules Tuyes, Charles Cavaroc, and Achille Chiapella as sureties, executed a bond of that date in favor of the owners of the Richmond in the sum of \$8,000. By the terms of the bond, Moulton and Tuyes each became bound in the sum of \$2,000 only, and they each justified in that amount. Upon trial a decree was rendered dismissing the libel of the Sabine against the Richmond, but sustaining the libel of the Richmond against the Sabine, and awarding to the owners of the Richmond the sum of \$9,750 for the damage sustained by her, and rendering a decree in their favor against Jules Tuyes and Alfred Moulton for \$2,000 each. From this decree, an appeal being taken to the circuit court by

the sureties upon the bond given by the owners of the Sabine upon a cross libel of the Richmond, the circuit court, on April 10, 1875, rendered a decree in favor of the Richmond against the Sabine for the damages sustained by the former in consequence of the collision. Afterwards, on March 11, 1876, upon the report of the master, the amount of the damages was fixed at \$8,000, which the owners of the Sabine were condemned *in solido* to pay. At the same time decrees were rendered against Jules Tuyes and Alfred Moulton, sureties on the bond aforesaid, for \$2,000 each. On July 3, 1876, Jules Tuyes compromised the decree against him in favor of the owners of the Richmond by paying the latter, in full satisfaction thereof, the sum of \$1,166.66, and was by them subrogated to their rights as owners of the decree. The following is a copy of the paper by which this settlement was evidenced:

"SHIRLEY *et als.*, OWNERS OF THE SABINE v. THE RICHMOND.

"United States Circuit Court: Received, New Orleans, July 3, 1876, from Jules Tuyes, Esq., security on the bond given by the libelants in the above cause to respond to the cross libel filed by N. S. Green and others, claimants of the steamboat Richmond, the sum of \$1,166, and in full satisfaction of the decree rendered against him in the above-entitled cause, and I hereby subrogate him to the rights of N. S. Green and owners of the steamboat Richmond.

KENNARD, HOWE & PRENTISS,

"Attorneys for Owners of Richmond."

Afterwards, September 28, 1876, the Home Insurance Company paid, in behalf of Alfred Moulton, to the owners of the Richmond, the sum of \$1,500, which the owners of the Richmond acknowledged to be in full settlement as a compromise of the liability of Moulton on said bond, signed by him. It was in fact a compromise of the decree for \$2,000 which had been rendered against Moulton on said bond. On November 2, 1876, the owners of the Sabine filed a petition for appeal from the decrees of the circuit court hereinbefore mentioned, upon giving bond to cover costs, which was allowed, and on December 16, 1876, they gave an appeal bond in the sum of \$500. Neither Tuyes nor Moulton joined in the petition for appeal, and neither of them became obligors upon the appeal bond. At the October term, 1880, of the supreme court the decree of the circuit court of March 11, 1876, was in all respects affirmed, and a mandate was sent down to the circuit court. After the mandate of the supreme court, showing the affirmance of the decree of the circuit court, had been entered in the latter court, an execution was issued on the decree against Tuyes and Moulton rendered by the circuit court March 11, 1876, on their bond above mentioned, and affirmed as aforesaid by the supreme court. The marshal being about to seize the property of Tuyes and Moulton to satisfy the execution, they each for himself filed a motion to quash the execution, on the ground that the decrees against them respectively had been satisfied. Upon these motions the cause was heard.

C. E. Schmidt, for Jules Tuyes.

C. B. Singleton and R. H. Browne, for Alfred Moulton.

John A. Campbell, for owners of the Richmond.

Woods, Circuit Justice. It is insisted by counsel for the owners of the Richmond that the decree of the circuit court, as well that part of it which condemned Tuyes and Moulton to pay \$2,000 each as that part by which the owners of the Sabine were compelled to pay \$8,000 to the same parties, having been affirmed by the supreme court, and the mandate of that court having been received, this court has no discretion, but must execute the decree in all respects as it has been affirmed. The result of this contention would be that Tuyes and Moulton, who had once compromised and satisfied the decrees against them respectively, would be compelled to pay them again. I do not think the law requires of this court a course of administration which would produce such a result. This court is not, under all circumstances, bound to render a servile obedience to the mandate of the supreme court. It is bound to exercise a judicial discretion in the interpretation and execution of the mandate. In the case of *Story v. Livingston*, 13 Pet. 373, the supreme court said, in reference to its mandate, that "it is to be interpreted according to the subject-matter to which it has been applied, and not in a manner to do injustice." In *Ex parte Morris*, 9 Wall. 605, the supreme court, having reversed a decree rendered against Morris and Johnson by the district court, by its mandate directed the marshal to make restitution to them of whatever they had been compelled to pay under that decree. Pending the appeal, the whole amount of the decree had been collected from them by execution. A part of the money so collected had been distributed by order of the court. The residue the marshal had, by order of the interior department, deposited in a national bank, which had failed since the deposit had been made. These facts were held by the supreme court to exonerate the marshal, and excuse him from obedience to the mandate of the court. See, also, *Supervisors v. Kennicott*, 94 U. S. 498. When the appeal taken does not supersede the decree, and such was the appeal taken in this case, the appellee, notwithstanding the appeal, may take out execution, and enforce the payment of the decree. It has never been supposed that money so collected could, after the affirmance of the decree, be again collected. A voluntary payment stands on the same footing. It is not the practice of the supreme court, in affirming or reversing a decree, to take notice of payments or adjustments subsequent to the decree of the court below. These matters belong to the circuit court to consider after it shall have received the mandate of the supreme court. Thus in *The Kalorama*, 10 Wall. 204, it was said by Mr. Justice CLIFFORD:

"Payments have been made by the respondents since the decree was entered in the district court, but the court here is not asked to revise the finding of the district court as to the amount, nor to deduct the payments since made, as those matters will be adjusted under the stipulations executed between the parties."

So in *Canal Co. v. Gordon*, 2 Abb. (U. S.) 479, it was said by Mr. Justice FIELD:

"Obedience to the mandate of the supreme court will always be rendered by this court. It will be a prompt and implicit obedience; but we trust it

will be, as it should be, an intelligent, and not a blind, obedience. The judgments of that tribunal are founded on the records before it, and these judgments will be unhesitatingly enforced, except as their enforcement may be modified or restrained by events occurring subsequent to the period covered by this record. That such events may modify, and often do modify, the mode and manner of enforcement is well known to all members of the profession. The death of parties, partial satisfaction, changes of interest subject to judgment and sales upon the judgment pending the appeal, are instances where this result is frequently produced."

It follows from these authorities, if it, indeed, needed any authority to support so obvious a proposition, that payments or compromises made in his own behalf by a party to a decree after its rendition in the court below are to be noticed and enforced by the inferior court after the affirmance of the decree by the supreme court and the return of its mandate. It is conceded, however, by counsel for the execution creditors that Tuyes and Moulton are entitled to be credited on the execution with the amounts paid by them in compromise of the decrees rendered against them, but it is insisted that they are entitled to no more. This concession, it seems to me, yields the whole case. Tuyes and Moulton insist that the decrees against them have been discharged by accord and satisfaction. The accord and satisfaction is clearly established. It is impossible to hold that they would be entitled to the benefit of full or partial payment, and to deny them the benefit of their accord and satisfaction. Both these methods of satisfying a decree, so far as the question in hand is concerned, stand on precisely the same footing.

But it is insisted that the adjustments made with Tuyes and Moulton were compromises, and that the compromises failed; therefore the appellees were remitted to their original rights, and can collect the balance of their decrees not covered by the compromise payments. It is true, the adjustments were compromises, but the compromises have not failed. Those compromises were that the appellees should receive a certain sum in full satisfaction of the decree. This was agreed to by the debtors; the money was paid, and a release executed. So far from the compromises failing, they were fully executed and performed. When these compromises were made it was perfectly well known to the owners of the Richmond that Tuyes and Moulton could not prevent the owners of the Sabine from carrying up the decree by appeal. They never agreed that there should be no appeal. They compromised and satisfied the decrees against themselves. They took no appeal, for they had nothing to appeal from. They were out of the case. It is true that, if the decree of the circuit court had been reversed, the reversal would have extended to the decree against Tuyes and Moulton. But that would have been of no benefit to them. They could not have recovered back the compromise money voluntarily paid before the appeal in satisfaction of the decree. No reason is perceived why the execution in question should be allowed to proceed against the property of Tuyes and Moulton. They have both satisfied the decrees upon which the execution is issued. The affirmance by the supreme court of the entire decree of the circuit court does not make this any the less a fact. It would not be just to compel another



satisfaction by Tuyes and Moulton. As to Tuyes, he is in fact subrogated to the rights, so far as they have any, of the owners of the Richmond in the decree against himself. If the decree is not satisfied, he is, in effect, its owner, so that the levy of this execution upon his property is an attempt to compel him to pay a decree which he has compromised, and the owners of which have attempted to subrogate him to their rights therein. In short, it is an attempt to enforce by execution payment of a decree which, if it is not already satisfied, is the property of the person from whom its payment is to be exacted. No question is made in reference to the method adopted by Tuyes and Moulton to gain the relief prayed for. The power to control their own process so as to prevent injustice is one which belongs to all courts. *McHenry v. Watkins*, 12 Ill. 233; *Russell v. Hugunin*, 1 Scam. 562; *Adams v. Smallwood*, 8 Jones, (N. C.) 258; *Barnes v. Robinson*, 4 Yerg. 186; *Azcarati v. Fitzsimmons*, 3 Wash. C. C. 134; *Davis v. Shapley*, 1 Barn. & Adol. 54; *Humphreys v. Knight*, 6 Bing. 572. The exercise of this power is invoked by their motions, and there seems to be no good reason why the relief asked for should not be granted. The motions are allowed.

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### THE LILLIE LAURIE.

(Circuit Court, E. D. Texas. November Term, 1880.)

#### 1. ADMIRALTY—PRIORITY OF LIENS.

Liens for salvage and for damage to goods are inferior to the lien of seamen for wages earned on a subsequent voyage, but, being general maritime liens, are superior to those of mortgages, whether their mortgages were registered before or after the origin of the maritime liens.

#### 2. SAME.

Liens for salvage and for damage to goods are superior to a state statutory lien for supplies subsequently furnished in the home port.

#### 3. SAME—APPEALS—IMPROVIDENT PAYMENT.

A libel for salvage and for damage to goods was dismissed, and decrees were rendered in favor of certain furnishers of supplies in the home port, on a lien created by the state law, each decree being for less than \$50, and therefore not subject to appeal. Libellant appealed to the circuit court, and, pending his appeal, the decrees for supplies were paid in full, though the proceeds of the vessel were insufficient to pay both classes of claims. *Held*, that the payment was improvidently made, as the question of priority was carried up by the libellant's appeal.

In Admiralty. Libel for seamen's wages. On appeal from district court.

The original libel was filed by Dennis Mahoney to recover seaman's wages. Several other seamen intervened, and filed similar libels. One E. N. Stevenson also intervened, and filed a libel for damages sustained by the nonperformance by the Laurie of a contract of affreightment and for salvage. Upon this latter libel the facts disclosed by the evidence were as follows: The schooner, in December, 1878, was bound on a voyage from Galveston to Moss' Bluff, on the Trinity river. A part of her cargo consisted of merchandise, valued at more than \$1,200, the prop-

erty of the libelant Stevenson. On December 16th, a short distance below her destination on the Trinity river, the schooner, from some cause not explained by the evidence, sank in water 20 or 30 feet deep. Her hull was utterly submerged. The schooner was abandoned by her master, who told Stevenson to undertake to save her as best he could. Stevenson employed a large force of men, and by strenuous exertions raised the schooner, and landed her cargo, which was in a damaged condition. This libel was filed to recover the damage sustained by his goods, which he claimed to be \$311, and for salvage, for which he claimed \$150. His claims were not immediately put in suit, owing to the negligence of his proctor, in whose charge they had been placed. The schooner resumed her business, and afterwards contracted the debts for seamen's wages, for which Mahoney and others brought their libels. On August 15, 1878, a mortgage on the schooner to one J. F. Magale for \$240 had been duly recorded in the customhouse at Galveston, which was her home port, and on June 7, 1879, another mortgage to one B. Dugat for \$227 was duly recorded in the same office. These mortgagees also filed intervening libels. Certain furnishers of supplies in the home port, who, by complying with the local law of Texas, had acquired liens on the schooner, also filed intervening libels against her. The supplies for which these latter liens were claimed were all furnished after the sinking of the schooner on December 16, 1878. The schooner was seized upon the libel of Mahoney, and by order of the district court was sold, and her proceeds, amounting to \$528, were paid into the registry of the court. The district court made a final decree in the case, dismissing the intervening libel of Stevenson for damages and salvage for want of evidence to sustain it, and decreed in favor of the seamen who sued for wages, the mortgagees, and the furnishers of supplies in the home port, who had acquired liens by virtue of the state law, and ordered a distribution of the fund in the registry among those who by its decree were entitled to it. The decrees in favor of the seamen and the furnishers of supplies were, respectively, for less than \$50 each. Stevenson appealed to the court from the decree disallowing his claim, and from the decrees in favor of the mortgagees; the fund in the registry not being sufficient to pay him and the mortgagees. Pending the appeal the decrees in favor of the seamen and the furnishers of supplies, amounting in the aggregate to \$195.93, were paid in full out of the registry of the district court, leaving, after the payment of the costs, only a balance of \$100.87, to be applied to the payment of Stevenson's claims should this court decree in his favor.

*Wharton Branch*, for Stevenson.

*A. N. Mills, Geo. W. Davis, and Henry Sayles*, for the mortgagees.

Woods, Circuit Judge. The testimony upon the hearing in this court establishes conclusively the claim of Stevenson for salvage and for damage to his goods resulting from the sinking of the *Lillie Laurie*. The salvage claimed (\$150) only covers the actual expenses incurred by Stevenson in raising the schooner, with a very moderate compensation for his own services. The damage to his goods (\$311) is also clearly estab-



lished, and there is no evidence to show that the damage fell within any exception made in the bill of lading. There must, therefore, be a decree in favor of Stevenson for both claims, amounting in the aggregate to \$461. The sum which the schooner brought when sold by order of the district court, to wit, \$528, not being sufficient to pay all the decrees against her, it becomes necessary to settle the order in which the decrees are to be satisfied.

The claims of the seamen were for wages earned upon voyages subsequent to the date of the salvage service rendered by Stevenson and the date of his claim for damage to his goods. They are therefore entitled to priority of payment by reason of that fact. *The Paragon*, 1 Ware, 326; *Surplus of the Ship Trimountain*, 5 Ben. 246; *The Hope*, 1 Asp. 563; *Porter v. The Sea Witch*, 3 Woods, 75. It has even been held that seamen's wages are entitled to priority over all other claims. *The Paragon*, *ubi supra*. The seamen are therefore entitled to be paid their claims in full before payment to any other lienholder.

The claims of Stevenson, which are strictly maritime liens, by the general maritime laws are entitled to priority of payment over the claims of mortgagees, whether the same were registered before or after the origin of Stevenson's claims. *Baldwin v. The Bradish Johnson*, 3 Woods, 582. And Stevenson is entitled to priority of payment over debts contracted subsequent to the date of his claim for supplies to the schooner furnished in her home port, and which are a lien upon the vessel by virtue of state law only. *Baldwin v. The Bradish Johnson*, *ubi supra*; *The John T. Moore*, 3 Woods, 61.

The order in which the proceeds of the sale of the schooner should be distributed is therefore as follows: *First*, the costs of suit; *second*, the decrees for seamen's wages; and, *third*, the decrees in favor of Stevenson for salvage and for damages to his goods. As the fund in the registry of the court will be insufficient to pay these claims, it is unnecessary to go further.

An interesting question of practice is raised by the fact that the decrees rendered by the district court in favor of the furnishers of supplies in the home port, each decree being for a less sum than \$50, and the decrees, therefore, not being subject to appeal, were paid in full out of the registry of the court, pending the appeal of Stevenson. Were these decrees properly paid? It seems to me clear that they were not. The fund in the registry being insufficient to pay the costs, the maritime liens, and the claims of these furnishers of supplies, a controversy necessarily arose between Stevenson and the supply men touching their right to priority of payment. The libel of Stevenson having been dismissed by the district court, his right to priority of payment over the supply men could only be settled in the circuit court, and that question was taken up by his appeal. All that the supply men could insist on was that the amount of their claims should not be disturbed by the circuit court, that having been finally settled by the district court. But, as long as Stevenson was prosecuting his appeal and claiming priority over them in the circuit court, they could not settle that question in their own favor by getting

payment of their claims in full from the registry of the district court. To hold otherwise would be to allow the fund against which an appellant was prosecuting his claim to be entirely withdrawn, and thus deprive him of all the fruits of his appeal and decree should the appellate court decide in his favor. When there is a fund in the district court against which several libelants are prosecuting claims, and it is insufficient to pay all, and the claim of one libelant is disallowed, and he appeals to the circuit court, no payments should be made from the fund until after the decree of the circuit court upon the appeal. By such an appeal the whole decree is brought up. The part not appealed from remains here in full force, to be executed on the final termination of the cause. What is not reversed is still in force and a necessary part of the decree of this court, and is to be executed as such. *The Roarer*, 1 Blatchf. 1. The result of this view is that the entire fund should have been sent up to this court with the appeal. "The appeal carries up the *res*, or money in the registry of the district court, to the circuit court, and, when the rights of the parties are adjudicated there, the court must carry into execution its own decree." *Montgomery v. Anderson*, 21 How. 386.

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### THE CARA.

#### WILMOT *et al.* v. THE CARA.

(Circuit Court, D. Louisiana. April Term, 1890.)

#### MARITIME LIENS—SUPPLIES AT HOME PORT—CONSTRUCTION OF STATUTE.

Under Rev. Civil Code La. art. 3274, declaring that "no privilege should have effect against third persons, unless recorded in the manner required by law," the owner of a vessel who has chartered her to another is a "third person," with respect to persons who claim a lien under the state law for supplies furnished in the home port. *Beard v. Chappell*, 23 La. Ann. 694, followed.

In Admiralty. Libel by W. G. Wilmot & Co. against the Cara for supplies, Lagan & Mackinson interveners. On appeal from district court. Libel and intervention dismissed.

The libelants, W. G. Wilmot & Co., and the interveners, Lagan & Mackinson, assert a lien upon the defendants, the steamboat Cara, for supplies furnished in the home port. The lien is claimed under the local law of Louisiana, (Rev. Civil Code, art. 3237.) The defense, set up by way of exception, is that the contract for supplies was not recorded, as required by law, and therefore no lien attached. The libelants claimed for coal furnished the Cara to the amount of \$345, between January 13 and 23, 1879. Their lien therefor was not recorded until March 7, 1879. The interveners, Lagan & Mackinson, claim \$74.07 for other supplies furnished between January 9 and 13, 1879, and their lien was not recorded until March 10, 1879. Rev. Civil Code, art. 3274, declares: "No privilege should have effect against third persons, unless

recorded, in the manner required by law, in the parish where the property to be affected is situated. It shall confer no preference on the creditor who holds it over creditors who have acquired a mortgage, unless the act or other evidence of the debt is recorded on the day that the contract is entered into." The libelants and interveners contended, in reply to this, that the claimant was not a "third person," within the meaning of article 3274, Rev. Civil Code. The supplies were furnished to the Cara, by the libelants and interveners, while the Cara was in possession of Dodge & Doherty, to whom she had been chartered by her owner, the claimant, on January 7, 1879, for three months from that date. At the time the steamboat was seized she had been returned to and was in possession of the claimant.

*B. Egan*, for libelant.

*Joseph P. Horner*, for claimant.

WOODS, Circuit Judge. The act or other evidence of debt on which the libelant bases his claim was not recorded on the day the contract was made, as required by article 3274, Rev. Civil Code, nor within seven days thereafter, as provided by an amendment passed in 1877. See Acts 1877, p. 59. The only question is therefore whether the owner of the boat falls within the term "third persons," found in article 3274. We think the case of *Beard v. Chappell*, 23 La. Ann. 694, furnishes an answer to this question. In that case it was held that, "the debtor for supplies being a lessee, the owner of the plantation and the stock thereon is a 'third person,' within the meaning of article 123 of the constitution. If, therefore, the owner of the plantation, a third person, was in possession of the cotton at the time the privilege was asserted by the furnisher of supplies, then, and in such case, the furnisher could not hold the same, because, not having had his privilege recorded, and the cotton having passed into third hands, the privilege was lost." This authority covers this case. As against the owner of the boat, who was a third person in possession, the libelants and interveners had no lien, because their contract had not been recorded as required by law. A lien is necessary to the relief they ask. *The Lottawanna*, 21 Wall. 558.

The libel and intervention must be dismissed, with costs.

BRADLEY, Circuit Justice, concurred.

## THE NETTIE WOODWARD.

WESTERN TRANSIT CO. *et al.*, Intervening, *v.* THE NETTIE WOODWARD.

(District Court, E. D. Michigan. April 30, 1893.)

## MARITIME LIENS—PRIORITY—MARITIME TORT—SEAMAN'S WAGES.

The maritime lien for damages arising from collision takes precedence of the lien for seaman's wages accruing prior to the collision. *The John G. Stevens*, 40 Fed. Rep. 331, and *The F. H. Stanwood*, 49 Fed. Rep. 577, followed.

In Admiralty. On petitions for distribution of proceeds of sale of the schooner Nettie Woodward.

Statement by SWAN, District Judge:

The questions in this case arise upon petitions for distribution of the proceeds of sale of the schooner Nettie Woodward, which was condemned and sold under the process and order of this court at the suit of the original libellant. The proceeds in the registry of the court are insufficient to pay the decree awarded against the vessel. The Western Transit Company holds a decree for damages resulting to its steamer *Commodore* from a collision in the St. Clair river, for which the schooner was adjudged solely in fault, and asks that its decree may be declared a lien upon the proceeds of sale paramount to those of the intervenors, who are the master and crew of the schooner, and in whose favor decrees for wages accruing prior to the collision have been entered. The master and seamen unite in a petition praying priority of payment of their decrees over that for the damages caused by the collision. The Nettie Woodward is a Canadian vessel, and, under the laws of the dominion of Canada, the master is given a lien for wages co-ordinate with that of the crew.

*W. E. Leonard*, for claimant Phillip Cross.

*Moore & Canfield*, for Western Transit Co.

SWAN, District Judge. The authorities upon the subject have been so ably and exhaustively reviewed in the opinion of Mr. Justice BLATCHFORD in *The John G. Stevens and R. S. Carter*, 40 Fed. Rep. 331, and later in that of Judge JENKINS in the court of appeals for the seventh circuit in the case of *The F. H. Stanwood*, 49 Fed. Rep. 577, that nothing remains to be said upon it. With their reasoning and conclusions I fully concur. In accordance therewith, the order upon these petitions will be that the decree of the Western Transit Company for damages suffered by the collision be first paid out of the fund in the registry before payment of the decrees in favor of the intervenors. The costs taxed in favor of the original libellant are secured by the stipulation filed, and are recoverable from the stipulators, and for these execution will issue if necessary. In view of the nationality of the crew and the vessel, the rule applied works no injustice, since it gives the seamen's claims the same relative rank, as against that for the collision, as is accorded by the settled principles of the English admiralty courts.

## THE HADJE.

(Circuit Court, E. D. New York. June 28, 1881.)

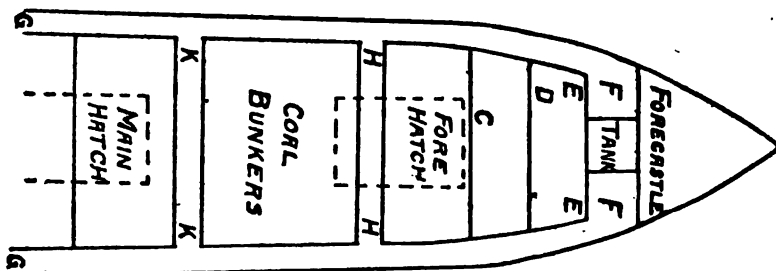
**ADMIRALTY—NEGLIGENCE—PERSONAL INJURIES.**

It is not negligence to allow the between-deck beams of a vessel to remain uncovered with a permanent deck, and to use them as a place for the temporary storage of loose planks; and a longshoreman, who unnecessarily, and with fair notice, attempts to walk over such loose planks while executing an order of the stevedore, cannot recover against the ship for an injury occasioned there.

In Admiralty. Libel *in rem* for personal injuries. Dismissed.

This was a suit in admiralty *in rem*, brought in the district court. That court dismissed the libel, and the libellant appealed to this court. (1 Fed. Rep. 89.) This court found the following facts:

"The Hadje was an ocean steamer, about 200 feet in length, and built with two decks. The upper or main deck was close-laid and caulked. The other deck consisted of transverse beams, which, at the time of the accident herein-after mentioned, were from 7 to 10 feet apart, and of various dimensions. These beams were about 10 feet above the bottom of the hold, and  $7\frac{1}{2}$  feet below the main deck. On these beams loose planks were sometimes laid for the purpose of separating different classes of cargo, and relieving the lower tiers of cargo from undue pressure. For about three years before December, 1877, the Hadje had been engaged in trade between Montreal and the West Indies. Early in December, 1877, she came to New York, to run upon a different route, and in preparing for that route went to a ship-yard, where extra transverse beams were fitted in her. These extra beams were of wood, and in putting them in all the loose planks in the vessel were thrown into the lower hold. On the 7th of December, 1877, the repairs being completed, the master of the Hadje ordered the planks to be taken from the hold, and placed on the between-deck beams, to make room for the cargo in the hold. Aft of the coal-bunker the planks were laid on the between-deck beams, with a view to separating the cargo carried in the between-decks from the cargo carried in the hold. Forward of the coal-bunker no cargo was to be carried in the between-decks, and the planks were put on the beams merely to get them out of the way. Most of the planks were Quebec deals. All the Quebec deals were of a uniform length of 12 feet, though there were some other planks mixed with them of different lengths. The arrangement of the between-decks of the Hadje, from the main hatch forward, was as shown in the accompanying diagram.



H, H, and K, K, were beams running across the vessel, each 2 feet wide. They were on the same level with the other between-deck beams. A stringer of iron, G, G, 1 foot 9 inches wide in parts, and 2 feet wide in other parts,

extended around the vessel on the same level, and could be and was used to walk forward and aft upon, in the between-decks. The space between H, H, and K, K, was filled with coal, inclosed between bulk-heads. The coal was about level with the top of the between-deck beams. F, F, were small decks, on the same level with the between-decks beams, on which dunnage was commonly stowed. The forward hatch of the main deck was 15 feet 8 inches in length and 6 feet in width, and the forward part of the forward hatch was nearly on a line with the between-decks beam, C. The main hatch was 23 feet in length by 12 feet in width, and the forward end of it commenced 2 feet from the said coal-bunker. Loose planks were laid on the between-decks beams, (except under the hatch,) extending from H, H, to C. From the center of H, H, to the center of C, was 10 feet 9 inches. Other planks were laid irregularly from C, over D, towards E. Most of these planks were Quebec deals. The beam, C, was 8 inches wide. From the center of C to the center of D was 7 feet 9 inches. D was a beam 9 inches wide. From the center of D to the tank was 7 feet 4 inches. The after-end of the tank was flush with the after-end of the decks F, F. From the center of C to E was 15 feet 1 inch. The Quebec deals fell about 8 feet short of reaching E.

"The libellant was a longshoreman, and on the 8th of December, 1877, was employed by the owners of the *Hadje* to assist in the stowage of the cargo of the vessel. He was working under the direction of a foreman stevedore, but was paid directly by the owners of the vessel. The vessel was afloat in the port of New York, lying at pier 12, North river. About 2 o'clock in the afternoon of the 8th of December, while at work in the lower hold, near the main hatch, the libellant was ordered by the foreman stevedore to go forward and get some dunnage. The dunnage was stowed on the little deck, F, on the starboard side. He went forward from the main hatch in the between-decks, starting from the port side near the main hatch, and, while attempting to reach the dunnage by walking on the loose planks, he stepped on the unsupported ends of some Quebec deals, between D and E, and fell with the deals into the lower hold, sustaining injuries. The proper and usual way of going fore and aft in the between-decks of the *Hadje* was over the stringer G, G, running along the side of the vessel, and the proper and usual way of crossing from one side of the vessel to the other was on the cross-beams H, H, and K, K. At the time of the accident the covers were off of the main hatch and the fore hatch of the main deck, and the between-decks was well lighted. The planks forward of the coal-bunker had not been laid for the purpose of forming a deck, or affording support, or means of access to the forward part of the vessel. They had been laid there irregularly, for the purpose of getting them out of the way of the cargo which was being stowed in the lower hold. The libellant had, some 18 months before, worked on the *Hadje*, at which time he noticed that she had no planking in her between-decks. For 2 years continuously, prior to this accident, he had been working upon other steamers of the line to which the *Hadje* belonged, three of them on which he so worked having had, at the times he so worked on them, open between-decks, like that of the *Hadje*; and he had frequently laid loose planks in the between-decks of said vessels, while stowing cargo there. The planks forward of the coal-bunker, in the between-decks of the *Hadje*, were not, and did not appear to be, regularly laid. They were, to the eye, loose and irregular. The danger of attempting to walk upon them was apparent. There was no occasion for the libellant to go upon them. They were not laid to walk on, nor held out as places to walk on. There were safe places laid for the libellant to walk on."

*James McKeen*, for libellant.

*Thomas E. Stillman and Wilhelmus Mynderse*, for claimant.





BLATCHFORD, Circuit Judge. Having found substantially the foregoing facts, the district court held that it was not negligence to allow the between-deck beams of the vessel to be uncovered by a deck, or to use such beams for the stowage of loose planks for a temporary purpose, or to leave the ends of the loose deals unsupported at the place where the libellant fell; that the deals were not so placed as to justify the libellant in believing that he was proceeding upon a deck; and that the libellant used the deals for a purpose for which they were not intended, without necessity, and with fair notice, from the manner in which they lay, that they were not intended to be so used. In these views I concur, and it is not necessary further to enlarge upon them. The libel must be dismissed, with costs in both courts.

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STEBBINS *et al.* v. FIVE MUD-SCOWS.

(District Court, S. D. New York. April 1, 1892.)

1. SALVAGE—ELEMENTS OF—PREVENTION OF DAMAGE TO PROPERTY OF OTHERS.

When a vessel has gone adrift through negligence, and is drifting towards other vessels, which she is likely to injure, the saving of her owners from liability to pay any such damage as was likely to arise, and which the owners would be called on to pay, should be taken into account in determining the amount of a salvage award.

2. SAME—AWARD.

Seven hundred and fifty dollars salvage awarded a tug worth \$15,000 for picking up five scows worth \$30,000, which had negligently got adrift in the Harlem river, and were liable, by collisions, to injure other property.

In Admiralty. Libel for salvage.

*Wilcox, Adams & Green*, for libellant.

*A. A. Wray*, for claimant.

BROWN, District Judge. On May 26, 1891, five loaded mud-scows broke adrift from the bulk-head where they were moored, between 115th and 116th streets, Harlem river, between 6 o'clock and 7 p. m., and went drifting upwards with the slow current at the beginning of the flood-tide. Some little time afterwards, estimated by two or three of the witnesses to be half an hour, a powerful steam-tug, the Archibald Watt, going up the river to lay up for the night, discovered the scows adrift between 117th and 118th streets, made fast to them, and towed them back to the bulk-head at 114th street, where they were tied up a little after 9 p. m. The scows were worth \$6,000 each, in all \$30,000; the Watt, \$15,000. No special difficulty or danger attended the work, excepting that the channel of the river was very narrow; the scows were more or less kinked up, and very heavy; and the handling of them was attended with some danger to vessels going up and down the river in so narrow a channel. The small tug Curtis was going up the Harlem at the same time with the Watt; her pilot saw the scows adrift and made

for them; but as the Watt reached them first, the Curtis made no claim to assist. She was a much smaller tug than the Watt, and could not, I think, have handled the five scows together. Had the scows not been picked up by the Watt, I think there is no doubt that they would have come in collision with the United States steamer Azalia, worth \$90,000, which ran some 40 feet beyond the end of the long projecting wharf at the end of 119th street. Further above, the scows would also have been likely either to run upon Negro rocks off 122d street, or upon the yachts above. It is not probable, however, that from merely grounding without collision, the scows would have suffered any great damage. For the claimants it is said upon the authority of *The Baker*, 25 Fed. Rep. 771, that the risk of inflicting loss on others is not to be taken as an element in fixing a salvage allowance. That is undoubtedly true, but it is not applicable here. The observations of the court in that case had reference to the existing facts, namely, that the danger of communicating fire to other vessels from the fire on board the vessel saved, was a danger not arising through any fault of the latter vessel. The owners of the saved vessel could not, therefore, have been called on to pay any such damage to others. In the present case, the presumption is to the contrary. It is impossible to suppose that five barges could break adrift from a bulk-head in the Harlem river in mild weather at the beginning of the flood-tide, which was so weak as not to drift them above two blocks in nearly half an hour, except under very insufficient and negligent mooring; and the scows and their owners would have been liable, therefore, for any damage inflicted on other persons through breaking adrift. The rescue of the scows, therefore, saved the owners from any such damage as they might have been called upon to pay; and anything thus saved is as much a pecuniary benefit to the owners of the scows as the saving of any damage to the scows themselves. It is not the loss to other persons that is considered, but the saving to the owners themselves. Although this saving is not a matter of precise calculation, yet as collision was a very certain danger, it is one of the elements which under such circumstances is proper, I think, to be taken into account. In view of all the circumstances, I think that a salvage allowance at the rate of \$150 per scow or \$750 for the five scows, will be a reasonable award; one-third of which should go to the officers and men, in proportion to their wages; and two-thirds to the tug. A decree may be entered accordingly, with costs.

## THE INIZIATIVA.

JARVIS *et al.* v. THE INIZIATIVA.

(District Court, S. D. New York. April 12, 1892.)

## 1. SHIPPING—NEGLIGENCE—CAPSIZING OF LIGHTER—UNAUTHORIZED LOADING.

The crew of a partially loaded lighter received word from the ship which was loading her that the work would not be continued at night, and accordingly they did not return after supper. In their absence the loading of the lighter was completed by the crew of the ship in the evening, and then she was left without watch, in an exposed situation, where she afterwards capsized, from some cause not explained. *Held*, that the ship was liable.

## 2. SAME—BAILMENTS—LIGHTERMAN NOT AGENT OF CONSIGNEE—DELIVERY OF CARGO—WHEN NOT LEGAL.

A lighterman taking from the consignee of cargo an order on the ship for 100 tons for transportation is not the consignee's agent. The ship acts at her own risk in loading the lighter in the absence of the lighter's crew, without their knowledge or authority, and the cargo so put aboard without authority is not in law received by the lighterman, nor is he accountable for it as a bailee to its owner. *Held*, therefore, that in the above case he could not recover its value.

In Admiralty. Libel for negligently upsetting a lighter.

*Hyland & Zabriskie*, for libelants.

*Ulo & Ruebsamen*, for claimants.

BROWN, District Judge. At about half past 5 o'clock in the morning of October 8, 1891, the libelants' lighter Overton, fully loaded with about 98 tons of sulphur, and made fast alongside the steamship Iniziativa at the Mediterranean pier, Brooklyn, broke her lines, capsized, and sank. The libel was filed to recover damages for the loss of boat and cargo, on the ground that they were upset by the negligence of the Iniziativa.

The libelants were engaged in the lighterage business in the harbor of New York. The consignees of the sulphur gave them an order on the steamship for 100 tons, the capacity of the lighter Overton, to be taken to Gowanus creek. The lighter arrived alongside the Iniziativa in the afternoon of October 7th, and up to a little before 6 P. M. had taken on board 85 tons; namely, 20 tons, which filled the hold, and 15 tons on deck. The loading was done by hoisting the sulphur out of the ship upon a platform erected upon her rail, where the sulphur was weighed by a weigher employed by the consignees, and after being weighed upon the platform, was shot down upon the lighter below.

The bill of lading provided that the sulphur "was to be discharged into lighters which consignee is to furnish as requested by ship, and delivery to be taken day and night as ship delivers." One of the printed clauses of the bill of lading also provided that the consignee was bound to be—

"Ready to receive the goods from the ship's side simultaneously with the ship being ready to unload, either on the wharf, or into lighters, provided with a sufficient number of men to receive and stow the goods; and in default thereof the master was authorized to enter the goods at the customhouse, and

to land, warehouse, or place them in lighter without notice to, and at the risk and expense of, the said consignee of the goods after they leave the deck of the ship."

At about half past 5 P. M. the master of the lighter hailed the ship to know whether there was to be work at night; and the weigher replied, no, that they were to knock off at 6 o'clock. Soon afterwards, the discharge being stopped, the three men on board the lighter made her fast properly alongside for the night and went home.

Work was resumed at 7 P. M. but the lightermen not being present, the foreman on the ship sent down a couple of men to trim the sulphur as it was dumped aboard, and the loading, up to 98 tons, was completed at half past 9, when the men were discharged. The lighter was moved several times while loading in the evening. At half past 5 the next morning the noise of the upsetting of the lighter was heard. No one saw it upset, or testifies to the immediate cause. All the lines that fastened it to the ship were broken.

The libel charges that the sulphur was not properly trimmed. This charge is not sustained by proof. It also charges that the loading during the evening was made without authority or permission of the libelants; and that the lighter was left without necessary watch or attendance. Upon the evidence the case turns upon the fact whether the lightermen were notified that work would go on in the evening; or, if not, whether it was negligence in the ship to leave such a lighter for the night unattended, when fully loaded.

On the first question the evidence is very conflicting. There is no doubt that the weigher, about half past 5 o'clock, told the lightermen that they were not to work in the evening. The ship's men, however, claim that before they left for supper, it was arranged to complete the loading of the lighter; and that the lightermen were present at the interview and were informed of this determination. The lightermen all testify positively to the contrary; and the weigher testifies with equal positiveness that there was no such arrangement before supper, and that it was not until after he had gone to his supper that he concluded to come back. The libelants' superintendent also testifies that between 4 and 5 o'clock in the afternoon, in conversation with one of the stevedore's chief men, in reference to night work, he was told that it was undecided whether work was to go on in the evening; but that if so, the lightermen should certainly be informed.

There is no evidence of any indisposition on the part of the lightermen to work in the evening. It was their duty to do so if required; there was no reason why they should not; and all the evidence on their part points to entire good faith in their intention and willingness and expectation to work at night, if required by the ship. The superintendent's inquiries and arrangement that they should be informed, and their own inquiries at the time, confirm this. On the whole, therefore, I accept the libelants' testimony in this respect, and find that the lightermen left the lighter at about 6 o'clock with no notice that the ship was to work at night, but upon the distinct understanding to the contrary.

In subsequently loading the lighter to her full capacity, and leaving her without attendance for the night, the ship acted upon her own risk. I have no doubt that the lighter was loaded at the stern within a few inches of the top of the rail. She had once before capsized when fully loaded. I give no credit to the guesses of the men employed in the evening to trim the lighter, as no special attention was given by them to this point at the time they left; nor have I any doubt that it was unsafe and improper to leave such a lighter so deeply loaded and liable to capsize through the swells of passing boats, in a place where she was thus exposed.

The ship had no authority to make use of the libelants' lighter as a mere place of deposit of the sulphur under the bill of lading, without the libelants' consent; and they did not consent. The lighter did not belong to the consignees of the cargo, but to the libelants, who were acting under an independent contract, and not as the consignee's agents. Under the order for 100 tons the ship had no right to put the sulphur on the lighter of her own notion, in the absence of the men in charge of the lighter, and in a manner to imperil its safety, or without taking such reasonable care of the lighter as was necessary to protect it from damage in the lightermen's absence. The theory of the boatswain that the lighter first filled from leaking is negatived by the proof that even after raising she was found tight. The probability, therefore, is that she took in water from the swells of passing boats in the early morning, through her exposed situation, in the absence of any watch to guard against such dangers.

The libelants are, therefore, entitled to recover for the damage thus caused to their lighter; and also, I think, for the damage to the 35 tons of sulphur which the lightermen had received on board, since the libelants were undoubtedly bailees of so much of the cargo, and had a lien upon it for their hire. The remaining 63 tons put aboard the lighter without the libelants' knowledge or authority, were never received by them in law, nor did they become accountable for it to the owner. It was never in their care or custody, and they never came under any legal responsibility for it, and hence are not entitled to recover for it. *The City of Paris*, 14 Blatchf. 538; *The City of Macon*, 20 Fed. Rep. 159; and see *Phoenix Ins. Co. v. Erie & W. Transp. Co.*, 117 U. S. 323, 6 Sup. Ct. Rep. 750, 1176; *The Sidney*, 23 Fed. Rep. 88, 92.

Decree for the libelants for the items above allowed, with a reference to a commissioner to compute the amount, if not agreed upon, with costs.

## THE BEATRICE HAVENER.

CROWELL *et al.* v. THE BEATRICE HAVENER.

(District Court, E. D. New York. March 24, 1892.)

## COLLISION—VESSEL CARRYING OWNER'S GOODS—LOSS OF VOYAGE—DAMAGES—HOW ASCERTAINED—FREIGHT.

A vessel carrying her owner's goods only is not earning any freight as a separate interest; hence when she is lost at sea by collision her owner cannot recover, as for loss of freight, the estimated amount that such a vessel could have been chartered for to carry a similar cargo on a similar voyage. The proper rule of damages, *restitutio in integrum*, is satisfied by taking the market value of the vessel at her sailing port at the time she was devoted to the voyage, with interest thereon, together with her stores, wages, and any other items of expense reasonably incurred for the voyage up to the time of loss, with interest.

In Admiralty. On exceptions to commissioner's report.

*Carter & Ledyard*, for libelants.

*Owen, Gray & Sturgis*, for claimant.

BROWN, District Judge. Upon the reference to the commissioner to take proof of the libelants' damage from the collision in the above cause, it appeared that at the time of collision the libelants' vessel, the *Ethel A. Merritt*, was bound upon a voyage from Philadelphia to St. Andrews, carrying the libelants' own goods exclusively. Besides the value of the vessel and cargo, the libelants have been allowed, as for loss of freight, the amount for which it was estimated that such a vessel could have been chartered to carry a similar cargo, less the estimated expenses of completing the voyage from the time of collision. If the vessel had been under charter, the loss of freight would have been computed and allowed for in that way. Exception has been taken, however, to that mode of estimating the damage in the present case, because there was no charter in fact, and hence no basis for applying that mode of ascertaining the libelants' damage.

The exception, I think, must be sustained. When freight has been allowed as an item of damage, it is because the owner had a distinct interest separate from the vessel, known as "freight," arising out of some contract or employment under which freight as such was being earned; and the allowance was for the loss of that distinct interest. Such a distinct interest may accrue either under a charter that covers the whole ship, or under bills of lading, which are in effect charters of portions of the ship's carrying capacity. Such contracts create a definite, valuable interest; and when they are destroyed by the defendant's fault, the libelant is entitled to indemnity for that specific loss.

But it is inadmissible, as it seems to me, to resort to the fiction of an imagined charter, when the libelants are transporting their own cargo. Under the liberal construction of policies of insurance, where the parties insure "freight" and pay a premium on "freight," a "reasonable freight" has sometimes been deemed covered in favor of owners

carrying their own cargo; because otherwise the intent of the insurance would be lost, and the common object be defeated. *Flint v. Flemmyng*, 1 Barn. & Adol. 45. But in cases of tort, there is no contractual relation; no question of the construction and intent of a contract arises, but only the question of indemnity to the injured party. While the general rule is that the indemnity shall be as complete as the nature of the case admits of, yet it is well settled that mere anticipated profits are excluded. *The Scotland*, 105 U. S. 24-35; *The City of Alexandria*, 40 Fed. Rep. 697; *The City of New York*, 23 Fed. Rep. 619. In collision causes the price of goods at the place of destination is on that ground excluded as incompetent, and only the price at the port of departure is allowed, with interest and any incidental expenses.

In the absence of any charter or bill of lading, and of any contract which might furnish a basis for any independent employment of the ship, or earning of "freight" as such, I do not feel at liberty to adopt any different rule, or to depart from the well-established law in the case of goods. The compensation for which the ship-owners look in the employment of their vessel to carry their own goods is solely in the expectation of the enhanced value of the goods at the place of discharge; and if that expectation of enhanced value cannot be considered in determining the owner's loss on the goods, I do not see how it can be any the more considered as regards the loss of the ship, either directly or indirectly. Nor is that necessary, nor is the supposition of a fictitious charter necessary, in order to satisfy the rule of *restitutio in integrum*. That rule will be fully satisfied by allowing to the libelants, as in the case of goods wholly lost at sea, the market value of their vessel at the port of sailing at the time she was devoted to the voyage, with interest from that date; and in addition thereto, whatever stores or special equipment of any kind may have been provided for the voyage, including the wages of officers and men from the time they were engaged, as well as any other items of expense, if any, reasonably incurred for the prosecution of the voyage up to the time of loss, with interest on such sums from the time they were supplied or paid. This rule will fully indemnify the libelants for their actual loss of the voyage, while excluding, as is necessary, all merely anticipated profits.

Upon the widely divergent testimony concerning the value of the steamer, I am not satisfied that I could arrive at any better judgment than that of the commissioner; and I shall not, therefore, disturb his finding in that respect.

If the parties do not agree upon a modified sum in lieu of that allowed for freight, the matter will be referred back to the commissioner for readjustment in accordance herewith.

## THE LEPANTO.

THE CASSIE F. BRONSON.

THE LEPANTO v. BENNETT *et al.*

WISE v. THE CASSIE F. BRONSON.

(Circuit Court of Appeals, Fourth Circuit. April 12, 1892.)

## 1. COLLISION—STEAM AND SAIL—LIGHTS.

A steamer moving at midnight in the open sea, on a course S. W.  $\frac{1}{4}$  W., and, approaching a schooner moving on a course N. E. by E., passes the point of intersection of courses just before the schooner reaches it, and, seeing the schooner's green light, puts her helm hard a-port, thereby producing a collision with the schooner, held, that the steamer was in fault.

## 2. SAME—INTERNATIONAL RULES.

Section 4284, Rev. St. U. S., requiring sail-vessels to show torch-lights on the approach of steamers at night, does not apply, since the adoption of the international rules of navigation of 1885, to vessels upon the high seas or coast-waters.

## 3. SAME—PARALLEL AND OBLIQUE COURSES.

A maneuver which would have been a proper one as to vessels approaching each other on parallel courses may be a fatal one if the vessels are moving on courses obliquely intersecting.

(Syllabus by the Court.)

Appeal from the Circuit Court of the United States for the District of Maryland.

In Admiralty.

*Foster & Thomson*, (James Thomson, of counsel,) for appellant.

*Robert H. Smith*, for appellees.

Before FULLER, Chief Justice, and HUGHES, District Judge.

## OPINION BY JUDGE HUGHES.

A collision occurred between the steamer Lepanto and the schooner C. F. Bronson, 25 miles south of Long island, in the Atlantic ocean, shortly after half-past 12 o'clock on the night of the 22d-23d April, 1890, from which the schooner sustained damages assessed at about \$10,000, and the steamer damages claimed to the same amount. Libel was filed in behalf of the schooner, which was answered, and a cross-libel filed. The district court of Maryland decreed for the libellant, the circuit court affirmed that decree, and the case has been appealed to this court.

The collision occurred on a clear night; the deck officer of the steamer Lepanto described it as a "fine, very fine, starlight" night. Witnesses severally say that objects could be seen at 2, 3, 4, 5, and 6 miles distant. The Lepanto was running, half-laden, 10 to 11 miles an hour, on a course S. W.  $\frac{1}{4}$  W., and was first seen by the schooner when at a distance of 5 or 6 miles. She registers 1,489 and carries 3,000 tons. Her dimensions are not given. The Bronson is a four-masted schooner of 183 feet keel, 40 feet beam, and 2,000 registered tonnage. She was laden with 1,789 tons of coal. She was on a course N. E. by E., with



all sails set, moving before a very light wind, blowing from S. S. W.; at a speed of two and a half miles an hour, which barely gave her steerage-way. There being very little wind, her sails were "hauled out by the tackles on the port side;" were "way off on the port side;" were "drawing hardly enough to keep the booms off;" "requiring tackle to be hooked on to keep the booms off." Witnesses of the Lepanto all insist that they did not see the schooner, or her red light, until within half a mile from the place, and four minutes of the time, of the collision. The two vessels were approaching each other. The course of the steamer being S. W.  $\frac{1}{2}$  W., and of the schooner N. E. by E., they were moving on intersecting lines, and the sequel proved that they were moving in such manner that the steamer would pass the intersecting point of the two courses before the schooner reached it. Before the collision the schooner had the steamer a point and a half on her port bow, the steamer conversely having the schooner a point on a half on her starboard bow. If their lights were in place and burning, the steamer showed her green light and the schooner her red light to the approaching vessel until the steamer crossed the course of the schooner. The steamer was bound by the seventeenth international rule of navigation, (1885,) which requires, in substance, that when a steam-ship and a sailing ship are approaching each other on intersecting courses the steam-ship shall keep out of the way of the sailing ship, and the schooner by the twenty-second rule, which required her to keep her course. If the schooner was not in fault as to her lights and her men on deck, and kept her course, then the presumption is that the steamer was in fault; her duty being to keep out of the way. The evidence of all the crew of the schooner in the case is so positive, clear, and consistent to the effect that her lights were in their proper places, and burning brightly, for hours before and at the time of the collision, that it would be unreasonable to entertain doubts of the fact.

In every case of collision between ships in which the testimony of one vessel is as unanimous and positive as it is in this, if it nevertheless be in fact false, there is sure to be some physical circumstance, condition of things, or occurrence developed in the evidence to refute and discredit the false testimony. This sort of refutation is wholly wanting in the present instance, and it must therefore be repeated that it would be unreasonable to doubt the fact that the regulation lights of the schooner were in their proper places, and burning brightly, before the collision. The matter of the flash-light is not included in this remark, and will be dealt with in the sequel.

It is true that those of the Lepanto's crew who were examined all say that they did not see the red light of the schooner until shortly before the collision; their testimony being as follows, respectively: The first officer says, "about three or four minutes before;" the third officer mentions no time, but first saw the red light "about one, and a half points off our starboard bow; about half a mile, I should say, or a quarter of a mile, from us;" Howard, the lookout, says "two or three or four minutes, bearing a point and a half on the starboard bow;" and Kilby, the pilot, says,

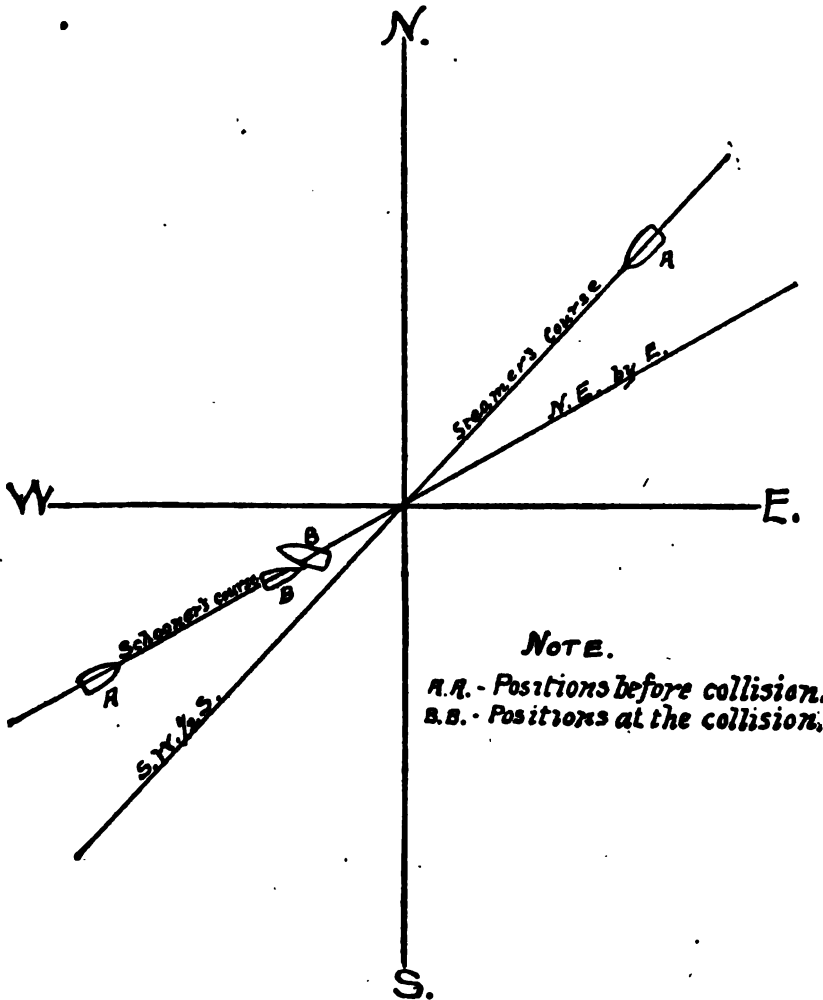
"Saw a red light about a point and a half on the starboard bow, about three minutes before the collision."

It would be unreasonable to question the sincerity or truth of these statements. It must be conceded that the red light of the schooner, though in its place and burning, was not visible to these witnesses until shortly before the time, and within half a mile of the place, of collision; a fact which was doubtless due to the feebleness of the breeze, and the consequent slack condition of the sails of the schooner, hanging "way off on the port side," obscuring the red light. As to the men on deck of the schooner at the time of the collision, the lookout was in his proper place, the first and third officers were on duty, and giving due attention to the navigation, and there was a pilot at the helm,—all competent men, none of whom were at fault in the discharge of their respective duties. Nor can it be doubted that the schooner kept her course. Moving so slowly before a light wind as barely to be in possession of steerage-way, this large four-masted schooner, fully laden, was incapable of changing her course, except in the slowest manner; and the testimony proves that she made no change of helm until just before the moment of collision, when it was put hard a-port, but with no other effect than to bring her bow to starboard about a quarter of a point. It follows from the foregoing considerations that the schooner was not in fault.

Was the Lepanto in fault? In order to simplify this inquiry, let two things be premised: *First*. If two vessels are approaching each other in the night on parallel courses, each passing to the right, and showing the other her left or port side and red light, and each keeping her course, they will certainly pass clear. But if one of the vessels, just as the other nears her, shuts in her red and shows her green light,—that is to say, throws herself across the bows of the other,—then a collision is inevitable if the two are in close proximity; and all that the other vessel can do is to put her helm hard a-port and throw her bow to starboard, in order to lighten the concussion as much as possible. *Second*. But if the two vessels are approaching each other in the night on courses that intersect at an oblique angle, in such manner that one vessel will reach the point of intersection before the other, the two will clear each other if each keeps its course. The vessel reaching the intersection first, if running S. W.  $\frac{1}{2}$  W., will see the other's red light, if the latter be moving N. E. by E., until just before crossing that vessel's course, but will see her green light immediately after crossing, and, if the crossing vessel then keeps on, there will be no casualty. But if this vessel, unmindful of the fact that the two courses intersect, after crossing the other's course, and on seeing the green light, puts her helm hard a-port, as if she were passing the other on parallel lines, then, if she is very near the other vessel, a collision becomes imminent. See the annexed diagram.

The evidence in this record adduced in behalf of the Lepanto, although very indefinite and confusing on the vital point of the case, seems to leave no doubt that the second statement describes what occurred. The Lepanto, immediately on crossing the Bronson's course, and on seeing that vessel's green light, committed the blunder of putting her helm

hard a-port, thus throwing her bow rapidly to starboard against the schooner, which she had actually, though unconsciously, cleared. This maneuver of the Lepanto would have been the proper one if the two vessels had been nearing each other on parallel lines, for in that case the sight of the schooner's green light would have been the announce-



ment of an imminent collision. But they were not passing on parallel lines; the Lepanto had crossed the bows of the Bronson on an intersecting course, and the sight of that vessel's green light was the signal that she had crossed in safety. If she had then continued on her course, nothing would have happened, but, on seeing the schooner's green light, and losing sight or in ignorance of the fact that he was on an intersect-

ing course, her navigator made the maneuver which was fatal in that condition of things, though it would have been proper if he had not crossed the course of the schooner.

It is true that the witnesses for the Lepanto insist that, while she still had the schooner a point and a half on her starboard bow, and was a quarter to a half mile off, and immediately on seeing the schooner's red light, and several minutes before that vessel's green light appeared, she made the maneuver of putting her helm hard a-port. But the Lepanto's testimony on these points cannot overcome a stubborn physical fact. A close examination of that testimony on the crucial point of the time of putting her helm a-port itself leaves the impression, notwithstanding the language of the witnesses to the contrary, that the steamer had crossed the schooner's course, and that the green light had shown itself, when the helm was put to port. But such an examination is unnecessary here, because a collision would have been physically impossible if the helm had been put hard down, as described by the steamer's witnesses, "three to four minutes" before the collision, when the steamer was at a distance of "a quarter to a half mile" from the schooner, and still had her "a point and a half on her starboard bow." The steamer's pilot testifies, with apparent pride, that she "obeyed her helm readily,—very quickly;" and the proposition must be absolutely rejected that a steamer thus exceptionally responsive to her wheel failed, with her helm hard a-port, to clear a vessel on her starboard bow, more than a quarter of a mile, and three or four minutes, off.

Given the position of a slowly moving schooner on the starboard of a steamer; given the facts that a half-laden steamer, readily and quickly obedient to her wheel, moving 10 miles an hour, puts her helm hard down, and, coming around, strikes the schooner with her port side,—on these premises the conclusion is irresistible that this steamer was in very close proximity to the schooner when she put her helm hard down. In the matter of the Lepanto, the conclusion is irresistible that the schooner's green light had shown itself when the steamer's helm was put to port. The collision could not have occurred if the helm had not been put down after the schooner's course had been crossed, and the steamer was in fault in putting it hard to port after that crossing, and doubtless after the schooner's green light was shown.

It is insisted, however, on behalf of the Lepanto, that her failure to discover the relative situations of the two vessels was largely owing to the fault of those on the schooner in not showing a flash-light, as required by section 4234 of the Revised Statutes. It is answered, on the schooner's behalf, that in point of fact she was prepared to exhibit a flash-light, and did actually ignite it, but put it out immediately after doing so on seeing the green light of the steamer, which gave assurance that that vessel was about to cross her course and go clear.

It is needless to deal here with this issue of fact. The international rules of navigation, enacted into laws by the act of congress of March 3, 1885, do not require flash-lights to be used by vessels upon the high seas and coast-waters of the United States. Article 2 of those rules de-

clares that no other lights than those mentioned in the articles of the act relating to lights shall be carried, and none of those articles mention flash-lights; and section 2 of the act repeals all laws and parts of laws inconsistent with those articles. Moreover, the act of 1885, establishing international rules for sea-going and coasting vessels, omits section 4234 of the Revised Statutes. It follows, therefore, that if the schooner Bronson did not display a flash-light on the approach of the Lepanto, she was not in fault on that score. The decree of the circuit court is affirmed, with interest, and costs of the appeal to be paid by appellant.

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THE F. W. VOSBURGH.

THE CIAMPA EMILIA.

CIAMPA v. THE F. W. VOSBURGH.

(Circuit Court of Appeals, Second Circuit. January 13, 1892.)

1. COLLISION—TUGS AND TOWS—VESSEL AT ANCHOR—CHANGE OF COURSE.

A tug, with a ship in tow on a hawser, gave a rank sheer in an attempt to pass from one side to the other of a dredge anchored in midstream, when so near the latter that, although the ship instantly put her helm hard over to follow the tug, she came in collision with the dredge. *Held*, that the tug was liable.

2. APPEALS—PARTY NOT APPEALING CANNOT BE HEARD.

Where libellant has not appealed, he cannot contend in this court that certain items of his loss were improperly disallowed in the court below.

41 Fed. Rep. 57, affirmed.

In Admiralty. Appeal from the circuit court of the United States for the eastern district of New York. The district court sustained the libel against the tug, (41 Fed. Rep. 57,) and claimants appealed to the circuit court, which affirmed *pro forma* the decree of the district court, and claimants appealed to this court. Affirmed.

See 46 Fed. Rep. 866.

*Hyland & Zabriskie*, (Josiah A. Hyland, of counsel,) for appellants.

*Wing, Shoudy & Putnam*, (Charles C. Burlingham, of counsel,) for appellee.

Before WALLACE and LACOMBE, Circuit Judges.

WALLACE, Circuit Judge. This is a libel brought by the owner of the ship Ciampa Emilia to recover damages sustained by a collision which took place in the Delaware river, at Mifflin bar, November 2, 1888, with the dredge Arizona, then anchored in mid channel. The ship at that time was in tow of the tug F. W. Vosburgh, going northward, bound for Philadelphia. The dredge was anchored on the bar by spuds. She was about 92 feet long and about 34 feet wide. The ship was being towed on a hawser about 250 feet long. The tide was

strong flood. The libel avers that, when very near the dredge, the Vosburgh took a rank sheer to port, and undertook to pass to the westward of the dredge, and, although the ship instantly put her wheel hard a-starboard, and went off to port several points, she was so close to the dredge that she fetched up on one of the lines by which it was anchored, and her port bow was brought into collision with the easterly corner of the dredge. The Vosburgh asserts that the collision was brought about solely by the carelessness of those in charge of the ship, in that they did not properly steer her to follow the tug; that the tug had shaped her course to pass to the westward of the dredge in due season, but that when she had arrived about opposite, and about 60 or 70 yards to the westward of the dredge, the ship took a sudden rank sheer to eastward, and thereby brought her port bow into collision with the dredge. The learned district judge, who decided this cause in the court below, accepted the theory of the libellant, and concluded that the collision arose from the attempt of the Vosburgh to pass from the east to the west side of the dredge when so near that the ship, while following the tug, brought up upon the line of the dredge. The case turns wholly upon questions of fact. The claimants have taken the testimony of two witnesses, that of Dasey, master of the tug M. W. Hunt, and Tees, the cook of that tug, who were not examined in the district court. The tug Hunt delivered a message to the ship, and then proceeded alongside, not fast to her, but keeping close by her on her port side, until the collision took place. We are satisfied that the decree of the district court was right. It will not be useful to make any extended reference to the proofs. It is proper to say, however, that we attribute very little weight to the testimony of Bacon, the pilot of the *Canonicus*, and none at all to the testimony of the two new witnesses, Dasey and Tees. Dasey's testimony is completely overthrown by his previous affidavit of November 10, 1888, in which he stated, in substance, that the collision was caused by the rank sheer to port made by the Vosburgh. The circumstance that their tug struck the westwardly corner of the dredge when the ship struck the easterly corner is significant. Why did not their tug follow the Vosburgh, if the Vosburgh was a hundred feet to the westward of the dredge, and the ship suddenly sheered more than that distance to the eastward? We accept the evidence adduced by the ship, all on board of her having been examined, as satisfactory to the fact that she was trying to follow the tug at the moment of the collision, and was not guilty of any carelessness. The libellant insists that certain items of loss were improperly disallowed in the court below. As the libellant has not appealed, we cannot notice this contention. The decree below is affirmed.

## CAMPBELL v. DULUTH, S. S. &amp; A. RY. Co.

(Circuit Court, D. Minnesota. April 7, 1892.)

**1. CIRCUIT COURTS—JURISDICTION—RESIDENCE OF DEFENDANT.**

Under Act Cong. March 3, 1887, § 1, as amended by Act Aug. 13, 1888, citizens or subjects of foreign states can sue citizens of the United States in the federal courts only in the district in which the latter reside.

**2. SAME—CORPORATIONS—WHERE SUABLE.**

A corporation is conclusively presumed to be a resident and inhabitant of the state under whose laws it is created, and an employe, a citizen of a foreign state, cannot maintain an action for damages against a railroad in a state other than that under whose laws it was organized, merely because its agents are there found engaged in its business.

**At Law.** Action by William Campbell against the Duluth, South Shore & Atlantic Railway Company for damages for personal injuries. Cause dismissed.

Statement by SANBORN, Circuit Judge:

The plaintiff, a subject and citizen of the dominion of Canada, brought an action at law in the Minnesota district against the defendant, a corporation created and existing under the laws of Michigan, to recover damages for injuries received by him at Bagdad, Mich., while operating defendant's trains as a brakeman. It appears from the amended complaint, which we permit to be filed in order fully to present the question plaintiff's counsel desires to raise, that "the defendant owned and operated a railroad running through Bagdad, Mich., and Wisconsin, and into Duluth, Minn., and at Duluth Minn., said defendant maintains a ticket and freight office, with an agent thereat, who makes contracts there for defendant for both passenger and freight business, and defendant transports both passenger and freight so contracted for in its cars both to and from Duluth, from and to its other stations on its line of railway in Wisconsin and Michigan." The summons was served on the defendant's ticket agent at Duluth, and, under the statutes of Minnesota and the decisions of the courts of that state, the service would have been sufficient to have given a state court jurisdiction of the defendant corporation, if the action had been pending in such court. The action comes before us on an order to show cause why the service of summons should not be set aside, and the action dismissed, upon the ground that this court has no jurisdiction of the action, because the defendant is not an inhabitant of this district.

*Larrabee & Lammons*, for plaintiff.

*W. W. Billson*, for defendant.

Before SANBORN, Circuit Judge, and NELSON, District Judge.

SANBORN, Circuit Judge, (*after stating the facts.*) The first section of the act of congress of March 3, 1887, (24 St. p. 552,) as amended by the act of August 13, 1888, (25 St. p. 433,) defines the jurisdiction of the circuit courts in suits of a civil nature, at law or in equity, originally brought in those courts. Aside from the restriction as to the amount

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in controversy, it declares that the circuit courts shall have original cognizance, concurrent with the courts of the states, of five classes of suits: (1) Those arising under the constitution or laws of the United States, or treaties made, or which shall be made, under their authority; (2) those in which the United States are plaintiffs or petitioners; (3) those in which there is a controversy between citizens of different states; (4) those in which there is a controversy between citizens of the same state, claiming lands under grants of different states; (5) those in which there is a controversy between citizens of a state and foreign states, citizens, or subjects.

The section then provides:

"But no person shall be arrested in one district, for trial in another, in any civil action before a circuit or district court; and no civil suit shall be brought before either of said courts, against any person, by any original process or proceeding, in any other district than that whereof he is an inhabitant; but, where the jurisdiction is founded only on the fact that the action is between citizens of different states, suits shall be brought only in the district of the residence of either the plaintiff or the defendant."

In the case now under consideration, the jurisdiction of the circuit court is not founded only or at all on the fact that the action is between citizens of different states. This action is one in which there is a controversy between a citizen or subject of a foreign state and a citizen of a state; hence the exception contained in the last clause, above quoted, to the general rule that no civil suit shall be brought in the circuit courts against any person by original process, in any other district than that whereof he is an inhabitant, does not apply to this action. The defendant corporation is conclusively presumed to be a resident and inhabitant of the state under whose laws it was created. *Gormully & J. Manuf'g Co. v. Pope Manuf'g Co.*, 34 Fed. Rep. 818; *Railroad Co. v. Koontz*, 104 U. S. 5, 12; *Filli v. Railroad Co.*, 37 Fed. Rep. 65; *Booth v. Manufacturing Co.*, 40 Fed. Rep. 1; *Myers v. Murray*, 43 Fed. Rep. 695; *National Typographic Co. v. New York Typographic Co.*, 44 Fed. Rep. 711. It would seem to follow that if this plaintiff, a subject of Great Britain, and presumably a resident of Canada, desires to bring suit against this defendant in the circuit courts of the United States, he must do so in the district of Michigan, of which the defendant is an inhabitant. The acts of congress do not, in our opinion, give the citizens or subjects of foreign states the right or privilege of maintaining actions against the citizens of the United States in the circuit courts in any district in which the plaintiffs may chance to find a ticket or other agent of the defendants carrying on their business. If they desire to bring suits in the federal courts of the nature of the one at bar, they must resort to the circuit court in the district of defendant's residence. These views are sustained by the following decisions: *Wilson v. Telegraph Co.*, 34 Fed. Rep. 561, 568, 564; *Machine Co. v. Walthers*, 134 U. S. 41, 43, 44, 10 Sup. Ct. Rep. 485; *Denton v. International Co.*, 36 Fed. Rep. 1, 3; *Filli v. Railroad Co.*, 37 Fed. Rep. 65. The motion to set aside the service of summons and dismiss the complaint must be granted.



It might be suggested that there is an apparent conflict between this decision and that rendered orally by Judge NELSON in 1890, in the case of *Peterson v. Chicago, St. P., M. & O. Ry. Co.*,<sup>1</sup> in which it was held that, on account of the action of that company in accepting and taking the benefit of a special statute of the state of Minnesota, (Sp. Laws 1881, c. 219,) which authorized it to purchase, construct, and operate railroads in Minnesota, and provided that in all suits to which it was a party in the state of Minnesota it should be deemed a domestic corporation, it had subjected it to the jurisdiction of this court in a suit brought against it by an alien. It is sufficient to say that in the case at bar the question presented in the *Peterson Case* does not arise. Let an order be entered setting aside the service of the summons and dismissing the action.

NELSON, District Judge, concurring.

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INSURANCE CO. OF NORTH AMERICA *et al.* v. DELAWARE MUT. INS. Co. *et al.*

(Circuit Court, W. D. Tennessee, W. D. March 3, 1892.)

1. REMOVAL OF CAUSES—SEPARABLE CONTROVERSY—INSURANCE.

Where a bill was filed by three marine insurance companies, corporations of Pennsylvania, New York, and Rhode Island, respectively, in their own and in behalf of other marine insurance companies having like interests, against receivers of a transportation line, who are citizens of New York, the corporation being one of Illinois, a compress company, being a Tennessee corporation, and certain citizens of Tennessee, its trustees, against certain other marine insurance companies of Pennsylvania, New York, and the kingdom of Great Britain, and against 14 fire insurance companies, being corporations, respectively, of West Virginia, Pennsylvania, New York, Illinois, Louisiana, Wisconsin, Alabama, Connecticut, Ohio, Texas, Minnesota, Mississippi, South Dakota, and the kingdom of Great Britain; and the object of the bill was to establish a liability against the receivers, as carriers, upon divers bills of lading issued by them upon sundry lots of cotton deposited by them in the shed of the compress company while awaiting compression, amounting in the aggregate to about 5,000 bales, being part of the whole 14,000 bales destroyed by fire in the shed, for the value of the cotton covered by their bills of lading, for its non-delivery at the point of destination according to the contracts of carriage; and to apply in payment of that liability so established in favor of the owners of the cotton a share of the \$301,750 of insurance upon the 14,000 bales, issued by the defendant fire companies to the compress company, which had a contract with the receivers to keep the cotton fully insured for their benefit; also to hold the compress company liable for certain breaches of contract, and of trust arising out of it, by not insuring in solvent companies, by not collecting such insurance as was available, and by not taking out full insurance; and to apply the sum so realized from the compress company to the payment of the liability of the receivers, as carriers, to the owners of the cotton; and, lastly, that the plaintiffs, and other marine insurance companies who had paid to the owners on policies held by them the losses by fire on this cotton, should be subrogated to the claims of the owners against the receivers, as carriers, and that, generally, the fire insurance fund in the hands of the carriers or compress company or of the fire companies, unpaid, be applied in exoneration of their losses so paid as aforesaid: *Held*, upon the petition for removal of one of the Connecticut fire insurance companies, two of the

<sup>1</sup>Not reported.

New York fire insurance companies, the Louisiana fire insurance company, and two of the English fire insurance companies, that, whether aliens could remove or not, the others could, and the case was removed as one having, as to each of the fire companies, a separable controversy between citizens of different states, and thereby determinable between them, the parties being properly arranged on the record, as they might be by the court, to show the jurisdictional diversity of citizenship and corporation domicile.

2. SAME—JURISDICTION.

The test of the federal jurisdiction by removal, where the parties are numerous, and the suit complicated with many demands at law and in equity, as where the bill is to enforce trusts arising out of losses by fire between insurance companies, the owners of cotton burned, and the carriers and its agents, is whether or not the plaintiffs are proceeding upon a right that is joint in themselves or severable as to each, or whether or not the liability of the defendants is joint between them or severable as to each. If joint in either of these respects, or if there be a joint and severable right or liability, and the plaintiffs choose to sue upon the joint right or the joint liability, there may be no removal; but if there be neither joint right in the plaintiffs, nor joint liability in the defendants, no matter how complicated the demands as to each, respectively, the mere union of several rights or liabilities into one suit for convenience cannot defeat the federal jurisdiction by removal, if, besides this separable quality of controversy sought to be removed, it cannot be fully determined without the presence of other parties, whose citizenship might otherwise defeat the jurisdiction.

3. SAME—ARRANGING PARTIES.

The court cannot search the record for a mere ideal controversy that might have been made by the plaintiffs, which is separable and wholly determinable as between citizens or corporations of different states, and arrange the parties as if that controversy had been made, but must find a real controversy, actually made by the pleadings, and may then arrange and adjust the parties without regard to their present attitude on the record, if it have the separable quality, and may be wholly determined between citizens or corporations of different states.

4. SAME—ALIENS—ACT 1887.

Whether an alien defendant, actually interested in a controversy between citizens of different states, which is separable and removable, may remove the suit under the peculiar structure of the act of 1887, *quære*.

In Equity. Motion to remand.

*Taylor & Carroll, Holmes Cummins, and Lewis Y. Farmer*, for plaintiffs.

*Metcalf & Walker, Turley & Wright, and H. C. Warriner*, for defendants.

HAMMOND, District Judge. On the 17th day of November, 1887, 14,000 bales of cotton were burned while awaiting compression, for convenience of carriage, in the sheds of the Merchants' Cotton-Press & Storage Company at Memphis. This cotton had been sent there by numerous shippers of it, under the usages of the business, upon dray tickets and receipts of the compress company, expressing on their face the fact that the cotton was insured by that company. Upon these tickets and receipts the numerous shippers in small lots had procured from the various carriers and transportation lines doing business from Memphis bills of lading, consigning the purchases to owners at the points of destination, which consignees had paid for the cotton upon the drafts of the consignors, with the bills of lading attached. The consignees, with few exceptions, held open policies of insurance in what has been called throughout the litigation "marine" companies of insurance. These were companies issuing a form of policy ordinarily used in marine insurance to cover goods afloat or about to be transferred by water, but applied in these interior shipments to merchandise in transit by rail, or partly by rail and partly by water. The policies usually begin the risk

at the moment of delivery to the consignee or purchaser, or to his carrier, and end it at the moment of arrival at its destination, and contain differing stipulations as to the adjustment of a loss in its relation to other additional or double insurance; and they open and close upon each and every shipment as it arises. The consignees of all this cotton now in controversy held marine insurance of this character upon which the risk had attached. Another peculiarity of this and all fire insurance of cotton is that the policies are valued at an agreed price per bale, generally, and in this case at \$50 per bale, or invoice cost and 10 per cent., to save all question of weight, quality, or value elements of any kind. The marine companies more or less promptly paid or adjusted their losses, either under stipulations in the policies or outside of them, with a reservation of one kind or another that the payment should not prevent any claim they might have over against the carrier, through subrogation to the rights of the owner.

To build up a monopoly of the business of compressing cotton bales by the costly methods that must be used, this compress company had made long-time contracts with the carriers doing business out of Memphis that it should do all the compressing, the carrier securing the bales in the form of light pressing in use upon the plantations. These contracts were in writing, and, among others, contained a stipulation that the compress company would, at its own expense, keep all cotton fully insured, in good and solvent companies, for the benefit of the railroads, transportation lines, and owners. At the time of this fire the compress company held about 52 policies of common fire insurance in the ordinary form, with ordinary stipulations as to other additional or double insurance, amounting to \$301,750, something less than half of the total loss. The policies each covered all the cotton in the shed. They were issued by 44 companies, belonging to 13 states and 1 foreign kingdom, as follows: 7 to Wisconsin, 6 to Illinois, 5 each to West Virginia, Iowa, and Louisiana; 2 each to Alabama and Connecticut, and 1 each to Ohio, Texas, Indiana, Minnesota, Mississippi, and South Dakota, and 6 to England.

Among the contracts of the compress company with the carriers was one with the Cairo, Vincennes & Chicago Line, known as the "C., V. & C. Line," for its traffic name. This was the Cairo Division of the Wabash system, a consolidated corporation of Illinois and adjacent states. This division was in the hands of receivers, Tracy and Thomas, citizens of New York. These receivers kept an agent at Memphis, soliciting cotton shipments east, upon which they issued bills of lading in the usual form, containing certain stipulations as to fire losses, the legal effect of which is the pivotal point of this litigation. These bills of lading covered the entire distance from Memphis, but the C., V. & C. Line depended on special contracts made by itself, from time to time, as the occasion required, for transportation to Cairo, its initial terminus, generally by the Mississippi river, but sometimes by rail also. This line had in this fire an aggregate of about 5,087 bales of cotton, for which it had issued bills of lading, in different lots, to various consignors. The

marine companies have paid the several consignees, in one form or another, and the plaintiffs and other marine companies and their assignees are parties to this record.

Soon after the fire, litigation arose, and the bill of one of the consignees and owners went to the supreme court of Tennessee, and the case is reported as *Lancaster Mills v. Merchants' Cotton-Press & Storage Co.*, 89 Tenn. 1, 14 S. W. Rep. 317. Another case also went to that court, and is known as the case of *Deming v. Merchants' Cotton-Press & Storage Co.*, 17 S. W. Rep. 89, 90 Tenn. 306. These cases, more in detail, state the facts herein noted, and show the legal questions involved in the litigation, and it is assumed that they will be taken, as this bill assumes, as showing the scope of this case in all its bearings. But the C., V. & C. Line were not parties to that litigation in fact, though named in the record, because there was no service or appearance to bind them; and, because of the absence from the record of the C., V. & C. Line and its receivers, the *Deming Case* was, by the state supreme court, dismissed without prejudice, so far as concerned the cotton covered by the bills of lading of that line. Hence this bill was filed in the chancery court of Shelby county by three of the marine companies—the Insurance Company of North America, a Pennsylvania corporation; the Atlantic Mutual Insurance Company, a New York corporation; and the Providence Washington Insurance Company, a corporation of Rhode Island—against the other marine insurance companies, or their assignees, corporations or citizens of Pennsylvania, New York, Rhode Island, and the kingdom of Great Britain, against the C., V. & C. Line and its receivers, citizens of New York, against the compress company, a Tennessee corporation, and three citizens of Tennessee, its trustees in a deed of trust given after the fire on certain real estate to secure the beneficiaries therein named, which need be no further mentioned, and against the 44 fire insurance companies whose corporation domiciles have been already stated, home and foreign. The bill prays for general relief, and especially that a liability may be declared against the C., V. & C. Line receivers upon their bills of lading, as if in favor of the owners who were holders thereof, respectively, and that on that right a judgment be had against these receivers; that this liability may be satisfied by the fire insurance fund collected, or that ought to have been collected, by the compress company, and by a decree for any deficit or breach of trust by the compress company under its contract, and recovery of judgments therefor against the fire companies, and against the compress company; that the marine insurance companies paying losses on their respective policies may be subrogated to these rights and remedies; and that they may be enforced as a trust in their favor. The Continental Insurance Company, of New York, the Fire Association of New York, the National Fire Insurance Company of Connecticut, the Home Insurance Company of Louisiana, and the Royal Insurance Company and the London, Liverpool & Globe Insurance Company of the kingdom of Great Britain filed a petition to remove the cause to this court, and the cause is now heard upon the plaintiffs' motion to remand for want of jurisdiction.

The fundamental controversy in this case undoubtedly is that of the marine insurance companies, claiming exoneration from their losses by fire upon the cotton burned by subrogation to the right of the owners to damages from the C., V. & C. Line for a breach of its contract by bill of lading to deliver the cotton safely at its destination to its consignees. But this is obviously not a joint liability to the marine companies *en bloc*, or to the owners *en bloc*, but a separate and distinct claim upon each and every lot of cotton, covered by a separate bill of lading to each and every owner or consignee, according to the facts as they appear in that behalf; any owner or consignee holding more than one bill of lading having the right, possibly, to combine them into one suit brought to enforce the stipulations of the bills of lading. So, too, possibly, if any one marine insurance company should have paid more than one holder of a bill of lading the several losses incurred by the fire under its policies severally issued to such owners, it might in a court of equity, if by any means such a court may acquire the jurisdiction to enforce an action to of damages for the breach of the bills of lading, so purely legal in its nature, combine all its several claims, although so diversely arising, into one claim against the carrier. But otherwise than this no joinder in pleading of several marine companies as plaintiffs in the bill in equity, or in the suit at law, could create a joint cause of action, inseparable, in the sense of the removal acts of congress, by the plaintiffs joined against the carrier; and, notwithstanding such joinder, they would remain the separate and distinct action or complaint of each and every marine company, plaintiff, against the carrier, the C., V. & C. Line or its receivers in this case.

Next in the upbuilding of this lawsuit stands the controversy—scarcely, if at all, less fundamental than that just mentioned—arising out of the claim of the marine insurance companies that the fire insurance companies, 44 in number, having policies on the burned cotton aggregating \$301,750, shall pay so much of the sum, already estimated in previous litigation to be \$210,224.37, as pertains to the bills of lading issued by the C., V. & C. Line, to them, in discharge of their aforesaid claim for damages against the C., V. & C. Line upon its aforesaid bills of lading, thereby indemnifying the aforesaid carrier against such damages, which it is averred are covered by the policies of the fire companies, and thus enforcing the claim of the marine insurance companies for exoneration by subrogation to the rights of the owners as against the carrier.

Next in the orderly construction of the suit, but not in importance, is the claim that the compress company, having collected certain parts of the insurance held by it, has misappropriated to other losers \$4,394.12 of these collections, which should have gone to the C., V. & C. Line on account of cotton covered by its bills of lading. This is charged as a breach of trust.

Next, the bill claims that there has been another breach of trust in failing to perform its duty by the compress company to collect the fire policies held by it, and this is set up as a cause of action against the com-

press company; next, a breach of its contract with the C., V. & C. Line to keep fully insured is set out, and this is claimed as a liability against the compress company; also the cross-bills, or some of them, claim there has been a breach of contract in taking out insurance in companies that are "not good and solvent companies," but are insolvent, and this is set up as a claim against the compress company. It is a claim covered, probably, by that charging it with not taking out full insurance, and the two are quite the same. Also there is a prayer to foreclose a deed of trust by the compress company on real estate to secure certain beneficiaries, not necessary to be considered here.

This is an analysis of the suit sufficient for the determination of the motion to remand for want of jurisdiction. Now, it is obvious, as before, that the liability of the fire insurance companies, however it arises, or however it is to be enforced, whether at law or in equity, whether directly or indirectly, through other agencies in favor of the marine insurance companies, is not a joint one, to be enforced against the fire companies *en bloc*; and no pleading, however complicated, can deprive these controversies against each and every fire company, by each and every marine company, of their separate existence, in the sense of our removal acts of congress. It is a mere matter of mathematical calculation, upon the proof, either at law or in equity, however expensive or costly such a controversy might become when enforced by separate suits at law or in equity, to ascertain what each fire company may owe to each marine company upon the policies held by it, or to which it may be entitled by any equitable right of substitution, subrogation, exoneration, or what not. The mere factitious circumstances that there were some 14,000 bales of cotton covered by some 52 policies of fire insurance, in some 44 different companies, belonging to some 13 of our states and 1 foreign kingdom, burned in one shed, or that this fire insurance was procured by one agent in pursuance of a contract to so procure it, or that that contract was made with one carrier, through whose contract right the marine companies all held their alleged equity of subrogation, do not at all affect the separable character or quality of these controversies from each other; nor does the fact that there are some dozen or more marine companies claiming this quality of subrogation, and consequent exoneration, through one carrier, and that carrier's one agent for procuring the fire insurance, make the claims of the marine companies a joint one in any sense; certainly not in the sense of our removal acts of congress, either against the fire companies, that one carrier, or that one agent. This question of joint and separable controversy never depends upon such similarity of action, no matter how complete the similarity, but always upon the quality of being joint or identical in estate or interest, or a common and joint source of the title for the same, as arising out of a joint contract or the like. It is altogether true that if the obligation sued for be joint and several, and the plaintiffs sue jointly, either in the unity of their own interest joining themselves on the record, or in the unity of the defendant's liability joining them on the record, the defendants, the cases have settled, may not lay hold of the

alternative quality or separability, and, by filing separate defenses or otherwise taking advantage of it, remove the case because of that separability. But where there is no joint cause of action, no unity of interests or title, except that which comes of mere similarity, however complete, and no right of joinder, except that which is arbitrary in the sense that the plaintiffs may unite themselves together for convenience, or to save to themselves costs and expenses, and may unite the defendants for the same reason to avoid a multiplicity of suits, then, on the other hand, no such joinder as that, however made, can defeat the removable character of the suit, which inheres always in that separable quality, whenever the controversy is wholly, in that sense, and not in the sense of the artificial construction of the record, between citizens of different states, and may be fully determined between them. Under the act of 1866, this separable controversy might be carved out and removed, leaving the other parties in the state court; but under later acts it is not carved out, but serves as a vehicle, so to say, to convey the whole suit, however artificially constructed or framed by the parties plaintiff, to the federal court; and although there may be in the suit some controversy between citizens of the same state, if the plaintiffs have chosen to put it in the same suit along with the other it must go in the same vehicle to that court; not against their will, indeed, because they are presumed to have known, under the law, that by this artificial and voluntary uniting, for their convenience, or to save to themselves expenses, those separable controversies which they might have kept separate, if they had chosen to protect their choice of jurisdictions, that their choice might be defeated at the will of those whom they had so joined, who might choose another jurisdiction.

To illustrate the position here taken, let us consider this case in its relation to the defendant the National Fire Insurance Company of Connecticut, one of the petitioners for removal. It has a policy, No. 1,328, for \$5,000, covering this loss, in general terms, "on all cotton in bales received by them as agents for the benefit of railroads, transportation line, or owners in boundaries of the Merchants' Cotton-Press & Storage Company." That is to say, the whole 14,000 bales burned were covered. Fortunately for all concerned, the mode of doing business was to fix the value of the cotton at so much per bale, inferentially, from the proof contained in the exhibits and bill, at \$50 per bale, or invoice cost and 10 per cent., and this was an insurance of 100 bales of the 14,000. Now, if there had been designated a specific lot of 100 bales, surely the controversy over it would have been none the less separable than it is, albeit there are more "railroads, transportation lines, and owners" than one interested in this \$5,000, each exactly equal, according to his *pro rata* of the whole number of bales. Indeed, the exact share of the C., V. & C. Line in the \$301,750 of fire insurance has been already ascertained in other suits to which it was not a party,—and which it seems, by the way, got along very well without it, and perhaps without some of the fire companies here named as defendants not being before the court,—to have been 85½ per cent. of the value of the cotton covered by its bills.

of lading, and which, upon the theory of this bill, is averred to belong equitably to marine companies issuing policies which have been paid by them, each according to his *pro rata* share thereof, easily ascertained by mathematical calculation. Now, if the Connecticut corporation had not appeared in this suit, and had not been by process of any kind, either direct or substituted process of attachment and publication, suable at all in Tennessee in any court, state or federal, can it be doubted but that the compress company, to which the policy of insurance is payable as the assured, could bring a plain action of *assumpsit*, or other appropriate form at law, in Connecticut, against that corporation alone, and collect either the whole unpaid balance of the policy as belonging, on the theory of the bill, to the C., V. & C. Line, as indemnity against its liability on its bills of lading, or, if not belonging to it, to be held in trust for whom it might concern? The compress company belongs to Tennessee, and the insurance company to Connecticut, and we have the requisite diversity of corporation domicile, it is true, and it is argued that this gives us jurisdiction. But I do not think our jurisdiction can be placed on that ground. It is urged that the position of the parties on the record is immaterial, and that the court will arrange them on either side according to the nature and character of the controversy. But this always has reference to the controversies made by the pleadings, and does not authorize the interjection of a suit not made by the pleadings, nor authorize the court to construct pleadings that do not exist for such interjected suit. The controversy must be in the shape of a suit, and not a bare abstract idea, which might take the form of a suit, if the parties were so minded. They must have the mind to make that controversy, and must have done it. Here the plaintiffs have not made it. They do not sue in the name of the compress company for their use, nor ask to, but sue in their own name and right, and upon their own ground, not upon that of the compress company. On the contrary, one of the very best bases of their equitable right is that the compress company has neglected to do that thing; that it has deserted its trust in that behalf; and that they must take care of themselves in respect of the liability of the fire companies, and they proceed to do it by this bill. Now, it would be a perversion of this record as a pleading, and a distortion, to wrest the compress company from beside the fire companies, with whom the plaintiffs have associated it on the defendants' side, as a co-conspirator, upon an allegation of a conspiracy against the plaintiffs, and to put it on the plaintiffs' side as a party suing the fire companies for the benefit of whom it may concern, as parties on the record, plaintiffs and defendants. We are not authorized to do this in the process of arranging parties, but, however we arrange them, they must fit the pleadings, if not technically, at least in substance, and there must be some sort of conformity to the frame-work of the suit, as the plaintiffs have made it, and their lawsuit must be conducted, and not an entirely different one. If the compress company had filed a cross-bill against its co-defendants, and sued them for the use of the parties interested, plaintiffs and defendants, as it might have done, then it is possible that in behalf of this Connecticut



corporation, on a petition for removal, we might have looked at the bill and cross-bill as one suit, so far as the Connecticut corporation was concerned, and might have sustained the jurisdiction on the ground of diversity of domicile in their respective states, being a controversy wholly between them, and fully determinable between themselves, but not upon this record.

Returning now, however, to the supposition of a necessity for going to Connecticut, for want of process here, can there be any doubt that the C., V. & C. Line or its receivers could sue the Connecticut corporation for its per centum of the \$5,000 due upon its policy, without the presence of the other parties, assuming and admitting its own liability upon its bills of lading to the owners of the cotton for damages for not delivering it? Possibly it might bring this suit at law in its own name upon the now well-settled principle that a third party may so sue upon a contract made by others for its benefit. Certainly it could sue at law in the name of the compress company for its use; or failing in that, upon the very allegations of this bill of a desertion of its trust by that company, a conspiracy, and a refusal to sue or otherwise collect the amount, the C., V. & C. Line, or its receivers, could go into equity, admit its liability on the bills of lading, and recover. That is precisely what has been done by the pleadings in this case, taking the cross-bill of the C., V. & C. Line and its receivers, as one may do, along with the original bill. I mean that cross-bill filed by them on the same date, and by the same solicitors, as the original bill, and not the cross-bill filed by them by another solicitor at a later date, and after the petition for removal was filed, to which we cannot look, however, because it is well settled that this question must be settled according to the situation and conditions existing at the time of filing the petition for removal. Taking the original bill and the cross-bill then on the record together, and arranging the parties as we may, and doing this with perfect technical conformity to the two pleadings, and we have the plaintiffs Pennsylvania, New York, and Rhode Island corporations, and along-side them we place the C., V. & C. Line, an Illinois corporation, if all sue that way, and disregard the fact, subsequently developed by an amended bill and cross-bill filed after the removal petition, that there is no such corporation, that supposition of the pleadings being a mistake, and the receivers, Thomas and Tracy, citizens of New York. So, on the plaintiffs' side we place all the other marine companies in whose behalf the bill is, in terms, filed by the plaintiffs, although some of them have been placed on this record upon the defendants' side thereof. That this arrangement does no violence to, but is in conformity to, the pleadings, is manifest. The marine companies all have similar—not joint, however, in any sense, as we ruled in the outset—interests and rights as against this Connecticut fire company; the receivers or their line have the same, admitting their own liability, as they do, by the cross-bill; and referring to the amended bill and cross-bill filed September 22, 1891, after the removal petition, for the mere purpose of arrangement, we find that technically these receivers are so associated as plaintiffs, the original and cross bills being

taken together as one suit, as we may, and in substance they are plaintiffs, as against this Connecticut defendant, seeking to remove. Now, then, we have as defendants on the other side the Connecticut corporation alone, or associated with other fire companies, as you please, but with none of them has it any joint liability in any sense whatever. If the compress company be either a necessary or indispensable party, it is on the record associated with its co-conspirators, according to the allegation of the bill and cross-bill. And so we have, the parties being thus arranged to this separate and distinct controversy with the Connecticut corporation, the requisite of diversity of citizenship and corporation domicile. Another feature of this record may be noticed argumentatively to show how separable each fire company is from the rest, and that is the plaintiffs seek by their amended bill to dismiss as to all of them alleged to be insolvent, including this Connecticut company. Here, then, we have all the essential elements for our jurisdiction.

It matters not that in this bill and cross-bill there are other controversies; that, for instance, between the marine companies by substitution to rights of owners and consignees, all left out, by the way, as parties, although the bills of lading were in their names, and they are technically parties to the carriage contract, as against the C., V. & C. Line or its receivers, as to whether the carrier is liable for non-delivery of that cotton, or is exempt from such liability by stipulations in the bill of lading against fire losses. This Connecticut company has no connection or concern in that controversy by reason of any joint liability; not the least. It may be interested in defeating the claim, for then, possibly, the C., V. & C. Line would have no claim against it, or only one to the extent of loss of freights; but that interest is purely incidental, and does not, in the sense of our removal acts, inseparably connect them as parties to this suit in its relation to that controversy; nor, for another instance, is this Connecticut Fire Company in such an inseparable sense connected with the controversy in this bill and cross-bill between the C., V. & C. Line receivers and the marine companies, one or both, suing jointly or separately, against the compress company for any breach of its trust under its contract to keep the cotton fully insured; nor that concerning the alleged misappropriation of insurance funds collected, as to which, if it had paid any part of that collection, its only interest is to see that such part is duly credited when judgment comes to be entered against it; nor that concerning the alleged neglect to collect of the fire companies, as to which it had no interest whatever except to profit by the neglect, if it may not yet be compelled to pay; nor yet again with that concerning the alleged neglect to keep fully insured all the cotton covered by the C., V. & C. Line's bills of lading; nor still again with that concerning the foreclosure of the deed of trust upon real estate. None of these concern the liability of the Connecticut company.

If we look to the C., V. & C. Line receivers' cross-bill, filed since the petition for removal, in which it vigorously denies its liability as carrier, and claims that the loss was exempt under the stipulations of its bills of lading, and does not admit the liability, as formerly it did in the other

cross-bill, still there is no joint interest or liability of the Connecticut fire company, but only that incidental interest and possible profit to it by a decision in favor of the carrier on that question which has been hereinbefore referred to, but which in no sense defeats our jurisdiction over its separable controversy.

But apart from all this, there is still another, and to my mind more conclusive, ground for our jurisdiction. The joining together of the Insurance Company of North America, a Pennsylvania corporation, the Atlantic Mutual Insurance Company, a New York corporation, and the Providence Washington Insurance Company, a Rhode Island corporation, three only of the marine companies, as plaintiffs, is entirely artificial and arbitrary. Nothing in the record, or in the nature of the litigation as disclosed by the record, unites them any more than it unites all the other marine companies, some five or six or more of which are made defendants. We have shown that there was no joint right in them, and the splitting made by the pleading shows that they might occupy either side of a bill filed by either one of them, which is also apparent from the very nature of the case. Indeed, any one of these "marine" companies might have filed this bill solely or in behalf of all the others, as these three plaintiffs have done; and if so filed, unless there was some special reason, the others perhaps need not become full parties at all, but in the end, when the accounting should come, would be admitted by petition, or without even that formality, in modern practice, to file and prove their respective claims, and receive their respective shares; or, if need be, by petition to become full parties defendant, and by just such cross-bills as the defendants the Delaware Mutual Company, Deming & Co., and the receivers, Thomas and Tracy, have filed, set up any special claims they might have, and frame any special litigation they might wish. Now, it is plainly to be seen that if the leading plaintiff, the Insurance Company of North America, a Pennsylvania corporation, had alone filed such a bill, there would have been no difficulty about the federal jurisdiction by removal, upon the petition of this Connecticut corporation in this case, provided, of course, that we are right here in holding that there is no joint liability of the defendants, and no joint right of action in the plaintiffs, and the separable character of the controversy with it would be easily apparent. It would be none the less "a representative" suit, as urged by counsel, then than now; and that arrangement is, in my judgment, the most rational and technical that could have been adopted. Adopting it now, and arranging the parties in that way, as we may, our jurisdiction is complete, upon the theory of this opinion as to the nature of the controversy. Certainly the pleader cannot, by the association he has selected to display a Pennsylvania, a New York, and a Rhode Island party, on either side the record, obscure or defeat our jurisdiction, especially when those defendants he has put upon that side are contemporaneously, by their cross-bills, seeking the same relief the other plaintiffs seek, as against this Connecticut corporation. Neither are these fire companies, defendants, in any sense garnishees, and therefore nominal parties, without the

right of removal. The suggestion that they are, supports the position of the separable character of their respective controversies. But, wholly aside from that, there is no judgment upon which they may be garnishees in execution, either against the compress company or the C., V. & C. Line receivers. The compress company is charged with no fraudulent conveyance, or attempted fraud upon creditors, entitling plaintiffs to an attachment against it, upon which process these fire companies are garnishees. Neither are the C., V. & C. Line receivers attached for fraud, or because they are non-residents under the Tennessee attachment laws, upon which process the fire companies are garnishees. The attachments sued out against the fire companies are for the purpose of bringing them into court by substituted process, and not upon garnishments, as above explained. If there be any meaning for the term "equitable garnishees," other than the garnishees are in a court of equity, rather than a court of law, and the plaintiff's right or record is equitable rather than legal, I do not quite comprehend it. But certainly nothing can be implied from the term, in its relation to this right of removal, other than that, to be nominal parties, *qua* garnishees, they must be mere debtors, naked of all possible interest except to pay the money, which surely these fire companies are not, with the stipulations in their policies relating to contribution, where there is double insurance, and the like. Moreover, it is my own opinion that possibly in its very last analysis this hydra-headed lawsuit, with its many purely legal actions, like that upon the bills of lading, that upon the policies of insurance, that upon the contract of the compress company with the receivers of the C., V. & C. Line, for the many breaches thereof assigned, may depend for the rock of safe foundation in a court of equity, upon the principle that these fire insurance companies, defendants, shall be treated as trustees of the funds they respectively owe for the benefit of the marine companies, by implication of law. The fact that they are at the same time debtors would make them none the less trustees, as is often held in a court of equity, working out its beneficent design of ascertaining the rights of parties, and enforcing them through the process of declaring duties and trusts. All along in this record, and in argument on both sides, the compress company is treated as a trustee of the insurance fund, speaking largely. But the part it has actually collected is insignificant comparatively, and of that it might be directly a trustee for whom it may concern. But how as to the part it has not collected? If it be trustee as to that part, how does it become so? The bill seeks to hold it in damages for not collecting; for a breach of trust in that behalf; for damages for not taking out insurance "in good and solvent companies;" for a breach of a contract in that behalf; for damages for not insuring fully, but only partially,—a breach of contract in that behalf. If all these damages be aggregated, and judgment taken against the compress company for the amount, then, as to this debt by the compress company, it is held to be a trustee only by implication of law. So these fire companies, by like process of implication, are trustees of that which they owe, and must be, possibly, to make them amenable in a court of equity. Indeed,

suppose the compress company had committed no breach of trust, and, having full insurance by policies "in good and solvent companies," had turned them over to the marine companies or to the owners, or to the carrier, or to whomsoever they belonged, or could derive any interest in them, and had said that these interested parties must bring their own suits, using their name, if need be indemnifying them against costs. What answer could have been then made to the claim that it had no other duty in the premises? If, then, the C., V. & C. Line receivers were insolvent, *qua* receivers, and the compress company were insolvent also, would these fire companies be taken by plaintiffs to be nominal parties, and only garnishees? Surely not, and they are none the more garnishees now. They would be called trustees of that which they respectively owe, for whom it may concern, as the compress now is called. The right of subrogation or substitution, and the consequent right of exoneration and indemnity, existing between the marine companies, the owners of the lots of cotton and the carrier, and between all these parties and the compress company, might support the equitable jurisdiction of the bill, and so might the right of contribution among the insurance companies of both complexions, and all *inter sese*; but, in the end, these equities would all have to be worked out through the doctrine of a trust attaching to the actual money to be paid, in whose hands soever it may be at the filing of the bill, as the debtor owing the duty of applying the money to whomsoever it may belong. It is useless to speak of such parties as garnishees.

It is also urged that the Newport News & Mississippi Valley Company, a corporation of Connecticut, doing a railroading business in Tennessee, is a party, and therefore we have no jurisdiction. This company was not a party to the original bill at all. It was made so by an amendment filed after the petition for removal, but we need not consider that. It was made a defendant to the cross-bills of the C., V. & C. Line receivers, and of Deming & Co., filed contemporaneously with the original bill. But technically new parties cannot be brought in by a cross-bill which is confined to the parties to the original bill, strictly to the plaintiffs only, perhaps, but, by enlargement of practice, co-defendants may be made parties to a cross-bill also. So that in fact, as we must look at the record, the Newport News & Mississippi Valley Company is not a party. But waiving that, it is well settled that a controversy between co-defendants, belonging to the same state, does not defeat such a jurisdiction as we have by the arrangement of parties last suggested. This is all that need be said on this point, but, looking to the character of the claim against this company, it appears that it issued no bill of lading, and had no contract right with any of the owners of this cotton here involved. As to 948 bales of the cotton, it is alleged that, after the C., V. & C. Line receivers had issued their bills of lading, there was an agreement between them and the Newport News & Mississippi Valley Company that this last company should take the cotton to Cairo. That was their affair, and, while it may complicate this lawsuit by adding another perplexity to it, it does not make the Newport News & Mississippi Valley Company an indispensable party.

But take either that company or the C., V. & C. Line as the carrier to be charged, and if it is meant that there must be a judgment against such carrier as a preliminary foundation for the equities of subrogation and exoneration in favor of the marine companies, if that is what is meant by the argument and by the decision of the supreme court of Tennessee, then, there being no such judgment averred in this bill, the whole structure would fail; but, if it be meant only that a state of facts must be shown which would entitle the carrier liable to invoke the equities, that showing could be made contemporaneously by this bill, as it is attempted to be done by it, and the carrier is not an indispensable party, except to hold him liable and collect the money from him, and the fire company has no concern with that. But if he be, in the suit as we have arranged, the carrier and the fire company are both defendants along with each other, and there is no adversity of record in the matter of citizenship and corporation domicile. Moreover, if this judgment against the carrier be necessary, it must be in favor of the owner, who is a party of the second part to the bill of lading. It is his contract, and he must sue on it. He is not in this record, and has been dispensed with by the plaintiffs in behalf of the marine insurance companies; and why may not the carrier—the other party to the bill of lading—be dispensed with in behalf of the marine companies in this showing that must be made to charge the carrier in the controversy between the marine and fire companies? It might be, under some holdings on the subject of the requirement of a preliminary judgment against the carrier, that that controversy which the marine companies have each with each of the fire companies would have to await the process of procuring a judgment at law against the carrier, but that circumstance does not connect them together inseparably in the sense of our removal acts. Nor does the circumstance that the plaintiffs are allowed graciously to pretermitt this independent and separate action at law against the carrier, and to proceed without the requisite judgment at law in a bill against all at once, in which, for the plaintiffs' sole advantage, this requisite judgment may be declared contemporaneously with a declaration of the plaintiffs' equities against the fire companies, make the carrier any more indispensable to the controversy with the fire companies than the carrier would be if there were two suits, one at law against the carrier and the other in equity against the fire companies. If this be not so, then the plaintiffs would have an advantage on this subject of removal which it would not have, and could not have, if the two suits were brought, as possibly they ought to be, in strict right, as between law and equity jurisdictions, as we have them in the federal courts, and to which we must look in determining our jurisdiction. In other words, we must treat this case, so far as the fire companies are concerned on their petition for removal, because of a separable controversy, as if the plaintiff had procured a judgment at law against the carrier, and were proceeding against the fire companies to enforce their equities arising out of it. The carrier is not, then, an indispensable party.

We come now to a case arranged with the second of the plaintiff companies, the Atlantic Mutual of New York, as the sole plaintiff. Here

our jurisdiction might be more doubtful, possibly, but the same reasoning of this opinion would sustain it as that of the Connecticut corporation seeking removal. Yet it is not necessary. Having jurisdiction in the suit already arranged, we have it as to this plaintiff, who has joined this suit in a common cause with others where there is a separable controversy; and no matter if separately we could not acquire jurisdiction, yet by that union of its own choosing we have acquired it. This is well settled. The same is true of the Rhode Island plaintiff, but our jurisdiction there would be complete if that plaintiff had proceeded alone.

Now, we come to the New York defendant fire companies, two of them asking for removal. If alone they could not have it, the Connecticut removal has brought them along; but I think their own removal is good as against the leading plaintiff, the Insurance Company of North America, a Pennsylvania corporation, and that is sufficient. As against the plaintiff the Atlantic Mutual of New York, of course we could not have jurisdiction over any controversy with these New York removing defendants, but, united with other controversies of other removing defendants of which we have equity jurisdiction, we have it over these also. The Louisiana corporation asking removal has a complete right. It is said the suit has been dismissed as to it, but there is no such order in the record, and the amended bill asking to dismiss was not filed till after the removal, and it is well settled that no change of parties, after petition filed, can affect the right of removal. As to the alien corporations asking removal, we need not decide, since the others will bring it along; but I wish to reserve my own opinion about the act of 1887 in its relation to aliens seeking to remove a suit in which there is a separable controversy between citizens of different states. The decision of the supreme court of the United States, cited by counsel, was under the act of 1875, and, while Mr. District Judge FOSTER adopts it as to the act of 1887, the language and structure of that act are peculiar, and it says, in so many words, that either one or more of the defendants actually interested in such controversy may remove said suit. *King v. Cornell*, 106 U. S. 398, 1 Sup. Ct. Rep. 312; *Woodrum v. Clay*, 33 Fed. Rep. 897.

Now, if an alien were actually interested in the controversy, why does not this language entitle him to remove? It has been decided that it does authorize a citizen of the same state in which the suit is brought, otherwise excluded from the benefits of the act, to remove it; and why not any defendant, even an alien? *Stanbrough v. Cook*, 38 Fed. Rep. 369. The test is actual interest in the separable controversy. But this we need not and do not decide now, for the reasons stated. It will be observed that we have placed this case within the category of those to which the leading case of *Barney v. Latham*, 103 U. S. 205, belongs, and have endeavored to show that it does not belong to the category of *Graves v. Corbin*, 132 U. S. 571, 10 Sup. Ct. Rep. 196. And we need cite none other of the numerous decisions. On the distinctions between these two, the right of removal depends. These are the cases typical of the principle upon which all must depend. Mr. District Judge SHIRAS, in *Stanbrough v. Cook*, 38 Fed. Rep. 369, has instructively stated the test

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rule to be, "if the plaintiff has a cause of action in tort or upon contract against several defendants, which is joint, or, being joint and several, is declared on jointly by the plaintiff, the defendants cannot, by tendering separate issues in their answers, create separable controversies, so as to authorize a removal of the cause." But the plaintiffs here cannot, by joining entirely separate and distinct causes of action, some legal and some equitable, upon each and every bill of lading, upon each and every policy of insurance, and upon the contract of the compress company, severable alike, also, as to themselves, so that each and every marine company has each and every cause of action all to itself upon all these contracts, possessing not one single element of joint right or joint liability among them all, defeat the federal jurisdiction over any one of them, where the conditions of the removal act are complied with in time, and any of the proper defendants make the application. Overrule the motion.

NOTE. I find upon re-examination of the record that the "C. V. & C. Line" is attached as a non-resident under the Tennessee Code, and garnishments were issued on that attachment. But it is still plain that this garnishment of the fire companies was only incidental to the suit as against the C. V. & C. Line, and did not at all affect the fact that the fire companies are made parties on their own account, and are sued in that capacity. The fact that they are also garnishees as to a co-defendant, and occupy this dual relation to the record, does not in any sense change the attitude of the case in this matter of the removability of the suit. If they were discharged as garnishees on their answer to that process that they owed nothing, they would still, on this record, be parties to the suit, and would be compelled to answer such decree for contribution or other relief as might be given against them.

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CASEY v. VASSOR *et al.*

(Circuit Court, D. Nebraska. July, 1882.)

PUBLIC LANDS—JURISDICTION OF LAND OFFICERS.

The courts will not, by reason of their jurisdiction of the parties to a cause, determine their respective rights to enter or purchase from the United States a tract of the public land, when the controversy between them remains pending before the land department of the government; nor will they pass a decree that will render void a patent when issued. *Marquez v. Frisbie*, 101 U. S. 478, applied.

In Equity. On demurrer to bill.

The complainant in her bill alleges that she is a *bona fide* settler upon 80 acres of the public land situated within the Sac and Fox reservation in Richardson county, Neb.; that she became an actual settler and occupant upon said land with the intent of purchasing from the United States, and becoming the owner thereof, under an act of congress authorizing its sale, approved August 15, 1876, (19 St. p. 208;) that said land was duly appraised, as required by said statute, at \$5 per acre; that complainant, on the 21st day of June, 1878, made the requisite proof before the register and receiver of the land office at Beatrice, Neb., and that she then paid to the receiver of said land office the sum of \$133.34, being the first payment of one third of the purchase price, and thereupon she was allowed to enter said land, and received from said officer a certificate



showing the said facts. The bill proceeds to aver the making of improvements and other facts tending to show that complainant was "an actual settler" within the meaning of the statutes. It is further averred that on the 26th of August, 1879, the defendant Vassor served complainant with notice that he would contest her right to enter said land, and that afterwards a trial was had before the register and receiver, who decided in complainant's favor, and held that she was an actual settler; and that thereupon said Vassor appealed from said ruling to the commissioner of the general land office at Washington, by whom the decision below was reversed, and it was declared that Vassor had the right to enter the land. It is alleged that Vassor was not an actual settler, and had no right to enter the land, and that the decision of the commissioner of the general land office was incorrect, and not sustained by law; that complainant has fully complied with the law, and the respondent Vassor has not; that since the commencement of this suit respondents have paid one or more installments upon the land, and now unjustly claim that one or both have the exclusive right to purchase, and that they have expelled complainant from the land, and that defendant Vassor has executed a deed conveying said land to defendant Quinlan, who is charged with notice of complainant's rights. It is not alleged that a patent has been issued to either claimant. The prayer is for decree that complainant has the first, sole, and exclusive right, as against defendants, to enter and become the purchaser of said land, and that whatever right the respondents may have is subordinate and subject to her rights, and held by them simply as trustees for her, and that they be ordered to convey, etc.

*C. Gillespie and E. W. Thomas, for complainant.*  
*Manderson & Congdon, for respondents.*

McCrary, Circuit Judge. This case falls clearly within the principle announced by the supreme court of the United States in *Marquez v. Frisbie*, 101 U. S. 473. It is there held, in a case very analogous to the one before us, that a court will not, by reason of its jurisdiction of the parties, determine their respective rights to a tract of land which are the subject-matter of a pending controversy in the land department, nor will it pass a decree which will render void a patent when it shall be issued. Relief in that case was refused because it appeared—"First, that defendants had not the legal title; second, that it was in the United States; and, third, that the matter was still *in fieri*, and under the control of the land officers." For the same reason we must refuse relief in the present case. The effect of a decree, if one were rendered in accordance with the prayer of the bill, would be to interfere with the officers of the government while in the discharge of their duties in disposing of the public lands, and this the courts will not do. *Litchfield v. Register*, 9 Wall. 575; *Gaines v. Thompson*, 7 Wall. 347; *Secretary v. McGarrahan*, 9 Wall. 298; *Marquez v. Frisbie*, *supra*. It is unnecessary to determine the question whether the decision of the land department that complainant was not an actual settler is the decision of a question of fact, and, in the absence of fraud, final and conclusive. The demurrer to the bill is sustained.

**BARLING *et al.* v. BANK OF BRITISH NORTH AMERICA.**

(*Circuit Court of Appeals, Ninth Circuit. April 23, 1892.*)

**1. STATE LEGISLATION—SUITS IN NATIONAL COURTS.**

The act of the California legislature of April 1, 1876, entitled "An act concerning corporations and persons engaged in the business of banking," does not prohibit such corporations or persons from maintaining actions in the national courts, nor has the legislature the power so to do; nor does the act apply to business done by a foreign corporation without the state.

**2. NOTE PAYABLE TO BEARER**

A note made by a California corporation payable to itself and indorsed in blank, and delivered to another, is a note payable to bearer; and a foreign corporation, which subsequently becomes the holder thereof, may maintain an action thereon in the national court, sitting in California, against a citizen thereof, and may also maintain such action against such citizen who is a stockholder in such corporation, on the ground of his statutory liability for the debts of the corporation, even if said note is payable to order.

**3. JURISDICTION.**

A party against whom a judgment is rendered in a district or circuit court may take the case to the supreme court directly on the question of jurisdiction, if the same is at issue, or to the circuit court of appeals on the whole case, and the court of appeals may, if it sees proper, certify any question arising therein to the supreme court.

46 Fed. Rep. 357, affirmed.

(*Syllabus by the Court.*)

Error to the Circuit Court of the Northern District of California.

At Law. Affirmed.

*Daniel Titus*, for plaintiffs in error.

*Carter P. Pomeroy*, for defendant in error.

Before McKENNA and GILBERT, Circuit Judges, and DEADY, District Judge.

DEADY, District Judge. On April 5, 1888, the Alaska Improvement Company, a corporation formed under the laws of California, drew three bills of exchange on William T. Coleman & Co., citizens of the state of California, payable to itself, the first two in 60 days, and the third in 90 days, after date, for the sum of \$2,740, \$2,500, and \$4,000, respectively, and on the same day indorsed the same in blank, and, before maturity thereof, transferred and delivered the same to said Coleman & Co., who subsequently, and before maturity thereof, in consideration of the amount of the face of said bills, paid them by the plaintiff, transferred and delivered the same to it in the state of Oregon; and on April 27, 1888, said bills were duly accepted by said Coleman & Co., who failed to pay them, upon due presentation for that purpose, of all which the Alaska Company had notice and neglected to pay the same.

On April 8, 1890, this action was commenced in the circuit court by the plaintiff against the defendants Barling and Eva, citizens of California, and stockholders of said Alaska Company, under section 322 of the Civil Code of California, which provides that—

"Each stockholder of a corporation is individually and personally liable for such proportion of its debts and liabilities as the amount of stock or shares

owned by him bears to the whole of the subscribed stock or shares of the corporation, and for a like proportion only of each debt or claim against the corporation."

The defendant Eva interposed a plea in abatement, to the effect that the plaintiff could not maintain the action, because it had failed to file the statements concerning its business, required by the California act of April 1, 1876, entitled "An act concerning corporations and persons engaged in the business of banking," which provides that no corporation or person "who shall fail to comply with the provisions of this law shall maintain or prosecute any action or proceeding in any of the courts of this state," to which plea the plaintiff demurred, and the court sustained the demurrer. 44 Fed. Rep. 641.

In this there was no error. The statute only prohibits an action in the courts of the state. Neither does it prohibit the transaction of banking business in the state, but simply provides that the parties failing to file the required statement shall be denied access to the courts of the state. Nor is it in the power of the state legislature to prohibit the plaintiff from maintaining an action in this court if it would.

While it is admitted that such legislature may limit the right or capacity of a foreign corporation to do business or acquire property within the limits of the state absolutely, or except upon compliance with conditions precedent thereto, it is well established that it cannot in any way limit or restrain the jurisdiction of the national courts. *Bank v. Traver*, 7 Fed. Rep. 146; *Phelps v. O'Brien Co.*, 2 Dill. 518; *Railroad Co. v. Whitton*, 18 Wall. 270.

But the defendant, having pleaded over under rule 9 of the circuit court, is deemed to have waived the matter in abatement.

Besides, the business of the purchase of these bills of exchange took place in the state of Oregon, and beyond the jurisdiction of the state of California. The act is intended to regulate business done in the state, and not otherwise.

Afterwards, on January 2, 1891, a demurrer was taken to the complaint on the ground that the court had not jurisdiction of the defendants, because the plaintiff sued as assignee of certain bills of exchange, in which the drawer, drawee, and payee are citizens of California.

The circuit court overruled the demurrer, (46 Fed. Rep. 357;) and in this we find no error.

The demurrer was based on the provision in section 1 of the judiciary act of 1888, which provides as follows:

"Nor shall any circuit or district court have cognizance of any suit, except upon foreign bills of exchange, to recover the contents of any promissory note or other chose in action in favor of any assignee, or of any subsequent holder, if such instrument be made payable to bearer, and be not made by any corporation, unless such suit might have been prosecuted in such court to recover the said contents if no assignment or transfer had been made."

And first, if this action is to be considered an action by an assignee to recover the contents of a chose in action, the circuit court, nevertheless, had jurisdiction, because the bills were made by a corporation, and payable to bearer.

The rule is this: A bill or note made by a person payable to himself or to his order, when indorsed by him and delivered to another, becomes, in legal effect, payable to the bearer thereof, and may be so sued on. It is simply a roundabout way of making the paper payable to bearer. Tied. Com. Paper, § 20; Daniel, Neg. Inst. § 130; *Bank v. Alley*, 79 N. Y. 536.

But the present action is not really founded on an assignment of the bills, but on the liability created by said section 322 of the Civil Code, In this action the assignment of the bills of exchange is a mere ingredient or inducement. By reason or means thereof the plaintiff became and was a creditor of the Alaska Improvement Company. In this condition the statute operated and gave it a right of action against the defendants, as stockholders of the corporation, for the amount of its claim against the latter.

This was an original right, then created, which did not exist before or otherwise. It never existed in favor of William T. Coleman & Co., the assignor of the plaintiff, but only in favor of the plaintiff against these defendants.

The case of *Bullard v. Bell*, 1 Mason, 243, is a strong case in point. An assignee of certain choses in action, to wit, bank notes, made by a banking corporation, brought an action against a stockholder of the bank to enforce a liability imposed upon him for the debts of the bank. The parties were citizens of different states, but the defendant objected that the court was without jurisdiction, because it did not appear that the plaintiff's assignor could have maintained the action. In overruling this objection, Mr. Justice STORY said:

"But the present action is not founded on any assignment. It is an original action, created by the statute between the present parties, and never had any existence between other parties. The debt which the plaintiff claims from the defendant is a sum which the latter never owed to any other person. It is a chose in action originally vested under the statutes in the present plaintiff, and which has never been assigned. To be sure a title to the bank notes stated in the declaration forms an ingredient in the case; but it is not all of his case. It is but matter of inducement to his action. How, then, is it possible for the court to say that it has no jurisdiction of this case, when the parties are citizens of different states, and there never has been any assignment of the present cause of action, and the original parties in whom it first vested are before the court? Neither the district judge nor myself has the slightest hesitation in overruling the motion."

The defendants filed an answer, denying the allegations of the complaint on information and belief. Said answer also contained a plea in bar of the action, which was nothing more than the demurrer filed to the complaint, to wit, that the plaintiff's assignor could not have maintained the action, and therefore the court, under section 1 of the judiciary act of 1888, was without jurisdiction.

On the trial the court gave judgment for the plaintiff, and in this there was no error.

It has been suggested by counsel for the plaintiff in error that, under section 5 of the act of 1891, we should certify this case to the supreme court, on the question of jurisdiction; the same being put at issue in the

case by the demurrer to the complaint, as well as the plea in bar. Said section 5 provides—

"That appeals or writs of error may be taken from the district courts or from the existing circuit courts direct to the supreme court in the following cases: In any case in which the jurisdiction of the court is at issue. In such cases the question of jurisdiction alone shall be certified to the supreme court from the court below for decision."

This court of appeals cannot be the "court below" here meant. The statute is providing for appeals or error from the district and circuit courts, and not the court of appeals, and the "court below" must be one of these.

In *McLish v. Roff*, 141 U. S. 668, 12 Sup. Ct. Rep. 118, the supreme court, in considering this statute, say:

"When that judgment [final] is rendered, the party against whom it is rendered must elect whether he will take his writ of error or appeal to the supreme court upon the question of jurisdiction alone, or to the circuit court of appeals upon the whole case. If the latter, then the circuit court of appeals may, if it deems proper, certify the question of jurisdiction to this court."

—And this it would do under section 6 of the act of 1891, which gives this court the power to certify questions of law to the supreme court, concerning which it desires instruction for its decision.

We do not think it necessary to certify so plain a question as the jurisdiction of the circuit court in this case to the supreme court for instructions.

The plaintiff in error might have taken the case to the supreme court on that question, instead of to this court upon the whole case.

The judgment of the court below is affirmed.

McKENNA, Circuit Judge. I concur in the judgment.

## HITCHCOCK *et al.* v. GALVESTON WHARF Co.

(Circuit Court, E. D. Texas. March Term, 1880.)

### 1. GARNISHMENT—EQUITABLE DEFENSES—TRUST PROPERTY.

When a corporation is served as garnishee, under Sess. Laws Tex. 1875, p. 103, in respect to shares of its stock held by a judgment debtor, it may set up as a defense that the stock is held by the latter as a trustee merely, and is not subject to sale for his debts, notwithstanding that such defense is equitable in its nature.

### 2. MUNICIPAL CORPORATIONS—PUBLIC PROPERTY—LIABILITY FOR DEBTS.

The property of the city of Galveston in its water front was held for the benefit of the public, and was not alienable without the consent of the legislature, nor subject to be taken under legal process for the city's debts.

### 3. SAME—STOCK IN CORPORATIONS.

The sale by the city of its property in the water front to the Galveston Wharf Company, in consideration of certain shares of stock in such company, derived all its validity from the confirmatory act of the state legislature, dated June 23, 1870; and as that act declared that the stock should be held in trust for the inhabitants of the city, and not subject to assignment, pledge, or mortgage, "or any liability for debt whatever," except by consent of four fifths of the qualified voters, the stock is not subject to sale, under process of garnishment, to satisfy a judgment against the city.

**4. SAME—DIVIDENDS.**

The trust attaches to dividends upon the stock as well as the stock itself, and they, too, are exempt from sale for the city's debts.

**At Law.** Proceeding in garnishment brought by D. G. Hitchcock & Co. against the Galveston Wharf Company to subject certain shares of its stock held by the city of Galveston to pay a judgment against the city. Decree of sequestration refused.

The second and third sections of an act of the legislature of Texas entitled "An act to provide for the sale of the shares in any joint-stock or incorporated company on execution," approved March 13, 1875, (Sess. Laws 1875, p. 102,) provided that—

"In any case where the plaintiff has recovered a final judgment against the defendant, and the same is unsatisfied, if the plaintiff, his agent or attorney, should file an affidavit in the court where such judgment was obtained, to the effect that such judgment is unsatisfied either in whole or in part, and that the defendant is the owner of shares in the capital stock of any joint-stock or incorporated company in this state, and that he knows of no other or a sufficient amount of property belonging to the defendant out of which said judgment can be made, the court in which such judgment is pending should issue a writ of garnishment against such corporation. \* \* \* If, on the coming in of the answer of any such joint-stock or incorporated company, it should appear that the defendant is the owner of any shares in such company or corporation, \* \* \* the court should order and decree a sale of a sufficient portion of the shares of such company, describing them, in such judgment, as shall be sufficient to pay the debt of the plaintiff, and all costs of suit and garnishment."

On May 9, 1879, the plaintiffs recovered in this court a judgment against the city of Galveston for \$117,550. On June 9, 1879, an execution was issued on said judgment, and on the same day returned unsatisfied, and said judgment still remains unsatisfied. On the same day Hitchcock & Co. filed in this court a petition, verified by affidavit, in which the foregoing facts were recited, and in which it was alleged that the judgment debtor, the city of Galveston, was the owner of shares in the corporate stock of the Galveston Wharf Company, a company incorporated by the laws of Texas, and residing and doing business in said city of Galveston, and realizing and declaring dividends to its stockholders, including the city of Galveston, and that there was no other sufficient property belonging to the judgment debtor out of which the judgment aforesaid could be made. Thereupon the plaintiffs prayed for a writ of garnishment against the Galveston Wharf Company, requiring it to answer what number of shares of its capital stock was owned by the city of Galveston, and the par value thereof; and also what were its liabilities to the city of Galveston; and also what effects of said city it had in its possession, and what credits and effects of said city there were in the hands of any other person, to the best of its knowledge and belief; and that at its next term this court would order a sale of said shares of stock, that the proceeds thereof might be applied to the payment of said judgment. On the same day (June 9, 1879) a writ of garnishment was issued, and on the next day served on the Galveston Wharf Company. The wharf company, on November 6, 1879, filed pleas to the jurisdiction.

tion, demurrers, and an answer to the writ of garnishment, and the affidavit on which it was based.

The answer set forth that at the date of the service of the writ or garnishment the city of Galveston was the owner of 6,222 shares of the capital stock of the wharf company, for which it held a certificate dated March 1, 1869, each share being for the sum of \$100. That the foundation and nature of the right and title of the city to said stock was as follows: The property of said wharf company consisted of lands upon the Bay of Galveston, constituting the water front of the city, and extending to the channel, and covering the extension of the streets of the city of said channel portion, and extending from east to west in front of the city from Tenth to Forty-First streets, inclusive, and of wharves built over said lands and a portion of said streets to the channel of the bay and harbor, and in the franchise of collecting tolls and wharfage. That prior to March 1, 1879, the city owned no right or interest in said wharf company, but claimed right to the said water front by reason of a public dedication thereof, and by virtue of an act of the legislature of Texas, December 8, 1851, which authorized it to open to the harbor or channel of the bay all its streets running north and south, and to erect wharves at the ends of said streets, and charge wharfage; and (section 3) to fill up such portions of the water front, lying between ordinary low-tide watermark and the channel on the bay side, as the city might deem necessary for public purposes; and by said act (section 4) the state relinquished to the city all the rights and privileges above mentioned, provided that nothing in the said third and fourth sections should be construed to affect any legal title to wharf privileges held by any persons in said city. That litigation arose between the city and certain claimants of wharf property and privileges, which resulted in a decision, reported in 23 Tex. 349-410, inclusive. That said litigation was revived in 1866, by a new suit commenced by the city of Galveston against the Galveston Wharf Company (which had in the mean time been organized) and a number of other claimants to wharf property. That said suit was finally, on April 1, 1869, compromised and settled between the city and wharf company, which compromise and settlement was embodied in a consent decree made by the court, as follows:

"The Mayor, Aldermen, and Inhabitants of the City of Galveston v. The Galveston Wharf Company. This day the above cause came on to be heard, and leave is granted to both parties to amend their pleadings, and amendments were filed; and thereupon the parties announced themselves ready for trial, and waived a jury, and submitted this cause to the court; and further announced that the said parties, plaintiff and defendant, had agreed upon the terms of a final settlement and compromise between said parties, and that the same should be entered as the decree and judgment of the court herein, all errors and exceptions thereto being waived; and the terms of said judgment and decree appearing to the court to be reasonable and fair, and for the public interests involved: Therefore it is considered, ordered, adjudged, and decreed by the court that the present capital stock of the Galveston Wharf Company, consisting of twelve thousand four hundred and forty-four shares of stock, of \$100 per share, amounting in the aggregate to \$1,244,400, shall be increased full one half thereof, viz., by six thousand two hundred and twenty-two

shares, of \$100 each, amounting to the sum of \$622,200, which said stock, of said sum of \$622,200, shall be the property of the mayor, aldermen, and inhabitants of the city of Galveston, and the same shall stand and remain on the books of said company as the property of said mayor, aldermen, and inhabitants of the city of Galveston; and the equal, undivided one third of the property of said company to be consolidated and vested in it by this decree shall be owned by said city, and represented by its said stock; and the said stock, and the rights and interests therein, and in said property of said mayor, aldermen, and citizens of the city of Galveston, shall be in trust for the present and future inhabitants of the city of Galveston, and all and every part thereof shall be inalienable, and not subject to conveyance, assignment, transfer, pledge, mortgage, or any liability for debt whatever, or in any other manner than by a vote of four fifths of all the qualified voters of said city in favor of some clear and specific proposition therefor. The dividends and net earnings of said stock shall be regularly paid to said mayor, aldermen, and inhabitants of the city of Galveston, to be disbursed and expended for the public good and benefit of said present and future inhabitants of said city; and that the said plaintiffs shall be represented by three directors in the board of directors of said company, one of whom shall be the mayor of said city, who shall be one of the committee on finance, another shall be an alderman of said city, and the third shall either be an alderman or citizen of said city, both to be elected by the common council of said city; the other six directors of said company to be elected by the remaining stockholders of said company, exclusive of the stock of said city. And it is further expressly understood and agreed between the parties, and is so ordered, adjudged, and decreed, that, in all the stockholders' meetings of said company, no measure shall be adopted, and no vote, act, or proceeding shall be valid, unless by a vote of three fourths of all the stock of said company, exclusive of the said stock of the plaintiff. In consideration of all which it is further agreed between the parties, and is now considered, ordered, adjudged, and decreed by the court, that all the property, rights, and claims, of every kind and description, (except certain lots and property hereinafter specified,) of the said Galveston Wharf Company, and also all the right, title, interest, and claim, of every kind and description whatsoever, of the said mayor, aldermen, and inhabitants of the city of Galveston, in and to all the land and ground extending from the shore or ordinary high-water mark of the island of Galveston, to the channel of the bay or harbor, from and including the street known on the map or plan of the said city of Galveston as 'Ninth Street,' on the east, to and including the street known as 'Thirty-First Street,' on the west, including all the ground known as the 'Flats' within said limits, and also all rights, capacity, powers, and claims of said plaintiffs to build and erect wharves, and take and receive wharfage therefor, at the end of streets now or hereafter running or extending to said channel, be, and the same are hereby, vested in the said Galveston Consolidated Wharf Company, and to be henceforth the corporate property, right, and title of the Galveston Wharf Company, and owned, held, possessed, controlled, used, and administered by said company; all the united and consolidated property, rights, and claims being represented by said aggregate of \$1,866,000, the original two thirds thereof held by the present stockholders, and one third by the said plaintiff, in trust as aforesaid."

The answer further alleged that this decree was afterwards ratified and confirmed by an act of the legislature of Texas of date June 23, 1870, as follows:

"An act to confirm the compromises and settlements between the corporation of the city of Galveston, the Galveston City Company, the Houston & Galveston Wharf & Press Company, and the Galveston Wharf Company.



Whereas, on the 8th day of December, 1851, an act was passed by the legislature entitled 'An act granting certain powers to the corporation of Galveston city,' and on the 16th day of February, 1852, an act was passed entitled 'An act supplementary to an act granting certain powers to the corporation of Galveston city,' approved December 8, 1851; and whereas, litigation in regard to the property known as the 'Flats,' within the corporate limits of said city, existed for many years, retarding the improvement and prosperity of said city, which said litigation was compromised and settled by a consent decree, rendered in the district court of Brazoria county on the first day of April, 1869, in a suit wherein the said corporation of the city of Galveston was plaintiff, and the wharf company was defendant, and by a further consent decree, rendered in said district court on the 2d day of November, 1869, in a suit wherein the Galveston City Company was plaintiff, and the corporation of the city of Galveston was defendant, and by a sale by the Houston and Galveston Wharf and Press Company to the said Galveston Wharf Company: Therefore be it enacted by the legislature of the state of Texas that the said compromises and settlements between said parties, and the said decrees of the district court of Brazoria county, recited in the preamble hereto, are in all respects validated, ratified, and confirmed: provided, that this act shall not be construed to affect the right of claim of any person whatever, not a party to said suits, decrees, or compromises. Approved June 23, 1870."

The answer further alleged that the said city had obtained said shares of stock, and now held the same by virtue of said compromise decree so confirmed by the act of the legislature; that since the service of the writ of garnishment dividends had been declared by the wharf company on its capital stock, and that the dividends on the stock of the city amounted to the sum of \$4,170.50, which, on account of the service of said writ, it still held, and had declined to pay over to the city; that at the date of the service of the writ of garnishment the wharf company was indebted to the city in no other sum or manner, and had in its possession no other property of said city, and had no knowledge or belief as to any credits or effects of the city in the possession of any other person. And the wharf company claimed, being expressly notified and required by the city to do so, that said shares of stock of the city in the Galveston Wharf Company, and the dividends arising therefrom, were not subject to the process of garnishment. And the wharf company, on its own behalf, claimed that to subject said shares to forced sale, or transfer to private individuals for the debt of the city, would violate the contract under which alone the wharf company consented to the issue of said stock to the city, and the rights and interests of the wharf company and the public in the premises, and the law and public policy of the state. The answer further alleged that the judgment of the said Hitchcock & Co. against the city of Galveston was founded on a contract made on February 28, 1874, and not at any anterior date; and thereupon the wharf company prayed to be dismissed, with its reasonable costs and attorneys' fees.

To this answer Hitchcock & Co. filed a motion to strike out such parts thereof as set up that the stock owned by the city in the wharf company, and the dividends arising therefrom, were exempt from liabilities for its debts, and that a sale thereof would be in violation of the

compromise contract under which the said shares were issued, on the ground that these were allegations of equitable defenses to the writ of garnishment, of which this, as a court of law, could not take cognizance. Hitchcock & Co. also filed exceptions to the answer on the ground that, notwithstanding the averments of the same, the stock of the city and the wharf company, and the dividends accruing therefrom, were subject to the process of garnishment, and should be applied to the payment of their said judgment.

*F. Charles Hume*, for plaintiffs.

*W. P. Ballinger*, for City of Galveston.

WOODS, Circuit Judge. The contention of the plaintiffs, that this court has no jurisdiction of the matter set out in the answer of the garnishee, because they present equitable defenses to the garnishment, and can therefore be considered only by a court of equity, will not hold. By the act of 1875, (Sess. Acts 1875, p. 102,) if, on the coming in of the answer of an incorporated company served as garnishee, it appears that the judgment debtor is the owner of any shares in such company, the court should order and decree a sufficient number of shares in such company, describing them in such judgment, as shall be sufficient to pay the debt of the plaintiff, to be sold. By this enactment it is made the duty of the court to consider whether the answer denies the fact that the judgment debtor is the owner of the stock, and, upon the review of that question, the court is authorized to make, or refuse to make, a decree or judgment directing the sale. The court is called upon to act upon the averments of this answer of the garnishee. If it appears that the judgment debtor has no stock in the company garnished, no sale will, of course, be ordered. If it appears that he is merely a nominal, but not real, owner of the stock, no sale will be ordered. If he holds as a trustee, the ownership being in another party, no sale will be ordered. To suppose that the court would order a sale of property not subject to execution, or to which a sale could confer no title, would be to attribute to the court the making of a vain and fruitless order. When a garnishee answers a writ of garnishment, it is his duty to state, with accuracy and directness, all facts that may be necessary to enable the court to decide intelligently the question of his liability. *Drake, Attachm.* § 629. To require an answer, and then disregard it because the garnishee showed that while he was apparently, he was not equitably, indebted, and to render a judgment against him on such apparent liability, and thereby compel him to go into a court of equity for relief, would be to do a vain and absurd thing. No court of law is bound to any such course. They have and habitually exercise control over their process so as to prevent wrong and oppression. Suppose that the answer of the garnishee declared that the city of Galveston held stock in the wharf company as trustee for an orphan asylum situate within its limits, would the court order a sale of the stock on the ground that the city held the legal title, and compel the trustee to go into equity to restrain sale? If the contention of the plaintiffs is right, that is what it would be the duty

of the court to do in such case. The true rule is that if the answer of the garnishee discloses that the property in his possession is not subject to levy, or if it is held by the judgment debtor as a trustee, to refuse the order of sale; and, if the judgment creditor believes that his debtor has an equitable interest in the property, it is his place to file his bill in equity to render it subject to the payment of his debts. No court of law will order a sale of what is not subject to execution. That this stock of the city of Galveston in the wharf company is not subject to execution is, in substance, what is set up in the answer of the garnishee. We believe that this court, as a court of law, ought to consider this objection to an order of sale, and, if made out by the proof, to refuse the order. The motion to strike out such parts of the answer as set up the facts, which, it is claimed, show that the stock of the city in the wharf company is not subject to be sold to pay the debts of the city, because such defense is of an equitable nature, must be overruled.

We are next to consider whether, upon the facts set up in the answer of the garnishee, the court should order a sale of the shares held by the city in the stock of the wharf company. On the one hand, it is claimed that the answer shows that the city holds the stock as a trustee for the benefit of the present and future inhabitants of the city, and that it cannot, therefore, be seized and sold, and that the very terms by which it holds the stock exempts it from seizure and sale to pay the city's debts. On the other hand, it is claimed that this stock is held by the city just as it holds any other municipal property, and not otherwise; that the trust is not for any specific purpose; that it is held for profit; and that it is not necessary to carry on the city government; and therefore it is liable for the city's debts. Property held by a trustee is not liable for his debts, and cannot be taken in execution upon judgment against him personally. It is not every legal interest that is made liable to a sale of a *feri facias*. The debtor must have a personal interest in the property. *Lessee of Smith v. McCann*, 24 How. 398. The question is therefore presented: Does the city of Galveston hold this stock in the wharf company by such a trust that it is exempt from execution and sale for the debts of the city? The source of the city's title to the stock is fully set out in the answer of the garnishee. The city claimed the water front abutting on the harbor. It claimed the right to extend its north and south streets to the channel of the harbor, and to erect wharves at the harbor ends of the streets, and to charge wharfage, by virtue of an act of the legislature of Texas. The title of the city to this part of the water front was sustained by the decree of the supreme court of the state, referred to in the answer. The city also claimed, by the dedication of the original proprietors, those portions of the water front lying between the streets terminating at the harbor.

Now, it is clearly settled that whatever property the city had in the water front it held for the benefit of the public, and that it was not liable for the city's debts. *Klein v. New Orleans*, 99 U. S. 149. And such property could not be alienated by the city, any more than its streets and squares, save by consent of the legislature. *Hart v. Burnett*, 15 Cal. 530. When the city, therefore, undertook, by the adjustment and compromise

between it and other claimants, which was embraced in a consent decree referred to in the answer, to transfer to a private corporation its title to the water front of the city, it undertook to do what required the legislative sanction to give it validity. In our judgment, the adjustment and compromise derives all its vitality from the ratifying act of the legislature, and the case stands precisely as if, before the making of the adjustment and compromise, the legislature had authorized it to be made upon the terms and conditions embraced therein. It was competent for the legislature, in authorizing the sale of the title of the city to the water front, to prescribe the conditions of the sale, and to direct what disposition should be made by the city of the consideration received for the property sold. This the legislature, by the confirmatory act, has undertaken to do. It has said that the city shall hold the proceeds of the property "in trust, for the present and future inhabitants of the city of Galveston, and all and every part thereof shall be inalienable, and not subject to conveyance, assignment, transfer, pledge, mortgage, or any liability for debt whatever, in any other manner than by the vote of four fifths of all the qualified voters in favor of some clear and specific proposition therefor." These very limitations appear written on the face of the stock certificate issued by the wharf company to the city. The city, by the authority which permitted a sale of the water front, which was itself trust property, inalienable except by legislative consent, and not liable to be taken in execution, is made a trustee of the proceeds of the sale, not for the benefit of the municipal corporation known as the "City of Galveston," but of the present and future inhabitants of the city. Those proceeds are decreed by the legislature inalienable, except upon the vote of four fifths of the qualified citizens, and not to be at all liable for the debts of the city of Galveston.

The plaintiffs in this cause propose to sell this property for a debt of the city, the trustee, and to convey it to the purchaser at a forced sale, without first obtaining the consent of the court thereto. In other words, they propose to disregard the law of the state by virtue of which the city of Galveston holds title to this property. To us it appears that the city of Galveston holds the stock in the wharf company as a trustee for the present and future inhabitants of Galveston. It cannot, therefore, be sold for the debts of the trustee. The legislature of the state has said that the stock shall not be liable for the debts of the city. By what authority can this or any other court say that it shall? The seizure and sale of this stock would also be in violation of the rights of the wharf company, assured by the compromise and adjustment, and which have been recognized and confirmed by the act of the legislature. This stock was issued to the city by the wharf company with the reservations set out in the compromise. These reservations have been adopted by the legislature. To allow a sale of the stock, in defiance of the terms of the compromise, would override rights and privileges conferred on the wharf company by the confirmatory act of the legislature.

To sum up my views on the merits of the case: The title of the city of Galveston to the water front was held by the city as a trustee for the public. *Hart v. Burnell*, 15 Cal. 531. That title was inalienable, save

by consent of the legislature, and the property was not liable to execution and sale for the debts of the city. By the compromise between the city and the wharf company, and the confirmatory act of the legislature; a sale of this property so held by the city for public use to a private corporation was authorized and confirmed. The legislature, by the same act, directed that the proceeds of the sale should be held by the city on the same trust, substantially, as the property sold, namely, for the use of the present and future inhabitants of the city of Galveston, and should not be liable for its debts. In my judgment, the city holds as a trustee, and for that reason the trust property cannot be sold for its debts. The legislature has, in effect, said that it should not be sold for the city's debts, and this is another reason why it cannot be sold on execution against the city. The same reasoning applies to the dividends declared upon the stock. They are not the property of the city, nor liable for its debts. The city is a trustee of the dividends, as of the stock itself. It would be a futile thing for the legislature to say that the stock should not be liable for the debts of the city, if all its fruits and profits could be seized as they accrued, and subjected to the payment of the city's debts. It seems, therefore, to be the duty of the court to refuse any decree or judgment directing the sale of this stock, or a sequestration of its dividends; and it is so ordered.

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UNITED STATES *v.* GEE LEE.

(*Circuit Court of Appeals, Ninth Circuit. April 18, 1892.*)

1. ACT OF SEPTEMBER 13, 1888.

This act having been passed subject to the ratification of a treaty then pending between the United States and the emperor of China, which was never ratified, is not in force, except section 13 thereof.

2. APPEAL TO THE DISTRICT JUDGE.

The phrase "district judge of the district," in section 13 of the act of September 13, 1888, construed, and held as the equivalent of the "district court of the district," and a writ of error will lie from this court to the judgment thereof.

3. CHINESE MERCHANT.

A Chinese merchant domiciled in the United States, on his return thereto from a temporary absence therefrom, is not required to produce the certificate provided for in the act of July 5, 1884, in the case of persons first coming into the United States.

48 Fed. Rep. 825, affirmed.

(*Syllabus by the Court.*)

Error to the District Court of Washington.

At Law.

Patrick H. Winston, for plaintiff in error.

Charles L. Weller, (*Wm. H. White*, of counsel,) for defendant in error.

Before GILBERT, Circuit Judge, and DEADY and HAWLEY, District Judges.

DEADY, District Judge. On October 7, 1891, Gee Lee, *alias* Lee Hoy, was arrested and brought before a commissioner of the circuit court of

the United States, under section 13 of the act of September 13, 1888, (25 St. p. 479,) and charged with unlawfully entering the United States.

On the hearing the commissioner found the accused to be a native of China, who had entered the United States from the port of Victoria without a certificate showing that he was a person entitled to enter the United States, and ordered him deported.

Gee Lee appealed from the order of the commissioner to the district judge.

On March 3, 1892, the judge filed the following findings of fact:

"The defendant, Gee Lee, *alias* Lee Hoy, is a native of China; that he came to the United States from China in the year 1880, and has made his home in this country ever since. For the first eight years after his arrival he belonged to the laboring classes, and was employed as a cook.

"At the end of eight years he ceased to pursue the avocation of a cook, purchased a stock of merchandise, and for upwards of three years last past he has been a merchant at Port Angeles, in this state. He has frequently visited relatives at Victoria, B. C., but has never been out of the United States since his first arrival here in 1880, except for the purpose of making said visits, when he always traveled by the regular passenger steamboats, and always landed, on returning, with the knowledge and consent of the collector of customs, at Port Townsend. There is no question as to his identity. He is as well known at Port Angeles, the community in which he lives, as any other merchant there. In the month of September, 1891, he went to Victoria, B. C., to visit a sick relative. On the 1st day of October, 1891, he returned from Victoria as a passenger on the regular passenger steamer Geo. E. Starr, and was permitted to land by the collector of customs, partly upon certificates of his identity and occupation as a merchant living at Port Angeles, given him by well-known citizens of that place, but chiefly upon his own personal recognition of the man, and knowledge as to his residence and business at Port Angeles, as aforesaid. After the landing he was allowed to go to Port Angeles, and was not molested for a period of two weeks, when he was arrested upon the charge of being a Chinese person not lawfully entitled to be or remain in the United States. That at the time he entered the United States from the foreign country of British Columbia, to wit, October 1, 1891, he had no certificate, as provided by the sixth section of the restriction act, as amended by the act of July 5, 1884.

"The court concluded from these premises—'(1) That the defendant is not in fact one of the class of persons not lawfully entitled to remain in the United States; [by which I understand that he was lawfully entitled to so remain.]

"(2) That, having been permitted by a collector of customs to land, after a temporary absence from the United States, without fraud on his part, the defendant cannot be lawfully sent out of the United States because of a mere error in a collector in not exacting legal evidence of the facts as to his identity and the nature of his business. In my opinion, the law does not authorize, but forbids, the execution of the warrant issued by the commissioner in this case. It is the judgment of this court, therefore, that the order and judgment of the commissioner be reversed.'"

In the opinion of the court which accompanied the findings of fact and conclusions of law the court appears to have assumed that section 12 of the act of September 13, 1888, is in force, and that consequently the action of the collector in admitting Gee Lee was final, and not reviewable by the court.

But we are of opinion that such section never went into force.

It occurs in a statute entitled "An act to prohibit the coming of Chinese laborers to the United States," the taking effect of which so far is made to depend upon the ratification of a treaty then pending between the United States and the emperor of China, which ratification had never taken place.

Particular provisions of the act may be in force, as not being within the purview thereof, as declared in section 1, as follows: "It shall be unlawful for any Chinese person, whether a subject of China or any other power, to enter the United States except as hereinafter provided."

Such is section 13 of the act, which provides for the arrest and deportation of "any Chinese person \* \* \* found unlawfully in the United States," and under which this proceeding was instituted.

It follows that section 12 of the statute, which is wholly taken up with the future landing or excluding of Chinese passengers by the collector, is not in force, and his act in admitting or refusing Gee Lee to enter the United States is not final; but the truth of the matter may be inquired into in any appropriate judicial proceeding, of which *habeas corpus* and arrest for being unlawfully in the United States are two.

Section 13 of the act of 1888 contains this clause: "But any such Chinese person, convicted before a commissioner of a United States court, may, within ten days from such conviction, appeal to the judge of the district court for the district."

No express provision is made for an appeal from the judgment of the district judge in such a case.

Section 6 of the act of 1891, creating this court, provides that it "shall exercise appellate jurisdiction to review by appeal or by writ of error final decision in the district court \* \* \* in all cases other than those provided for in the preceding section" of the act.

If, under the circumstances, the words "the judge of the district court for the district" can be held equivalent to the words "the district court for the district," a writ of error will lie from this court to review the judgment.

We are of the opinion that the statute should be so read. The learned judge of the district court, from the allowance by him of the writ of error, evidently so thought. Every argument of convenience and utility favors this conclusion. Uniformity of decision in a very important matter will thus be secured.

"Judge of the district court" and "district court" are not, strictly speaking, convertible terms. But they are so in a popular sense, and it is safe to assume that congress, in the use of the former phrase, in this connection, intended to give the party an appeal to the district court of the district.

Since the decision in the court below, the *Case of Lau Ow Bew*, 12 Sup. Ct. Rep. 517, has been decided by the supreme court, in which it is held that the certificate required by section 6 of the act of May 6, 1882, as amended by the act of July 5, 1884, does not apply to Chinese merchants domiciled in the United States, who, having left the country

for temporary purposes, *animo revertendi*, seek to re-enter it on their return to their business and their homes, and is only applicable to "Chinese residing in China, or some other foreign country, and about to come for the first time into the United States for travel or business, or take up their residence."

The claim that a Chinese merchant, long domiciled in the United States, on seeking to re-enter the same after a temporary absence, should be required to produce a certificate of the Chinese government, concerning facts of which such government could not, in the nature of things, be expected to have any knowledge, is fitly characterized by the chief justice as "unreasonable and absurd."

The ruling in *Lau Ow Bew* governs this case. The decision of the district court, though given on a ground in which we do not concur, is correct, and must be affirmed; and it is so ordered.

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BRICKILL *et al.* v. MAYOR, ETC., OF CITY OF BALTIMORE.

(Circuit Court, D. Maryland. April 27, 1892.)

1. PATENTS FOR INVENTIONS—UNCERTAINTY OF CLAIM—WATER HEATER FOR FIRE ENGINES.

Letters patent No. 81,132, issued August 8, 1868, to William A. Brickill, cover a water heater connected with the boiler of a steam fire engine by two detachable pipes, one carrying the cold water to the heater and the other returning it, heated, to the boiler, thus "maintaining a free circulation between the boiler and heater," and keeping the water in the boiler always hot, so as to expedite the generation of steam on a fire call. Pipes controlled by cocks connect the heater with a water tank, and when the engine is away the same circulation is established and maintained between the heater and the tank, "the object being to preserve the coil or heater." The claim is for the "combination, with a steam fire engine, of a heating apparatus, constructed substantially as described, for the purposes fully set forth." *Held*, that it sufficiently appears that the tank is a part of the heater, and not a separate element of the combination, and the patent is not void on its face for uncertainty.

2. SAME—COMBINATION.

Construing the tank as part of the heating apparatus, the claim cannot be said to show on its face only an unpatentable aggregation of parts, since there is a joint and co-operating action between the heater and the boiler, and the action of each influences the action of the other.

At Law. Action by William A. Brickill and others against the mayor and city council of Baltimore for damages for infringement of letters patent No. 81,132, issued to plaintiff August 8, 1868, for an improvement in "feed-water heaters for steam fire engines." Heard on demurrer to the declaration. Overruled.

The specifications describe, substantially, a water heater connected with the boiler of a steam fire engine by two detachable pipes, one carrying the cold water to the heater, and the other returning it heated to the boiler; thus "maintaining a free circulation between the boiler and heater," and keeping the water in the boiler always hot so as to expedite the generation of steam on a fire call. Pipes controlled by cocks connect the heater with a water tank, and, when the engine is away, the



same circulation is established and maintained between the heater and the tank, "the object being to preserve the coil or heater."

*Raphael J. Moses, Jr., Arthur Stewart, and A. C. Trippe, for plaintiffs.*  
*Albert H. Walker and Albert Ritchie, Corp. Counsel, for defendant.*

MORRIS, District Judge. The ground of demurrer urged at the hearing is that the plaintiffs' patent is void on its face, because it does not point out and distinctly claim the part, improvement, or combination which the patentee claims as his invention or discovery; and it is also urged that the patent is void because it appears upon its face to be for an unpatentable aggregation of a steam fire engine and a heating apparatus. The claim of the patent is expressed in the following words:

"Having thus described my invention, what I claim as new, and desire to secure by letters patent, is the combination with a steam fire engine of a heating apparatus constructed substantially as described, for the purposes fully set forth."

The specifications describe the water heater, and the means by which it is to be connected with the boiler of the steam fire engine, so as to establish and maintain a circulation of water between the heater and the boiler while the engine is in the engine house. In describing the construction of the heater, mention is made of an attachment to it called a "water tank," which comes into use when the fire engine is detached, and which then preserves the heater from the danger of burning out.

It is urged that, if the claim be construed to include the water tank as one of the elements of the combination, then the claim is not for a patentable combination, but for a mere aggregation of devices, because the water tank does not come into use until the boiler is taken away, and there is therefore never any joint action between the boiler and the tank. It is further contended that, if the claim be read as if the tank had been disclaimed as an element, still it is argued that there is no combined co-operating action resulting from the attachment of the heater to the boiler, and that the boiler is simply the inert receptacle of the hot water circulating through it, the heater being the only thing which acts at all. This line of argument, it appears to me, leaves out of consideration the beneficial result which is the object of the combination, and seeks to put a much too restricted and artificial construction upon patentable combinations. The object sought to be accomplished is to keep the water in the boiler constantly hot, without keeping up all the time a fire under the boiler, awaiting the time when the fire engine might be needed, so that steam can then be quickly raised. This can be accomplished only by combining with and attaching to the boiler some heating device in such manner that the water will circulate between them. As stated by Mr. Justice CURTIS in *Forbush v. Cook*, 2 Fish. Pat. Cas. 668:

"It is not necessary that the several elementary parts of the combination should act simultaneously. If those elementary parts are so arranged as to produce some one practical result, which result, when attained, is the product of the simultaneous or successive action of all the elementary parts, viewed as one entire whole, a valid claim for thus combining those elemen-

tary parts may be made. Nor is it requisite to include in the claim for a combination, as elements thereof, all the parts of the machine which are necessary to its action, save as they may be understood as entering into the mode of combining and arranging the elements of the combination." *McKesson v. Carnrick*, 19 Blatchf. 158, 9 Fed. Rep. 44; *Smith v. Fay*, 6 Fish. Pat. Cas. 446.

It is not a tenable proposition to say that the boiler is a mere inert receptacle, incapable of any joint action. The object to be attained is to enable the boiler to furnish steam as quickly as possible when the demand for it comes. The combined action of the heater and the boiler accomplishes this result, although by successive steps. The water circulates through the connecting pipes between the boiler and the heater, and one could not act without the other to accomplish the result proposed, although the final result is attained after the boiler is detached from the heater. I take it, therefore, that there can be no more objection to a claim for a combination of the heater and the boiler than there would be to a combination of an engine and a condenser, or of a boiler and a water feeder of any sort; and that it is quite clear that, if the claim or the specification distinctly disclaimed the water tank as an element, the combination would not be on its face open to any objection as an unpatentable aggregation.

The only question, then, is whether the claim is uncertain as to the elements of the combination. In his specifications the patentee states that he is—

"Well aware that the form of the heater used, as well as of supplying water after the engine has been detached therefrom, may be varied without changing the nature of my invention, which, as already set forth, consists in connecting to or combining with a steam fire engine a heating apparatus, so that water heated to nearly the boiling point may be supplied to the boiler of the engine, that the steam may be more rapidly generated, and consequently I do not wish to be understood as intending to claim any peculiar arrangement of heating apparatus herein shown."

Reading the claim in connection with this explicit statement in the specifications, I can perceive no uncertainty in the claim. It expresses to my mind that there are but two elements in the combination,—one a steam fire engine and the other a heating apparatus, constructed substantially as described. Just what scope is to be given to the words "constructed substantially as described" cannot intelligently or rightfully be decided upon a demurrer in advance of testimony as to the alleged infringement. To do so would be to necessarily disregard the rule that, where a claim is open to two constructions, the one will be adopted which will preserve to the patentee his actual invention. There is no more uncertainty in this case as to the actual extent of the claim than there is in every case in which it may be necessary to consider the state of the art at the date of the application, in order to define the limits and scope of the invention described in the patent. The demurrer is overruled.<sup>1</sup>

<sup>1</sup> This patent was also sustained, on demurrer, on substantially the same grounds, in *Brickell v. City of Hartford*, 49 Fed. Rep. 872.

G. G. WHITE CO. v. MILLER *et al.*

(Circuit Court, D. Massachusetts. April 27, 1892.)

**1. TRADE-MARK—INFRINGEMENT—BOURBON WHISKIES.**

Plaintiff and his predecessors have long used upon their whiskey barrels a trade-mark consisting of a picture of a chicken cock standing upright, within a circle surrounded by the words, "Old Bourbon Whiskey, Bourbon Co., Ky.," and below the picture the words, "From J. A. Miller, Paris." For over 30 years this brand has been known to the trade as "Miller's Chicken Cock Whiskey" or "Chicken Cock Whiskey." Defendants, doing business in Boston, adopted a like picture, including the circle; their brand being called "Miller's Game Cock Rye." On the label, in smaller type, are the words: "The King of all Whiskies. John Miller & Co., Sole Proprietors, Boston, Mass." Held an infringement; and it is immaterial that defendants use the device both upon barrels and bottles, while plaintiff has heretofore used it only on barrels, and that defendants' whiskey is a "blended" whiskey, having but one stamp, while plaintiff's is a "straight" whiskey, having two stamps.

**2. SAME—PRELIMINARY INJUNCTION.**

A preliminary injunction against the use of a trade-mark will be granted when from the affidavits the court is satisfied of the infringement, unless there are special circumstances which take the case out of the general rule.

In Equity. Bill by the G. G. White Company against John Miller *et al.* for infringement of trade-mark. On motion for a preliminary injunction. Granted.

*Avery & Hobbs*, for complainant.

*Russell & Putnam*, for defendants.

COLT, Circuit Judge. This is a motion for a preliminary injunction. As early as 1856, James A. Miller, of Paris, Bourbon county, Ky., who was then engaged in the business of manufacturing and selling whiskey, designed and adopted a certain trade-mark, which is the subject-matter of the present suit. The complainant, through mesne conveyances from Miller, became and is now the exclusive owner of said mark. The trade-mark consists of the representation or picture of a chicken cock standing upright within a circle surrounded by the words, "Old Bourbon Whiskey, Bourbon Co., Ky.," and within these encircling words, and below the representation or picture, are the words, "From J. A. Miller, Paris." This whiskey, for more than 30 years, has always been known in the trade as "Miller's Chicken Cock Whiskey" or "Chicken Cock Whiskey," and it has been noted for its high grade and uniform excellence; and this mark has been stamped upon every barrel or package of whiskey made or sold by Miller or his successor in the business. The defendants are the firm of John Miller & Co., doing business as wholesale liquor dealers in the city of Boston. About the year 1887 the defendants adopted a brand or trade-mark for their whiskey which consists of a cock standing upright, inclosed in a circle, and which is called "Miller's Game Cock Bourbon" or "Miller's Game Cock Rye." There is also printed on the label in smaller type, and underneath the picture, the words, "The King of All Whiskies. John Miller & Co., Sole Proprietors, Boston, Mass." In 1885 the defendants adopted a label for their whiskey which varied in some particulars with the form above described.

It appears that this earlier form was only used to a limited extent, and has now been abandoned. Upon a comparison of these two marks, they appear in all essential characteristics to be almost identical. The main feature of the mark in each case is the representation of a cock standing upright. The name of Miller on each label is the same. The designation of the one as "Miller's Chicken Cock Whiskey" or "Chicken Cock Whiskey," and of the other as "Miller's Game Cock Whiskey" or "Game Cock Whiskey," is the mere substitution of the word "Game" for "Chicken;" and this difference, together with other minor differences, are not enough to protect the defendants in the use of what is distinctively the complainant's mark. A glance at the two marks shows that the defendants have taken bodily the picture or representation which forms the complainant's trade-mark, and appropriated it to their own use. To my mind the infringement is so clear that it requires no further discussion; and, if there is any defense to this motion, it must rest upon some other ground.

The complainant uses its trade-mark upon barrels of whiskey. The defendants use their mark upon barrels and upon bottles of whiskey, but more extensively upon the latter. The complainant's whiskey is what is known as "straight" whiskey,—that is, a whiskey coming directly from the distillery; and the barrels have two stamps upon them,—one stamp being fixed when it comes from the distillery and goes into the government bonded warehouse, and another stamp when the tax is paid and the barrel taken out. The defendants' whiskey is what is known as a "blended" whiskey; that is, it is made under a rectifier's license, by blending together whiskey of different grades, on which the tax has been paid. When the whiskey is put into barrels the gauger affixes one stamp, and it is then ready for the market. It is strongly urged by the defendants that, owing to these circumstances, no one would be deceived into purchasing the "Game Cock Whiskey" for the "Chicken Cock Whiskey," and that, therefore, they are justified in using their mark. But it surely cannot be said that, a person having a valid trade-mark, which he uses upon one form of package, another person can adopt the same mark upon the same form of package, and is justified in its use because he also puts it upon another form of package. Nor is it very material whether the barrels have one or two stamps upon them, or whether one kind of whiskey is straight and the other blended, or the price of one is a little greater or less than the other. It may be that, owing to these differences, no expert or dealer in whiskies would be deceived into purchasing the one for the other. This, however, does not constitute a sufficient defense. The real question is whether the resemblance between the two marks is not so close that the public would be likely to be deceived, and thus enable the defendants to succeed in palming off their goods as those of the complainant. Suppose, for example, the complainant, or those who purchase from the complainant, should decide to put up the "Chicken Cock Whiskey" in bottles with a label representing their trade-mark; it is evident to me that the public would be likely to be deceived into buying the defendants' whiskey for that of

the complainant. The complainant has a right of property in this trade-mark, and it has a right to use it upon packages of different form, which contain its whiskey; and the defendants have no right to adopt a mark so near like it as to be liable to deceive purchasers, whatever the size or form of the package may be.

The granting of a preliminary injunction depends upon the special circumstances of each case. This case has been fully tried upon affidavits. I do not see what new proof could be brought forward by either side at final hearing. There is little dispute of fact, and the question is mainly one of law, namely, whether the two marks are so similar that the defendants should be enjoined from the use of the one they have adopted. In a case of this character, if the court has no doubt on the question of infringement, an injunction should be granted at this stage of proceedings, unless there are special circumstances which take the case out of the general rule. I do not find any such special circumstances in this case. The defendants contend that it would work irretrievable injury to them to grant this motion, but this position is not supported by the proofs. The defendants are liquor dealers, and they put this label upon one kind of liquor sold by them. It is true that money has been spent by them in advertising, but the only injury in restraining them from the use of this label will be to oblige them to put some other form of label on this particular brand of whiskey, which is not an infringement of the complainant's trade-mark.

Nor do I think the complainant has been guilty of laches, considering the distance from Boston where the complainant's distillery is established, and the fact that the evidence goes to show that Mr. White, one of the proprietors of the complainant company, had no knowledge of the defendants' label prior to 1889, and this suit was brought in 1890.

Upon the whole, I am satisfied that the complainant is entitled to an injunction; and it is so ordered.

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### BOYD v. CHERRY.

(Circuit Court, D. Iowa, E. D. January, 1888.)

#### 1. PATENTS FOR INVENTIONS—ANTICIPATION—PRIOR USE—MILK CANS.

The Cooley patent of September, 1879, covers "a new process of raising cream from milk," and, as stated by the specifications, "consists mainly in water-sealing the milk within the vessel containing it, and also in submerging such vessel in water, and in apparatus hereinafter described;" the object being not only to exclude dust and dirt, but also to prevent the absorption of deleterious gases or odors from the air, and the exposure to sudden changes, electric, thermal, and otherwise, of the atmosphere. *Held*, that the patent is valid, although other persons had been in the habit of occasionally submerging vessels containing milk, as they never proceeded so far as to discover the importance of the method or the valuable results achieved by the patentee.

#### 2. SAME—INFRINGEMENT.

The patent is infringed by a milk can manufactured under the Cherry patent, which describes a substantially similar apparatus, and purports to accomplish the same ends in substantially the same way; and infringement cannot be avoided on

the theory that the Cherry patent is for a device, while the Cooley patent is for a process, especially when it appears that the Cherry apparatus was sold with direction for using it according to the Cooley process.

**8. SAME—PATENTABLE PROCESS.**

By "process" is meant the application or operation of some element or power of nature, or of one subject to another; as, for example, the art of tanning, dyeing, smelting ores, and the like. In such cases, the invention consists in the application of old and well-known principles to new and useful purposes.

**In Equity.**

The complainant by his bill charges respondent with the infringement of a patent granted to William Cooley, and duly assigned to him. The said patent bears date February 20, 1877, and is "for an improvement in obtaining cream from milk." It is described in the opinion. The defense is twofold: (1) That Cooley was not the original and first discoverer of the process described in his patent; or, in other words, prior use by other persons. (2) That, even if complainant's patent is valid, defendant has not infringed. Proofs have been taken, and the case has been twice argued. Upon the first hearing, the court found that the defense of prior use was sustained, but granted a rehearing.

*Munday, Evarts & Adcock, Wishard & Read, and Phillips, Goode & Phillips*, for complainant.

*Stoneman, Rickel & Eastman*, for defendant.

MCCRARY, Circuit Judge. As it is admitted that the respondent has manufactured and sold a milk can constructed according to the patent issued to him on the 23d of September, 1879, known as the "Hawkeye Patept," our first inquiry will be as to whether this is an infringement of the earlier patent under which the complainant claims. An examination of the two patents will clearly show that they are substantially for the same invention. For convenience I will designate the older patent as the "Cooley Patent," and the later one as the "Cherry Patent." The Cooley patent is described as "a new process of raising cream from milk," and the specification declares that "it consists mainly in water-sealing the milk within the vessel containing it, and also in submerging such vessel in water and in apparatus hereinafter described." The Cherry patent is described as "an improved means of raising cream from milk, and for driving off the animal heat or vapor contained in the same in the shortest and best possible manner;" and the specification further declares that "the invention consists essentially in water-sealing the milk within the vessel containing it, by means of a cover of novel construction, and submerging such vessel and cover in a tank of water." In both patents, one main purpose is declared to be the excluding of the milk from the outer atmosphere during the process of raising the cream. Thus the specification in the Cooley patent declares:

"By my present invention I water-seal the can or other vessel containing the milk to be treated, whereby all possibility of the entrance into it of foreign matter, gases, or odors is prevented," etc.

And the specification in the Cherry patent declares that—

"The vessel containing the milk is submerged in a tank of water, and the milk not only excluded from the outer atmosphere, but an equality in the

temperature is established and maintained throughout the entire vessel, and the animal heat or vapor driven out into the surrounding water."

In both patents the utility of the invention is declared to consist in substantially the same thing. Thus the specification in the Cooley patent says:

"The ordinary mode of raising cream is with open cans, either shallow or deep, and then by hand labor skimming the cream from the surface after the milk has stood from say thirty-six to forty-eight hours. This mode is open to several serious objections, among which may be named the exposure of the milk to the atmosphere, from which it attracts insects and absorbs gases and odors, often very deleterious, and from which it collects and retains dust and dirt floating in the air; the agitation of its surface from winds and other causes; the great length of time required to raise the cream; the unavoidable lack of uniformity in the quality of the cream, and consequently in the butter made from it, because of the various subtle and invisible atmospheric causes which tend to taint, acidify, or otherwise vitiate it; the positive and direct exposure to all the sudden changes, electrical, thermal, and otherwise, of the atmosphere; and the necessity of having pans enough to hold the milk of two or more days' milking."

On the same subject the specification in the Cherry patent states:

"It will be observed that by the old method of raising cream in open, shallow pans, the milk absorbs deleterious odors and gases, and collects dust and dirt floating in the air, and is also subject to various changes of atmosphere, and rendering a lack of uniformity in the quality and quantity of the cream produced, and consequently lessening the value of the butter made from it. By means of the present improvement these objections are entirely obviated, inasmuch as the vessel containing the milk is submerged in a tank of water, and the milk not only excluded from the outer atmosphere, but an equality in the temperature is established and maintained throughout the entire vessel, and the animal heat or vapor driven out into the surrounding water."

The similarity in the two patents becomes still more apparent when we come to compare the description of the invention, and the milk cans actually constructed under them, some of which are in evidence before us. In both there is a cylindrical receptacle or pan for holding the milk. In both there is a tank or vessel for holding water into which the milk can be placed. In both there is a movable cover for the can, shaped somewhat like an ordinary tin pan, and placed upside down on the top of the can, the overlapping or flaring sides of the cover leaving an annular space between such sides and the can. Both are rendered airtight by water-sealing; that is, by being submerged in water, or so nearly submerged that the air is excluded from the can. In both the process contemplates that the can shall stand in the water until the cream is gathered at the top, and in both an outlet is provided at the bottom by which to draw off the milk, leaving the cream only in the can. True, there are some differences, but they are immaterial, and my conclusion is that the two patents are substantially identical.

But the counsel for the respondent insist that he has not infringed the Cooley patent; and their argument is that said patent is for a process, and not for a mechanical device, while respondent's invention is for the latter, and not for the former. It is impossible to maintain this

distinction between the two patents. What one is, in this respect, the other is. They are alike. In my judgment, both patents cover a process to be accomplished by a combination of mechanical devices. A process is patentable, provided that it is new and useful. By "process" is meant the application or operation of some element or power of nature, or of one subject to another. As examples of patentable processes, the art of tanning, dyeing, smelting ores, and the like may be mentioned. In these and in other similar cases the merit of the invention consists, not in the discovery of any new law of nature or principle of science or natural philosophy, but in the application of old and well-known principles to new and useful purposes. There can be no patent upon an abstract philosophical principle. The laws of nature and properties of matter are presumed to be known to and subject to be utilized by all alike. But the application of any one or more of these laws or principles to a practical object, and so as to secure a useful result not previously attained, is patentable. *Neilson v. Harford*, 1 Webst. Pat. Cas. 295; *Corning v. Burden*, 15 How. 267; *Cochrane v. Deener*, 94 U. S. 780; *Rubber Co. v. Goodyear*, 9 Wall. 788.

I doubt very much whether the mechanical appliances described in each of the patents is patentable aside from the process. Considered merely as cans or milk vessels, there would seem to be little, if any, novelty in them. But, however this may be, it appears, from an inspection of the Cherry patent itself, that it is intended to cover the process, and that the cans are to be used only for the purpose of raising cream in the manner described. Besides, the evidence discloses the fact beyond question that the respondent manufactures the "Hawkeye pan," and sells it to customers to be used by them in raising cream from milk according to the process described in the Cooley patent. He advertises and sells the can for this very purpose. They are especially adapted to it, and to no other, and the inference arising from their sale, that they are to be used, would be very strong. When it is added that they are generally, if not always, accompanied by directions to purchasers as to the mode of using them, which directions require the adoption and use of the Cooley process, it becomes very clear that the fact of infringement is established. *Bowker v. Dows*, 3 Ban. & A. 518; *Chemical Works v. Hecker*, 2 Ban. & A. 351; *Wallace v. Holmes*, 9 Blatchf. 65.

It only remains to consider the defense of prior use. The proof undoubtedly shows that, before the date of Cooley's invention, several other persons had been in the habit of occasionally submerging vessels containing milk during the process of raising cream therefrom, and in some instances, at least, such use was public. But it also clearly appears that none of these persons proceeded so far as to discover the utility of the process, or were aware of the fact that by it the important and valuable results since achieved by Cooley could be secured. It is beyond doubt that Cooley was the first to discover and to make known to the public the fact that by this process the cream could be raised in a much shorter period of time than by any other known means, and that by it a better quality of butter was to be secured at a reduced cost. The



others doubtless came very near to this discovery, but they overlooked it, as is apparent from the fact that no other one of them thought enough of the process to permanently adopt it, or to apply for a patent upon it, until after the Cooley patent had come into use and its great utility had been demonstrated. It follows that the controlling question upon this branch of the case is whether it is necessary for the defendant, in order to sustain the defense of prior use, to show, not only that the process was publicly used before Cooley's discovery, but that it was so used by some person or persons who perceived the fact of its utility, and who knew what could be accomplished by it, and who communicated this information to the public.

But, upon authority and upon principle, I am constrained to answer this question in the affirmative. In *Tilghman v. Proctor*, 102 U. S. 711, the supreme court, through Mr. Justice BRADLEY, held an alleged prior use not sufficiently proved, for the reason, among others, that the result had been accidentally and unwittingly produced, while the operators were in pursuit of other and different results, without exciting attention, and without its even being known what was done, or how it had been done. In *Pelton v. Waters*, 7 O. G. 426, the rule is distinctly recognized that the prior discoverer or inventor must have had such a conception of the invention as would enable him to give it to the public. Said Emmons, speaking of the alleged prior inventor in that case, "he not only did not give and could not give it [the invention] to the public, but he did not possess it himself." The same rule is recognized in *Andrews v. Carman*, 9 O. G. 1011, where it is declared, in effect, that the person "who first discovers the principle, and by putting it into practical and intelligent use first makes it available to man," is the first inventor.

If the alleged prior use of the process was under such circumstances that the public obtained no knowledge of the mode of its operation, or of the results to be attained by it, there is no prior use, within the meaning of the patent law.

"In other words, if the parties who made the combination, although seeing with the eye perceived not, and hearing with the ear understood not, \* \* \* they added nothing to their own stock of knowledge; and the fact, if observed by other men, (if they understood it not,) added nothing to the science on that subject. Therefore the invention was not made until the parties contriving, or others observing, the existing combination, saw that it could be made available for the purpose of producing a result similar to the one which the plaintiffs have mentioned in their specification." *Ransom v. Mayor*, 1 Fish. Pat. Cas. 267.

These adjudications are based upon a sound principle. The rights of a patentee are granted to him upon the consideration of the giving by him to the public of a new and useful discovery. If some one before him had already given the same invention or discovery to the public, this consideration falls, and he has no basis for his claim of exclusive right. Hence it is that the alleged prior invention must have been made public. If kept secret by the first inventor until the second

has discovered it and given it to the public, the latter will be protected, for it is to him that the public is indebted; it is from him that the public has received value; and, as no one can impart that which he does not possess, it must appear that the alleged prior inventor was aware, not only of his discovery, but also of its utility. These considerations lead to the conclusion that complainant is entitled to a decree in accordance with the prayer of the bill for an injunction and accounting. Let a decree be entered accordingly.

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FORACE v. SALINAS.

(District Court, D. South Carolina. April 20, 1892.)

ADMIRALTY—COSTS—GENERAL AVERAGE—LIBELANT MAINLY SUCCESSFUL.

A suit in general average was brought by libelant, a shipmaster, against respondent, who denied the necessity for the jettison, thus making the main issue whether libelant's entire claim was a fraud. This suit was the only method of arriving at a solution of the question. Libelant was successful on the main issue, though the amount of his claim was diminished, for want of evidence which could satisfy the court. *Held*, that respondent should pay the costs.

In Admiralty.

I. N. Nathans, for libelant.

I. P. K. Bryan and D. B. Gilliland, for respondent.

SIMONTON, District Judge. The only question remaining is as to the costs. Upon whom must the burden fall? In law cases costs constitute the penalty *pro falso clamore*; they inevitably follow the verdict or decision. In this court, as in equity, they do not necessarily fall on the losing party, and are altogether within the discretion of the court. When the litigation has arisen unnecessarily, either by haste before a settlement can be effected, or by unreasonable conduct *post litem*, rendering a settlement impracticable; or when there appears in the testimony such action on the part of the litigant as renders him obnoxious to the disapproval of the court; and sometimes when the question involved is of such a character that both parties are equally interested in the decision made,—in these instances, and in many others, varying sometimes with the case and sometimes with the disposition and temper of the judge, costs are divided, or apportioned, or put upon the successful party. In the present case the ship reached port, a jettison of cargo and other matters having occurred during the voyage. The usual and proper steps were taken. An average bond was executed, and the cargo delivered. An adjustment was made by an experienced adjuster. Respondents being dissatisfied, not with the manner of, but with the occasion for, the adjustment, this libel was brought. The answer denied any responsibility for the jettison, especially and particularly for much of the ship's property.

The suit was necessary. The adjustment, having been based on an *ex parte* statement, could not bind the parties. No solution of the question could be had in any other way. The result has been a reduction of the amount due on general average, but has established the fact that it is a case of general average. I do not perceive any impropriety in bringing the suit, or any conduct on the part of the libelant which would have prevented a settlement if practicable. The main issue was, was all this claim for general average a fraud? This issue has been decided in favor of the libelant. The amount of his claim was diminished for want of evidence which could satisfy the court. There is an atmosphere of suspicion hanging around cases of this character which, resist it as we may, has its influence. The libelant has had the disadvantage of this. I am not disposed to burden him further. Let respondent pay the costs.

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THE GRACE LITTLETON.

LYONS v. THE GRACE LITTLETON.

(District Court, D. South Carolina. April 22, 1892.)

SEAMAN'S WAGES—REFUSAL TO GO ABOARD—INTOXICATION—CONTRACT.

Where a seaman, who has signed shipping articles, went to his vessel, on her sailing day, intoxicated, and declined to go aboard, and the master, being pressed for time, thereupon shipped another man, *held* that, while the fact that he was drunk was not a sufficient ground for a rescission of his contract, his refusal to go aboard entitled the master to supply his place, and, when the place was filled, no subsequent application could help him.

In Admiralty.

*Huger Sinkler*, for libelant.

*Bryan & Bryan*, for respondent.

SIMONTON, District Judge. This is a libel for damages for breach of contract of hire of a seaman. Libelant signed shipping articles for the Grace Littleton on 19th March, for a voyage to West Indies, at \$20 per month. When he signed he was told to go aboard the next day at 7 o'clock A. M., as the vessel would sail that afternoon. The vessel was at the Northeastern Railroad wharf, and libelant did go to her the next day about 9 A. M. Now comes the inevitable conflict of testimony. He says that he went to the vessel with his duds, ready to enter upon his engagement, and that the master refused to let him go aboard, alleging that he was drunk; that, although he had taken a glass of beer or so, he was sober; that during the day he sought the master, with his counsel, and offered again to fulfill his contract. Mr. Getty, a clerk at the wharf, says that he saw a sailor at that wharf that morning going towards the schooner, and that, although he evidently had been on a heavy spree, he had sobered up. I will come to his testimony again. Hendrix, the

boarding house keeper, says that this sailor was staying at his house with the two other sailors, who had signed the same articles as he had; that pursuant to appointment he got them ready the morning of the 19th to proceed in his wagon to the vessel; that the other two were ready with their duds, but that libelant could be found nowhere. Putting his baggage on the wagon, they started, and finding libelant on their way, at the corner of State and Cumberland streets, they went to the Northeastern Railroad; that libelant had all the appearance of a drunken man, and had a pint bottle of whisky in his pocket, from which he took drinks on his way up; when they reached the Northeastern Railroad, the other sailors got off, and went to the schooner; the libelant swore that he would not go on her, and, in despite of the remonstrances of witness persevered in his declarations to this effect; that the master came up, and asked who he was, and if he was for his schooner; on his reply that he was, the master ordered him to go aboard, and he positively refused to do so. The master confirms all this, and says that the man was drunk; that, finding libelant in this condition and refusing to go aboard, he went to the shipping commissioner and shipped another man; that he had no time to wait; his vessel was ready for sea; he intended to leave that evening, and that to do so he needed the services of the crew in fixing his deck load; so, this man refusing to go on board, he supplied his place at 10 A. M. The shipping commissioner says that he saw libelant the morning of 19th, about 11 A. M., and that he was then seeking the agents of the schooner. I have no doubt that the libelant did, about 1 o'clock, try to resume his engagement. I agree with the proctor for libelant that the fact that libelant was drunk when he went to the vessel, assuming that he was in this condition, would not be sufficient ground for rescission of this contract. *Duncan v. Shaw*, 19 Fed. Rep. 521. The difficulty in his way is his refusal to go aboard, spoken of by the master and the man Hendrix. The latter is in some measure corroborated by Mr. Getty at the railroad. He says that he heard a violent altercation between the sailor and the boarding house keeper after the wagon came up. To be sure, the witnesses are not free from suspicion. Neither is libelant. Unfortunately for him, he is alone. It is not improbable that the sailor was drunk, and that he did carry on as stated, and, if the master had had time and patience, he may have gotten him aboard all right. But the master was pressed for time. He was compelled to fill up his crew at once. He did so. It would be unreasonable to compel him to wait on the recovery of the sailor from the condition in which he put himself. When the place was filled, no subsequent application of libelant could help him. His own conduct forced the master to go for some one else, and, if he lost his place, libelant can only blame himself.

The libel is dismissed.

## THE JAMES H. SHRIGLEY.

## LAWSON v. THE JAMES H. SHRIGLEY.

*(District Court, N. D. New York. April 22, 1892.)***SEAMAN'S WAGES—FEMALE COOK—WIFE OF FIRST COOK.**

On the evidence, *held*, that the libelant, who was the wife of the cook on a steam barge, had been engaged by the master of the barge as second cook, and was entitled in this suit *in rem* to recover wages for her term of service.

In Admiralty. Suit to recover wages.

*Cook & Fitzgerald*, for libelant.

*Clinton, Clark & Ingraham*, for respondents.

COXE, District Judge. Louisa A. Lawson brings this libel against the steam barge James H. Shrigley to recover wages as second cook, at the rate of \$15 per month from May 3, 1891, to August 18, 1891, in all \$54, under an agreement made with the master of the barge. That the libelant performed the duties of second cook faithfully and well and that her services were reasonably worth the sum demanded is not disputed. The defense is that no agreement was made with the libelant, but that an agreement was made with her husband by which he agreed to do the cooking for the barge, with his wife as assistant, for the sum of \$60 a month. The only question of fact is whether the contract was made as alleged in the libel. The libelant and her husband both swear in unqualified terms that the master agreed to pay her \$15 per month. This agreement is denied by the master. Three witnesses were called for the respondents who testified to declarations of the libelant and her husband inconsistent with their present testimony. The shipping articles of the barge were introduced in which, after the name of the libelant's husband, appear the words "cook and wife" and on the three pay rolls signed by her husband appear, not in his handwriting, however, the words "L. Lawson and wife, cooks." The libelant did not draw her wages when her husband drew his and nothing was said on the subject by either of them until they were about to leave the barge. These facts, certainly, tend to corroborate the testimony of the master that the contract was as stated by him. In an ordinary action between man and man the presumptions arising from facts like these would be persuasive and, perhaps, controlling, but in a case of mariners' wages, and that, too, where the libelant is a woman, a somewhat different rule obtains. It should be remembered that there are few claims so highly favored and studiously protected as the claims of mariners for their wages. They are regarded as the wards of the court and every shield and safeguard which the law can give is thrown around them, both by legislative enactment and judicial decision. Their usefulness and importance on the one hand and their proverbial improvidence and recklessness on the other have made them the objects of solicitude in all commercial nations. They

are recognized as a thoughtless, imprudent, rash and impulsive class, ignorant of their rights and easily imposed upon by sharp and designing men. Admiralty courts which do not follow the harsh and unyielding rules of the common law, but sit rather as courts of equity, are vigilant to protect them and hold as void and as of no effect all contracts and stipulations made by them which are in derogation or relinquishment of any of their general rights and privileges. It is the aim of the law to shield them from oppression and take care of their rights and interests by protecting them, not only against the master, but also against themselves. In the light of these well-known rules it is thought that the libellant is entitled to recover, and for the following reasons:

1. The preponderance of direct testimony is with her on the main issue. The three witnesses to the principal transaction were all interested, but the libellant and her husband agree as to the terms of the contract. They are contradicted by the master alone.

2. The contract as testified to by the libellant was an equitable and natural one. The shipping articles show that on former trips the cook on this barge received as high as \$75 per month and neverless than \$60, and that the second cook, on one trip, received \$25 per month. It is conceded by the respondents that the sum of \$60 a month for both first and second cook was low wages. As this was the lowest sum theretofore paid to the cook alone it is hardly probable that the libellant's services were to be counted as nothing, especially when it is conceded that she was a competent cook and discharged her duties faithfully.

3. The character of two of the witnesses called to contradict the libellant and her husband does not commend them to the favor of the court. Their testimony was evidently dictated by a hostile animus.

4. The libellant was, in legal sense, a mariner. She was part of the crew. It was the duty of the master to have the agreement, even if it were as stated by him, reduced to writing and signed by her. Rev. St. §§ 4520, 4521. If he had obtained a contract as advantageous as the one he says was made, a contract clearly understood by all parties, is it not probable that he would have had it so signed? His failure to do so, if it has no other effect, at least, tends to strengthen the position of the libellant that the contract was as stated by her.

It is thought that the action can be maintained by the libellant in its present form and that she is entitled to a decree for the sum demanded in the libel with costs.

TAYLOR *et al.* v. FRANKLIN SAV. BANK.

(Circuit Court, N. D. Illinois. August 10, 1891.)

**TRUSTS—INFANT BENEFICIARIES—FORECLOSURE—BILL OF REVIEW.**

Land was conveyed to a trustee by deed of trust, which provided that no lien, incumbrance, or charge should be created. The record of such trust deed having been destroyed by fire, a decree was entered in a proceeding under the burnt record act, establishing the trust deed without the provision aforesaid, but with a clause authorizing the trustee to create liens. After entry of this decree the trustee gave a mortgage and allowed a mechanic's lien to be created, under which the land was sold. Some of the *cestuis qui trustent* who were infants when the decrees of foreclosure and the decree restoring the trust deed were rendered, but who had appeared therein by guardian *ad litem*, filed a bill to review the foreclosure suits. *Held* that, as to them, the mortgages and the mechanic's lien were invalid, since the record of the trust deed, though destroyed, gave the mortgagee and lien holder notice of the inability of the trustee to incumber the property.

**In Equity.**

*R. B. Kendall and Mr. Pope*, for complainants.

*Swift, Campbell & Jones*, for Franklin Sav. Bank.

**BLODGETT**, District Judge. This is a bill to review, reverse, and set aside a decree of foreclosure, entered in this court on the 30th of April, 1880, under which defendant claims title to lots, 1, 4, and 5 of the subdivision of lot 4, in block 16, in Bushnell's addition to the city of Chicago; and also to set aside a sale made July 15, 1881, under a decree for a mechanic's lien, in favor of Gilsdorf and others, entered in the superior court of Cook county July 20, 1874. The original bill of review was filed by Robert C., Katharine, and Margaret Taylor, children of Frank C. and Louisa Taylor. And the cross bill was filed by Frank C. Taylor, Jr., and Maria Louisa Taylor, Jr., Josephine S. Taylor, and Alexander Taylor, infants, and older children of Frank C. and Louisa Taylor, Sr. The facts, as they appear from the proof, and which are not disputed, are that on the 13th of June, 1871, Maria Louisa Taylor, being seised in fee of all of lot 4, in block 16, Bushnell's addition to Chicago, joined with her husband, Frank C. Taylor, in the execution of a deed of said premises to Ira Scott, to hold upon certain trusts in the deed set forth, which trusts, so far as it is necessary to state them for the purposes of this case, were that the property was to be held for the benefit of Mrs. Taylor and the children of the marriage between Frank C. Taylor, her husband, and herself, except that, in the event of the death of Mrs. Taylor, and of the children, before the youngest child had reached the age of 21 years, Mr. Taylor or his heirs should become entitled to the remainder of the estate. The deed of trust contained an express provision "that no lien, incumbrance, or charge shall be created on said premises," and, although there was a provision in the trust deed that the trustee might sell some portion of the premises for the purpose of improving that which was unsold, yet that provision was so guarded as to prohibit the creation of any lien, incumbrance, or charge upon the unsold portion of said premises. At the time the deed was made there

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was a house upon the premises, which was occupied by Mr. and Mrs. Taylor as their home, this house covering only a comparatively small part of the lot. When this trust was created, three children had been born to Mr. and Mrs. Taylor, and four have since been born, and this bill was filed by the three youngest of the seven children, the three oldest having arrived at lawful age since this bill was filed, and the other four are still minors. By the great fire in the city of Chicago of October 8 and 9, 1871, the house upon the trust premises was destroyed, and the public records of deeds of land titles in the city were also destroyed, and the trust deed itself was for several years supposed to have been destroyed by the same fire, although it had been duly recorded within a few days after its date. In January, 1872, Mr. Taylor borrowed the sum of \$30,000 from the Franklin Savings Bank, the principal defendant in this case, for which he gave his own note, payable one year after date, and to secure the payment of that note he and his wife executed to Edward Brown a trust deed upon the whole of said lot 4 in block 16. The money so borrowed by Taylor was used in building upon the trust premises a block of five dwelling houses, which cost about \$53,700. In January, 1873, Taylor and his wife filed a petition in the superior court of Cook county under the provisions of what is known as the "Burnt Records Act" of this state, alleging the making and recording of the deed of trust, the destruction of the records, and the loss of the deed itself, and praying an establishment and confirmation of the trust deed and its terms, as set out in said petition. And such proceedings were had under this petition that on the 20th of March, 1873, a decree was entered establishing and confirming what was found from the proof to be a substantial copy of the trust deed, but in fact omitting the clause which provided that no lien, incumbrance, or charge should be created on the premises, and containing in place of that clause a clause that authorized the trustee to make liens for the purpose of rebuilding, etc. After the entry of this decree, Scott, the trustee, and Taylor and wife, made a subdivision and plat of said lot 4, dividing the same into five sublots, numbered from 1 to 5, inclusive. On the 22d of July, 1873, Mr. Scott declined to act longer as trustee, and Taylor and wife filed a bill in the superior court of Cook county for the appointment of another trustee, and asked that such new trustee be empowered to make a loan of money sufficient for the fair value and cost of the improvements made on said lots, and a decree was on the 19th of August, 1873, entered, appointing Charles H. Mullikin trustee, as successor to Mr. Scott, and authorizing him to make a loan to pay to Mr. and Mrs. Taylor the cost of the improvements made on the lots, not to exceed \$53,700. Mr. Mullikin accepted the trust, and on the 23d of August made four trust deeds, covering sublots 1, 2, 4, and 5 of said subdivision, to Francis S. Howe, trustee, to secure the payment of four notes of \$9,000 each, given by Mullikin and Mr. and Mrs. Taylor to the Franklin Savings Bank; and on the 1st of January, 1874, Mullikin, the trustee, and Mr. and Mrs. Taylor joined in the execution of another trust deed to Francis S. Howe, to secure the individ-



ual note of Taylor to the Franklin Savings Bank for \$2,875. The proceeds of the four first-mentioned trust deeds were used to take up the \$30,000 loan made by Taylor from the bank in June, 1872, and the last-mentioned trust deed for \$2,875 was to secure a personal indebtedness of Taylor's to the bank, not growing, as the proof shows, out of the rebuilding. In September, 1873, a petition for a mechanic's lien was filed by Henry Gilsdorf for labor and materials used in the construction of the block of new buildings in which petition other contractors intervened. This case came to hearing in July, 1874, and resulted in a decree establishing liens on the premises in favor of Gilsdorf and those who had intervened with him, which decree was afterwards affirmed by the supreme court of this state at the September term, 1874. 74 Ill. 354. In June, 1876, the Franklin Savings Bank filed in this court a bill to foreclose the four trust deeds of August 23, 1873, which, after default of some of the adult defendants, and answers by the guardian *ad litem* of the infant defendants, was in May, 1877, referred to a master to take proofs and report. In June, 1877, the original deed of trust to Scott was found, and very soon thereafter bills of review were filed in the case under the burnt records act, and in the suit brought for the appointment of a new trustee in place of Scott, and in which the decree appointed Mullikin trustee, and authorized him to make the loan to pay for building the five houses, which bills of review resulted in decrees setting aside the former decrees in those cases, but the decree in the case under which Mullikin was appointed trustee contained a clause that nothing therein ordered or contained should deprive the Franklin Savings Bank, or Howe, the trustee in the said trust deeds, of any interest they, or either of them, might have in the trust estate, the claims of the bank and said Howe not having been heard or adjudicated.

After the original trust deed was found, the bank filed a supplemental bill in the foreclosure case, which was answered. Before a report was made by the master, terms of settlement or compromise were made between the bank and the guardian *ad litem* of the infant defendants then in court, which included all the children then born, and all the children of the parents, except Margaret, the youngest. By this compromise the children were to have one of the sublots, and the house thereon, free and clear of all incumbrance. On the 29th of April, 1880, a decree of foreclosure was entered in the foreclosure suit in pursuance of the terms of this agreement, which, by its terms, was a foreclosure of the four trust deeds on sublots 1, 2, 4, and 5, respectively, and of the trust deed securing the \$2,875 (Taylor's individual debt) on the whole four lots, and a sale was directed to be made by one of the masters of the court of the sublots 1, 2, 4, and 5, to pay the amount found due by said decree on the said respective trust deeds; the lien of the several trust deeds on the premises covered by them respectively being found by the decree to be subject to the prior mechanic's lien established by the decree in the *Gilsdorf Case*. A sale was made under this decree on the 16th of June, 1880, and each house and lot sold to the bank, and certificates of purchase given by the master to the bank as such purchaser; and afterwards, to

consummate the settlement made with the guardian *ad litem* of the infant children, the certificate of purchase for lot 2 at such master's sale was assigned to the guardian *ad litem*, and by him assigned to the six children then born, and a deed was in due time made to them by the master, and a deed was also made to the bank of lots 1, 4, and 5. After the affirmance by the supreme court of the decree in the mechanic's lien case, the bank purchased the decree in that case, and was the owner of such decree at the time of the entry of the decree in the foreclosure case, and at the time of the alleged compromise and settlement; and on the 15th of July, 1881, a sale was made under the mechanic's lien decrees, and the defendant, H. H. Thomas, who was then the president of the bank, became the purchaser of the three sublots 1, 4, and 5, and it is admitted that this purchase was made by Mr. Thomas for the bank, and that he now holds the title solely for the bank, and has no individual interest therein. It also appears that the three oldest children were made defendants to the bill for the restoration of the deed of trust under the burnt records act, and appeared and answered by guardian *ad litem*; that the four oldest children were made parties to and appeared and answered by guardian *ad litem* in the bill for the appointment of a new trustee; and that, under the mechanic's lien suit, the four oldest children were made parties defendant, and appeared and answered by guardian *ad litem*. But the supreme court, in the suit brought by Julia S. Taylor against the bank to set aside the decree in the mechanic's lien suit, as far as it affected lot 3 in said subdivision, found that there was no service upon the infant defendants in the mechanic's lien case. It also appears that the youngest child, Margaret, who is one of the original complainants in this case, was born after the entry of the decree in the foreclosure case. It also appears that all the seven children born of the marriage of Mr. and Mrs. Taylor, who are parties to the original and cross bills in this case, were minors at the time the original and cross bills were filed.

The contention on the part of the complainants is that all the four trust deeds given by Mullikin, trustee, with the consent of Mr. and Mrs. Taylor, on the four houses and lots, and also the decree in the mechanic's lien case, are all void and inoperative as against the complainants and cross complainants, under the clause in the deed of trust to Scott, which prohibited the creation of any lien, incumbrance, or charge on the trust premises; that they are not bound by the decree in the foreclosure case, because the decree was by consent, and they were not competent to give such consent, and that the decree in the mechanic's lien case did not bind the infant defendants therein, because there was no service of process on them, and also because such decree was obtained by imposing upon the courts the false deed established by the decree in the burnt records act; of all which, and of the true terms of the genuine trust deed, it is claimed the petitioners in the mechanic's lien case, and the bank and its president, Mr. Thomas, were bound to take notice. While on the part of the defendant, the Franklin Savings Bank, and Mr. Thomas, it is contended that the three oldest of the minor children were made

parties to the mechanic's lien case, and appeared and answered by guardian *ad litem*, and are bound by said decree, and that the proof does not show that they were not served with process in the case, and that the children so brought into the mechanic's lien case were of the same class, as to their rights and interest in the property, as the after-born children, and that the after-born children were properly and sufficiently represented in the mechanic's lien suit by their older brothers and sisters, and that they are therefore bound by such representation of their class; that the three oldest children were parties to the proceeding under the burnt records act, which established, by the decree of the court, the power on the part of the trustees to loan money, and give the securities in question; that all the children of Frank C. and Maria L. Taylor were made parties in the foreclosure suit, except Margaret, who was born after the entry of the decree in said case, and that they appeared in said case by their guardian *ad litem*, and answered; and the decree in said case is binding on them, and each of them, and on the after-born child, Margaret, as she was represented in her class.

I do not deem it necessary to go into an elaborate discussion of the questions of law arising upon the facts, which have been so ably presented in the briefs of counsel. It is undoubtedly settled beyond question by the decisions of the supreme court of Illinois, which controls this court in all cases involving rights to real estate in this state, that the record of the deed of trust to Mr. Scott was notice to all persons dealing with respect to the trust property that no valid lien could be created upon that property either by the trustee, or any of the beneficiaries under the trust, and that the destruction of the record of the deed of trust did not change the rule as to its effect as notice. *Shannon v. Hall*, 72 Ill. 355, 85 Ill. 473; *Gammon v. Hodges*, 73 Ill. 140; *Steele v. Boone*, 75 Ill. 457; *Heaton v. Prather*, 84 Ill. 330; *Curyea v. Berry*, Id. 600; *Bank v. Taylor*, 131 Ill. 386, 23 N. E. 397. It is also clear from the admitted facts that the loan of \$30,000, made by the bank to Frank C. Taylor in January, 1872, was made upon the credit of Taylor alone, and not upon any valid security upon the trust property; that the four trust deeds, securing \$9,000 each, and the \$2,875 trust deed, made by Mullikin, trustee, with the consent of Mr. and Mrs. Taylor, did not create a valid lien upon the trust property, as such transaction would have been in express contravention of the deed of trust under which Mullikin held the property. It is insisted on the part of the defendants that the decrees in the burnt records act case, and in the case appointing a new trustee, fully empowered the making of the five trust deeds involved in the foreclosure suit; that four of the children were parties to those suits, and bound by the terms thereof, and the other unborn children were bound by representation, and that those decrees remained in full force at the time such trust deeds were made. It may be, and probably is, true that, so long as those decrees, as well as the decree in the mechanic's lien case, are allowed to stand, they are binding by their terms upon the infant defendants as well as upon the adult parties; but the essential question is, can these infants attack those decrees, and have them set aside as

against parties who acted under them while they were in force? I consider the law to be well settled that the infants can, by an original bill in the nature of a bill of review, attack any decree entered against them during their infancy, and have it set aside for fraud or error of fact. *Daniell*, Ch. Pr. 169, 170; *Rogers v. Smith*, 4 Pa. St. 93; *Mills v. Dennis*, 3 Johns. Ch. 367; *Massie v. Donaldson*, 8 Ohio, 377; *Mathes v. Dobschuetz*, 72 Ill. 438; *Gooch v. Green*, 102 Ill. 509; *Lloyd v. Kirkwood*, 112 Ill. 337; *Kuchenbeiser v. Beckert*, 41 Ill. 172; *Kingsbury v. Buckner*, 134 U. S. 650, 10 Sup. Ct. Rep. 638. It is also well established, I think, by the authorities, that any consenting decree entered against a minor is not binding, and can be attacked by original bill for the purpose of setting it aside; and in support of this practice no other authority need be cited than that of *Kingsbury v. Buckner*, above cited. Assuming, as I do, the right of these minors to attack this bill of foreclosure by their bill, I think the court must now assume that, had all the facts touching the validity of the securities involved in that suit been presented to the court, the court must have held that the securities sought to be foreclosed and enforced in that proceeding were invalid, and have dismissed that suit for want of equity as against the infant defendants; and, as the court was prevented from doing so, and was led into making an inequitable decree by the unauthorized agreement of the guardian *ad litem*, it will in this suit, now brought by the minors themselves, enter such decree as should have been entered in the original foreclosure case. As to the Gilsdorf decree, and the sale under it, I can see no reason why it is not properly the subject of attack by this bill. Undoubtedly, at the time that decree was rendered, the court properly assumed that it was justified by the deed of trust, as restored by the decree of March 29, 1873, under the burnt records act, but that decree was based upon a most palpable error of fact, of which the bank and its president were charged with notice, and it seems to me the right of these infants to set aside that decree, and all that has been done under it, is palpable. To set aside these sales under the foreclosure and mechanic's lien decrees will, without doubt, work a hardship upon the bank, that has invested a large sum of money on the faith that the four \$9,000 mortgages were valid; but the court cannot escape the conclusion that there was ample constructive notice that the trustees had no power to make those mortgages, as well as that no valid mechanic's lien could be created on the trust estate, and to hold that these incumbrances are valid as against these children would make a precedent for defeating the rights of many more minor children.

INTERSTATE COMMERCE COMMISSION *v.* ATCHISON, T. & S. F. R. Co. *et al.*

(Circuit Court, S. D. California. April 25, 1892.)

## 1. INTERSTATE COMMERCE ACT—LONG AND SHORT HAULS—COMMISSION.

To render lawful a greater charge for a shorter than for a longer haul, under section 4 of the interstate commerce act, (24 St. p. 379,) it is not necessary to first obtain authority from the commission. Such charge is lawful if the circumstances and conditions are not in fact "substantially similar," and the carrier may determine the question for himself, subject to a liability for violating the act, if, on investigation, the fact be found against him.

## 2. SAME—PROCEEDING TO ENFORCE ORDERS OF COMMISSION.

On a proceeding in the circuit court, under section 16, to enforce an order of the commissioners directing certain carriers to desist from charging a greater rate for a shorter than for a longer haul, the facts found by the commission are not conclusive, but are merely *prima facie* evidence, subject to be overcome by other evidence produced before the court.

## 3. SAME—COMPETITIVE POINTS.

Los Angeles, Cal., is a point to which there is active competition in certain kinds of freight, between several transcontinental railway lines, direct, or by water, via Vancouver and San Francisco, also by ocean freights, via Aspinwall and the straits of Magellan, from points east of the Missouri river; and a through rate on the same kind of freight, lower than that to San Bernardino, an intermediate non-competitive point, 60 miles from Los Angeles, on one of the competing rail lines, is not prohibited by the act, since the circumstances and conditions are substantially dissimilar.

In Equity. Petition filed by the Interstate Commerce Commission to enforce an order requiring certain railroad companies to desist from charging a greater rate for a shorter than for a longer haul. Dismissed.

*M. T. Allen*, U. S. Atty., and *Harris & Gregg*, for petitioner.

*A. Brunson* and *C. N. Sterry*, for defendants.

*Ross*, District Judge. This proceeding was instituted by virtue of the sixteenth section of the act of congress entitled "An act to regulate commerce," as amended March 2, 1889, (25 St. at Large, p. 855,) to enforce an order made by the Interstate Commerce Commission on the 19th day of July, 1890, directing that, from and after September 1, 1890, the defendants, the Atchison, Topeka & Santa Fe Railroad Company, the Atlantic & Pacific Railroad Company, the Burlington & Missouri River Railroad Company, the California Central Railway Company, the California Southern Railroad Company, the Chicago, Kansas & Nebraska Railway Company, the Missouri Pacific Railway Company, and the St. Louis & San Francisco Railway Company, cease and desist from charging or receiving any greater compensation, in the aggregate, for the transportation in car-load lots of certain enumerated commodities over their several lines or the routes formed by them, from Kansas City, St. Louis, Detroit, Cincinnati, or New York, or from corresponding points, for the shorter distance to San Bernardino, in the state of California, than for the longer distance over the same line, in the same direction, to Los Angeles, in the state of California. The order of the commission here sought to be enforced was made in a proceeding instituted before that body by a complaint on the part of the San Bernardino Board of Trade, setting forth that the railroad companies above men-

tioned were charging and receiving higher rates for each car load of reapers, mowers, harvesters, hay presses, plows, horse rakes, seed drills, corn planters, forks, (hay or manure,) hoes, hand rakes, shovels, spades, bags, burlap and gunny, compressed in bales, beer in glasses or stone, packed bottles, wine or beer in bulk, coffee in sacks, crockery, common china and white ware, packed, chairs, common wooden seated, cane seated, perforated, worth not more than nine dollars a dozen, school furniture, iron, bar or rod, fruit and jelly glasses, pumps, steam or hydraulic, sewing machines, soap, Castile, imitation Castile, common balls, and laundry, stoves, ranges, registers, radiators, black iron stove furniture and hollow ware, sugar, buggies and carriages, and farm wagons without springs, from the Missouri river, St. Louis, Chicago, Cincinnati, Detroit, and New York, over the same line, in the same direction, to San Bernardino, than to Los Angeles, San Bernardino being the shorter and Los Angeles the longer distance; thereby giving Los Angeles an unlawful preference over San Bernardino. To this complaint a demurrer was interposed by the Burlington & Missouri River Railroad Company, and answers were filed by the other defendant companies. The commission held that the complaint was sufficient to put the carriers to proof that the services were rendered under such dissimilar circumstances as to justify the greater charge for the shorter haul; and, after hearing evidence, found certain facts, which are set out in its report and opinion. Holding that the greater charge for the shorter haul was not justified by the facts found, the order was entered which this court is now asked to enforce.

The petition of the commission for such enforcement sets forth, among other things, that, subsequent to the filing of the complaint of the San Bernardino Board of Trade before the commission, the California Central Railway Company and the California Southern Railroad Company were consolidated, and constituted into a new corporation, under and by virtue of the laws of California, called the "Southern California Railway Company," which last-mentioned corporation claims to have some interest in the subject-matter of this suit, and accordingly it is also made a defendant herein.

To the petition all of the defendant companies, except the Chicago, Kansas & Nebraska Railway Company, filed an answer, admitting the allegations of the petition respecting the corporate existence of the defendant companies, and the location of their principal places of business; also the consolidation of the California Central Railway Company and the California Southern Railroad Company, forming the Southern California Railway Company; but alleging that, in addition to the California Central Railway Company and the California Southern Railroad Company, the Redondo Beach Railway Company, at the time being a corporation duly incorporated under the laws of California, having its principal place of business in the city of Los Angeles, was duly consolidated with the aforesaid two companies, under the name of Southern California Railway Company; that the Redondo Beach Railway Company, at the time of such consolidation, owned and operated a line of

road running from Los Angeles city, and there connecting with the California Central Railway Company, westerly to Redondo Beach, a point immediately upon the shore of the Pacific ocean, which road is now a part of the line owned and operated by the Southern California Railway Company. The defendants, answering, also admit that all of the aforesaid corporations, except the Southern California Railway Company, and its component corporations, were at the times mentioned in the petition, and still are, common carriers, engaged in the transportation of persons and property by their railroads extending through several of the United States, under a common control, management, or arrangement for a continuous carriage, and were then engaged in such business from the Missouri river, St. Louis, Chicago, Cincinnati, Detroit, and New York to Barstow, in the county of San Bernardino, state of California. But the defendants, answering, deny that they are interstate common carriers between Barstow and Los Angeles or San Bernardino, and allege that the defendant companies, other than the Southern California Railway Company, carry only from the eastern points named to Barstow, where all goods and merchandise shipped and hauled by them as common carriers are turned over and delivered to the Southern California Railway Company; that said Southern California Railway Company is a corporation organized and existing under the laws of California, having its principal place of business in the city of Los Angeles, and neither owns nor operates any line of railroad outside of the state of California, and is not subject to the provisions of the interstate commerce act. The answer admits the proceedings before the Interstate Commerce Commission as stated in the petition, but alleges that neither the Redondo Beach Railway Company nor the Southern California Railway Company was a party thereto, and that neither of them had a hearing before the commission upon any of the matters in question. The defendants, answering further, allege, among other things, as reasons why the order of the commission should not be enforced, that the true and existing state of facts as to ocean competition existing at the time of the filing of the petition by the San Bernardino Board of Trade, and of the answers of the respective defendants therein, were not fully proven and established before the commission; but that when the petition was filed, and when those answers were made, and when the hearing thereon was had, there did actually exist such water competition as to take the rates upon freight to Los Angeles out of the operation of the interstate commerce act, and that the carrying and transportation of the freight in question to Los Angeles and San Bernardino was not under substantially similar circumstances and conditions, but was made wholly dissimilar by reason of water competition actually existing; and, further, that, since the making of the order here sought to be enforced, there has grown up and now exists a new, substantial, and continuous competition, by ocean carriers, between all of the points east of the Missouri river named in the pleadings herein and the Pacific ports, including the ports of San Francisco, Redondo Beach, and San Pedro, and that there is now being carried by such ocean transportation large quantities of merchandise and

general freight, including the commodities mentioned in the petition filed by the San Bernardino Board of Trade before the Interstate Commerce Commission, to the ports aforesaid, in rivalry with and in competition to the overland carrying by the defendant companies, and that such competition is actual and present and is increasing; and that the defendant companies, by reason of such competition, have been compelled to make special rates to terminal points upon the Pacific coast, including among the number the city of Los Angeles; that the Redondo Beach Railway Company, now forming part of the Southern California Railway Company, by reason of its aforesaid consolidation, creates a continuous line through to the ocean at Redondo Beach, through which point, directly from the east and from the shipping points named in the petition of the San Bernardino Board of Trade, large quantities of freight are now being consigned and shipped directly to Los Angeles, and to the port of San Francisco, by steam and sailing vessels, and from Redondo Beach and San Pedro for Los Angeles. The defendants, answering further, allege that there are now four transcontinental lines of railroad from the east to the Pacific ocean, other than that formed by the defendant companies, namely: The Southern Pacific Railroad Company, operating its line of road from the city of San Francisco to Galveston, Tex., and other points east, running through the city of Los Angeles, and passing (three miles) south of San Bernardino; the transcontinental line composed of the Central Pacific and Union Pacific Railroad Companies, operating a line from San Francisco to Omaha, and there connecting with other roads to the eastern markets; the Northern Pacific Railroad Company, operating a line of road between Portland, Or., and Duluth, Minn., and other eastern points; the Canadian Pacific Railroad Company, operating a line of road through the British possessions from ocean to ocean. That all of these roads, other than that of the defendant companies, are engaged as common carriers in the transportation of freight from all of the eastern points named in the petition herein to the Pacific ocean, and thence down the Pacific coast, both by water and rail, to Los Angeles, from which point distribution is made to other points inland; that over all of said lines, other than that of the defendant companies, Los Angeles, though an intermediate, is recognized as a terminal point; that neither of said companies, other than the defendants, was mentioned in the complaint filed by the San Bernardino Board of Trade before the Interstate Commerce Commission, and that neither of them is bound by its order, the enforcement of which against the defendant companies would be to subject them to an undue and unreasonable disadvantage in the carrying of freight, by reason of the other transcontinental lines not being subject to the same order, and the same charges for transportation to like common points.

Much time was consumed in the taking of testimony on behalf of the respective parties, and the case has been but recently submitted. For the commission, it is contended, in the first place, that under no circumstances can any carrier, subject to the provisions of the interstate commerce act, charge or receive for transportation of freight a greater com-



compensation for a shorter than for a longer haul over the same line, in the same direction, unless upon application to the commission such carrier be, in the particular case, authorized to charge less for the longer than for the shorter distance. If this be the true construction of the act in question, the case is, of course, ended here; for not only was no such authority given in this case, but the order which it is sought to enforce expressly directed that the defendant companies should not charge or receive any greater compensation for the shorter haul to San Bernardino than for the longer haul to Los Angeles. In support of the construction thus contended for, it is said that "the law points out but one method of escape from the universal application of the prohibitory features of the fourth section of the act, and that is through an application to the commissioners, who alone are given, in the exercise of a sound discretion, the right to suspend the provision in particular cases, and their findings are not reviewable by any other tribunal, because the law has confided to the commissioners, as a special tribunal, the authority to hear and determine the question." But the fundamental difficulty in the way of adopting the construction now and thus contended for by the commission is that the act in question does not make it unlawful to charge or receive more for the shorter than the longer haul, under all circumstances, but only where the circumstances and conditions are substantially similar. By the first section of the act (24 St. at Large, p. 379) it is declared that all charges made for any service rendered or to be rendered, in the transportation of passengers or property by any carrier subject to its provisions, shall be reasonable and just; and every unjust and unreasonable charge for such service is prohibited and declared to be unlawful. By the second section, every unjust discrimination, as between persons for doing a like and contemporaneous service in the transportation of a like kind of traffic, under substantially similar circumstances and conditions, is prohibited and declared unlawful. By the third section it is declared to be unlawful "for any common carrier subject to the provisions of this act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever;" and then follows section 4,—the sections particularly applicable to the present question,—which reads:

"That it shall be unlawful for any common carrier subject to the provisions of this act to charge or receive any greater compensation in the aggregate for the transportation of passengers or of like kind of property, under substantially similar circumstances and conditions, for a shorter than for a longer distance over the same line, in the same direction, the shorter being included within the longer distance; but this shall not be construed as authorizing any common carrier within the terms of this act to charge and receive as great compensation for a shorter as for a longer distance: provided, however, that, upon application to the commission appointed under the provisions of this act, such common carrier may, in special cases, after investigation by the

commission, be authorized to charge less for longer than for shorter distances for the transportation of passengers or property; and the commission may from time to time prescribe the extent to which such designated common carrier may be relieved from the operation of this section of this act."

It is obvious that the authority and power conferred upon the commission by the proviso contained in section 4 is limited to cases that fall within the enacting clause of that section, for its purpose manifestly is to enable the commission to relieve carriers from its operation in cases where it deems such action proper. Such purpose is also expressly declared in the concluding clause of the proviso. And the power thus conferred is exclusive, and its exercise conclusive, in all cases that fall within the prohibition of the enacting clause of the section to which the proviso is appended; that is to say, to every case where, the carrier charges or receives greater compensation in the aggregate for the transportation of passengers, or of like kind of property, under substantially similar circumstances and conditions, for a shorter than for a longer distance, over the same line, in the same direction, the shorter being included within the longer distance. In all such cases, a greater charge for the shorter than for the longer haul is absolutely prohibited, unless the commission, for good cause, sees proper to relieve a particular carrier from its operation. But, if the circumstances and conditions are not substantially similar, the prohibition imposed by the statute does not apply at all. This question the court must determine. If it finds that the circumstances and conditions under which the greater charge was made for the shorter than for the longer haul in question were substantially similar, the inquiry ends, and the order of the commission must be enforced; for in such case it was the exclusive province of the commission to determine whether or not there existed such other circumstances as would make it proper to authorize the defendant companies to charge and receive greater compensation for the shorter than for the longer haul. But, if the case shows that the greater charge for the shorter than for the longer haul was made under substantially dissimilar circumstances and conditions, (there being no claim that the compensation charged and received for the shorter haul was otherwise unjust or unreasonable,) then, and in that event, it is manifest that the case does not fall within the prohibition of the interstate commerce act at all. This construction of the statute is in accord with that adopted by the Interstate Commerce Commission itself in *Re Southern Ry. & S. S. Ass'n*, 1 Int. St. Com. R. 280, where the commission, speaking through Judge COOLEY, after quoting the prohibitory clause of section 4, said:

"Here we have clearly stated what is unlawful and forbidden, and for doing the unlawful and forbidden act penalties are then provided. But that which the act does not declare unlawful must remain lawful if it was so before, and that which it fails to forbid the carrier is left at liberty to do without permission of any one. The charging or receiving the greater compensation for the shorter than for the longer haul is seen to be forbidden only when both are under substantially similar circumstances and conditions; and therefore if in any case the carrier, without first obtaining an order of relief, shall depart from the general rule, its so doing will not alone convict it of illegal

ity, since, if the circumstances and conditions of the two hauls are dissimilar, the statute is not violated. Should an interested party dispute that the action of the carrier was warranted, an issue would be presented for adjudication, and the risks of that adjudication the carrier would necessarily assume. The later clause in this same section, which empowers the commission to make orders for relief in its discretion, does not in doing so restrict it to a finding of circumstances and conditions strictly dissimilar, but seems intended to give a discretionary authority for cases that could not well be indicated in advance by general designation, while the cases which upon their facts should be acted upon as clearly exceptional would be left for adjudication when the action of the carrier was challenged. The statute becomes, on this construction, practical, and this section may be enforced without serious embarrassment. From the recital of the history of the framing of this section, (which is given further on,) it appears, among other things, that the proviso respecting orders for relief was devised by the senate committee which originally drafted the section, and that it was an essential part of it as first proposed; the prohibitory part of the section being then quite stringent, but a discretion being conferred upon the commission to relieve against its operation. Afterwards the words, 'under substantially similar circumstances and conditions,' were inserted in the first sentence of the section. The proviso was perfectly intelligible, so long as the leading clause contained a hard and fast rule against charging more for the shorter than for the longer haul. It was then obvious that a discretion was left to the commission in the matter of relaxing the rule when different circumstances and conditions rendered such relaxation, in its judgment, proper. Had the section passed as it then stood, the exercise of such a discretion might have been entered upon by the commission with a distinct understanding of the task imposed, even though its adequate performance might have been out of the question; but, modified as it now stands, the necessity for a relieving order is greatly narrowed, it being obvious that no order is needed to relieve against the operation of the statute, when nothing is done or proposed which it makes unlawful.

"If any serious doubt of the proper construction of the clause of the statute now under review should, after careful consideration of its terms, still remain, it would seem that it must be removed when section 2, in which the same controlling word is made use of, is examined in connection. That section provides 'that if any common carrier subject to the provisions of this act shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect, or receive, from any person or persons, a greater or less compensation for any service rendered, or to be rendered, in the transportation of passengers or property, subject to the provisions of this act, than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service, in the transportation of a like kind of traffic, under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is hereby prohibited and declared to be unlawful.' Here it will be observed that the phrase is precisely the same, and there can be no doubt that the words were carefully chosen, probably because they were believed to express more accurately and precisely than would any others the exact thought which was in the legislative mind; and in this section, as well as in section 4, the phrase is employed to mark the limit of the carrier's privilege,—its privilege, too, in respect to the very subject-matter with which section 4, where it is employed, has to do,—namely, the charges for transportation service. It is not at all likely that congress would deliberately, in the same act and when dealing with the same general subject, make use of a phrase which was not only carefully chosen and peculiar, but also controlling,

in such different senses that its effect, as used in one place, upon the conduct of the parties who were to be regulated and controlled by it would be essentially different from what it was as used in another. But, beyond question, the carrier must judge for itself what are the 'substantially similar circumstances and conditions' which preclude the special rate, rebate, or drawback, which is made unlawful by the second section, since no tribunal is empowered to judge for it until after the carrier has acted, and then only for the purpose of determining whether its action constitutes a violation of law. The carrier judges on peril of the consequences; but the special rate, rebate, or drawback which it grants is not illegal when it turns out that the circumstances and conditions were not such as to forbid it; and, as congress clearly intended this, it must also, when using the same words in the fourth section, have intended that the carrier whose privilege was in the same way limited by them should in the same way act upon its judgment of the limiting circumstances and conditions."

For the reasons above assigned, it seems to me to be clear that the court must determine the question whether or not the greater compensation charged and received by the defendant companies for the transportation of the commodities in question, for the shorter haul to San Bernardino than for the longer haul to Los Angeles, was under substantially similar circumstances and conditions; and in doing so it must be guided by the powers conferred and the duties imposed upon it by the sixteenth section of the act, as amended March 2, 1889, which reads as follows:

"Sec. 16. That whenever any common carrier, as defined in and subject to the provisions of this act, shall violate, or refuse or neglect to obey or perform, any lawful order or requirement of the commission created by this act, not founded upon a controversy requiring a trial by jury, as provided by the seventh amendment to the constitution of the United States, it shall be lawful for the commission, or for any company or person interested in such order or requirement, to apply in a summary way, by petition, to the circuit court of the United States, sitting in equity, in the judicial district in which the common carrier complained of has its principal office, or in which the violation or disobedience of such order or requirement shall happen, alleging such violation or disobedience, as the case may be; and the said court shall have power to hear and determine the matter, on such short notice to the common carrier complained of as the court shall deem reasonable; and such notice may be served on such common carrier, his or its officers, agents, or servants, in such manner as the court shall direct; and said court shall proceed to hear and determine the matter speedily, as a court of equity, and without the formal pleadings and proceedings applicable to ordinary suits in equity, but in such manner as to do justice in the premises; and to this end such court shall have power, if it think fit, to direct and prosecute in such mode, and by such persons as it may appoint, all such inquiries as the court may think needful to enable it to form a just judgment in the matter of such petition; and on such hearing the findings of fact in the report of said commission shall be *prima facie* evidence of the matters therein stated; and if it be made to appear to such court, on such hearing or on report of any such person or persons, that the lawful order or requirement of said commission drawn in question has been violated or disobeyed, it shall be lawful for such court to issue a writ of injunction or other proper process, mandatory or otherwise, to restrain such common carrier from further continuing such violation or disobedience of such order or requirement of said commission, and enjoining obe-

dience to the same; and in case of any disobedience of any such writ of injunction or other proper process, mandatory or otherwise, it shall be lawful for such court to issue writs of attachment, or any other process of said court incident or applicable to writs of injunction or other proper process, mandatory or otherwise, against such common carrier, and, if a corporation, against one or more of the directors, officers, or agents of the same, or against any owner, lessee, trustee, receiver, or other person failing to obey such writ of injunction or other proper process, mandatory or otherwise; and said court may, if it shall think fit, make an order directing such common carrier or other person, so disobeying such writ of injunction or other proper process, mandatory or otherwise, to pay such sum of money, not exceeding for each carrier or person in default the sum of five hundred dollars for every day, after a day to be named in the order, that such carrier or other person shall fail to obey such injunction or other proper process, mandatory or otherwise; and such moneys shall be payable as the court shall direct, either to the party complaining or into court, to abide the ultimate decision of the court, or into the treasury; and payment thereof may, without prejudice to any other mode of recovering the same, be enforced by attachment, or order in the nature of a writ of execution, in like manner as if the same had been recovered by a final decree *in personam* in such court. When the subject in dispute shall be of the value of two thousand dollars or more, either party to such proceeding before said court may appeal to the supreme court of the United States, under the same regulations now provided by law in respect of security for such appeal; but such appeal shall not operate to stay or supersede the order of the court or the execution of any writ or process thereon; and such court may, in every such matter, order the payment of such costs and counsel fees as shall be deemed reasonable. Whenever any such petition shall be filed or presented by the commission, it shall be the duty of the district attorney, under the direction of the attorney general of the United States, to prosecute the same; and the costs and expenses of such prosecution shall be paid out of the appropriation for the expenses of the courts of the United States. If the matters involved in any such order or requirement of said commission are founded upon a controversy requiring a trial by jury, as provided by the seventh amendment to the constitution of the United States, and any such common carrier shall violate or refuse or neglect to obey or perform the same, after notice given by said commission as provided in the fifteenth section of this act, it shall be lawful for any company or person interested in such order or requirement to apply in a summary way, by petition, to the circuit court of the United States sitting as a court of law in the judicial district in which the carrier complained of has its principal office, or in which the violation or disobedience of such order or requirement shall happen, alleging such violation or disobedience, as the case may be; and said court shall by its order then fix a time and place for the trial of said cause, which shall not be less than twenty nor more than forty days from the time said order is made; and it shall be the duty of the marshal of the district in which said proceeding is pending to forthwith serve a copy of said petition, and of said order, upon each of the defendants; and it shall be the duty of the defendants to file their answers to said petition within ten days after the service of the same upon them as aforesaid. At the trial of the findings of fact of said commission, as set forth in its report, shall be *prima facie* evidence of the matters therein stated; and if either party shall demand a jury, or shall omit to waive a jury, the court shall, by its order, direct the marshal forthwith to summon a jury to try the cause; but, if all the parties shall waive a jury in writing, then the court shall try the issues in said cause, and render its judgment thereon. If the subject in dispute shall be of the value of two thousand dollars or more, either party may appeal to the supreme court of the United States, under the same regu-

lations now provided by law in respect to security for such appeal; but such appeal must be taken within twenty days from the day of the rendition of the judgment of said circuit court. If the judgment of the circuit court shall be in favor of the party complaining, he or they shall be entitled to recover a reasonable counsel or attorney's fee, to be fixed by the court, which shall be collected as part of the costs in the case. For the purposes of this act, excepting its penal provisions, the circuit courts of the United States shall be deemed to be always in session."

On the part of the commission it is contended that the facts found by it and set out in its report are conclusive upon the court. It is impossible so to construe the language of the statute conferring jurisdiction upon the court to enforce the lawful orders and requirements of the commission. Not only does the provision of the statute that the findings of fact contained in the report of the commission shall be taken as *prima facie* evidence of the matters therein stated preclude the idea that such finding shall be deemed conclusive evidence thereof, but such a construction would, in effect, be to convert the court from a judicial tribunal into an executive organ to carry out the orders of the commission. Courts are instituted to hear and determine causes; and to hear is to hear not one only, but both, sides to the controversy. And so congress, in the act under consideration, in conferring upon the circuit courts, sitting in equity, jurisdiction to hear petitions for the enforcement of the orders and requirements of the commission, has provided that such courts shall proceed to hear and determine such matters speedily, as a court of equity, without the formal pleadings and proceedings applicable to ordinary suits in equity, but in such manner as to do justice in the premises; and to this end "such court shall have power, if it think fit, to direct and prescribe, in such mode and by such persons as it may appoint, all such inquiries as the court may think needful to enable it to form a just judgment in the matter of such petition; and on such hearing the findings of fact in the report of said commission shall be *prima facie* evidence of the matters therein stated." It is, I think, very clear from this language that while congress, prescribing, as it lawfully might, a rule of evidence, made the findings of fact of the commission, as set forth in its report, *prima facie* evidence of the matters therein stated, they are not conclusive evidence of such matters; and that it is the duty of the court to examine the entire evidence submitted, and base its judgment upon the case as here established. This conclusion is in harmony with that of the court in *Kentucky & I. Bridge Co. v. Louisville & N. R. Co.*, 37 Fed. Rep. 567, and *Interstate Commerce Commission v. Lehigh Val. R. Co.*, 49 Fed. Rep. 177.

The real question, therefore, for the decision of the court, is whether or not the case shows that the circumstances and conditions existing at Los Angeles and San Bernardino, respecting the transportation of the commodities in question, are substantially dissimilar; and this is a mixed question of law and fact. It is said for the defendant companies that the facts in regard to that question were not fully presented to the Interstate Commerce Commission when the matter was there considered

and attention is called to the fact that the commission itself has since held, in the case of *Rice v. Railroad Co.*, 3 Int. St. Com. R. 261, that Los Angeles is a terminal and competitive point in respect to petroleum and its products,—the traffic there involved,—and that the Atchison, Topeka & Santa Fe Railroad Company was justified, by the existence of substantially dissimilar circumstances and conditions, in making lower rates on that traffic to Los Angeles than to intermediate points. Referring to the difference in situation between Los Angeles and San Francisco, Sacramento, Stockton, Marysville, Oakland, and San Diego, the commission there say:

“With reference to this traffic, the city of Los Angeles occupies a different position to that of the water terminals named. It appears that this city receives petroleum and its products, important in amount, by the water lines to San Francisco or San Diego, as the case may be, and which is afterwards brought down the coast by the rail lines of the Southern Pacific Company or the Atchison, Topeka & Santa Fe Railroad Company, as the case may be, to Los Angeles. It does not appear whether it is brought to Los Angeles on through bills of lading, or only on bills of lading from San Francisco or San Diego, as the case may be, and afterwards, on a separate bill, to Los Angeles; but this is not important, as, in either event, the practical result would be the same. It may be brought to Los Angeles each way. If it is a separate carriage by a water line to San Francisco or San Diego, and no further, then the rate that is thus made for its carriage is one that is not subject to the regulation provided by the act to regulate commerce, and if from San Francisco or San Diego, as the case may be, it is a separate carriage by a rail carrier to Los Angeles, then it is a service beginning and ending in the state of California, and, as such, not subject to the regulation provided by the act to regulate commerce. The dealer in these products at Los Angeles has a right to demand that the rail carrier shall take these articles brought by the water lines to San Francisco or San Diego, as the case may be, and bring them to him at Los Angeles at reasonable rates; and these rates might be reasonable and be less in amount than the difference, for example, between the amount of the water rate to San Francisco or San Diego and the amount of the all-rail rates to these points. Such a state of facts creates a substantial dissimilarity of circumstances and conditions in reference to the transportation of this traffic to Los Angeles, that prevents the lower all-rail rate to that city upon these products from being a violation of section 4 of the act to regulate commerce. These circumstances and conditions are strongly competitive, and on one side they are subject to the regulation provided by the act to regulate commerce, while on the other they are not. They fairly warrant the all-rail carriers, who are subject to the act to regulate commerce, in making such just and reasonable rates on this traffic as will enable them to meet at Los Angeles the rates of carriers not subject to the act to regulate commerce, even though in doing so they charge lower rates than at intermediate stations, where no such circumstances and conditions exist. On the other hand, if this traffic is brought from New York, for example, by water lines to San Francisco or San Diego, and from the one or the other of these two last-named sea ports, as the case may be, to Los Angeles, under a through bill of lading, then it is manifest, upon the evidence in this proceeding, that it would be so brought from New York to Los Angeles at as low, if not a lower, rate than the all-rail rate from points east of the ninety-seventh meridian of longitude to Los Angeles; and being, as we have already seen, important in amount, would also be in actual competition with the all-rail rate, so that the rail carriers would be justified in meeting it by the all-rail rate.”

Freight carried to or from a competitive point, said Judge DEADY in *Ex parte Koehler*, 1 Int. St. Com. R. 319—

"Is always carried under 'substantially dissimilar circumstances and conditions' from that carried to or from noncompetitive points. In the latter case the railway makes its own rates, and there is no good reason why it should be allowed to charge less for a long haul than a short one. When each haul is made from or to a noncompetitive point, the effect of such discrimination is to build up one place at the expense of the other. Such action is willfully unjust, and has no justification or excuse in the exigencies or conditions of the business of the corporation. In the former case the circumstances are altogether different. The power of the corporation to make a rate is limited by the necessities of the situation. Competition controls the charge. It must take what it can get, or, as was said in *Ex parte Koehler*, 'abandon the field, and let its road go to rust.' Competition may not be the only circumstance that makes the condition under which a long and a short haul are performed substantially dissimilar. But certainly it is the most obvious and effective one, and must have been in the contemplation of congress in the passage of the act."

The common carrier cannot be required to ignore or overcome existing differences in the transportation facilities of different localities, created, not by its own arbitrary action, but by nature or by enterprises beyond its control. San Bernardino is situated in one of the most fertile and productive valleys in the world, and is a thriving and prosperous city, but it has not the transportation facilities that Los Angeles has. It is about 60 miles distant, and further inland. By reason of its nearness to Los Angeles, it receives the benefit of the competitive rates to that terminal in proportion to its proximity thereto. But, not being a competitive point, it does not get terminal rates. The proof shows, what is also a matter of common knowledge, that railroad companies do not make terminal rates, unless compelled to do so by competition. Wherever and whenever actual competition exists, the question the carrier has to deal with is not so much what is a fair rate for the service, or what the traffic will bear, but what rate can be got for the service as against the rate offered by the competitor. Especially is this true when the competitor is a carrier by water, because that is the cheapest known kind of transportation, and is unrestricted by law. If, therefore, Los Angeles can be justly regarded as a competitive point in respect to the transportation of the commodities here in question, there is such dissimilarity of circumstances and conditions between it and the intermediate point of San Bernardino as to make the long and short haul clause of the interstate commerce act inapplicable.

The facts in respect to this question, as shown by the evidence submitted to the court, are widely different from those set out in the report of the commission, and upon which its order here sought to be enforced was based. In its report and opinion the commission say:

"Between San Francisco and the southern border of California, a distance of six hundred miles, San Jose, Los Angeles, and San Diego are the only points designated Pacific coast terminals by said transcontinental association, and to which rates from the Missouri river and more eastern points are the same as to San Francisco. San Jose is an interior city, within fifty miles of



San Francisco. Los Angeles is also an interior city, 25 miles from San Pedro, its nearest harbor. The rates between Los Angeles and San Pedro are from 9 to 12½ cents per 100 pounds on goods similar to those named in the complaint. Los Angeles and San Diego are the principal commercial centers of southern California. San Pedro is a seaport through which importations of coal, lumber, and other commodities from the neighboring islands and British America are brought in, and vessels come in ballast from San Francisco to San Pedro, to be loaded with grain, but its commerce is very small. None of the articles named in the complaint shipped from the Missouri river, or places further east, have reached Los Angeles through San Pedro for many years. Seven or eight years ago some agricultural implements were shipped around Cape Horn to San Francisco. The time when shipment of any of the articles named in the complaint was made from the east directly through San Pedro or other Pacific coast port to Los Angeles was not within the recollection of any witness testifying. Some goods are shipped from New York by water to New Orleans; thence by rail to California and intermediate places. Practically, there is no such thing as water competition or a water route from the Missouri and Mississippi rivers and interior cities to the Pacific coast in the carriage of the articles named. Many of them, such as stoves, ranges, black hollow ware, when carried over a water route, are liable to injury from rust. It is possible to ship most of the articles named in the complaint from Atlantic ports and cities around Cape Horn to ports and cities on the Pacific coast. None are so shipped to or through San Diego or San Pedro, Cal. To what extent they are so shipped to San Francisco, or through it to Los Angeles, if at all, has not been disclosed by the testimony or otherwise ascertained in this investigation."

And again:

"The agent of one of the defendant roads testified that seven or eight years ago some agricultural machinery was carried around Cape Horn to San Francisco, and on this testimony alone rests the claim of water competition to Los Angeles, nearly five hundred miles from San Francisco. That the merchandise named in the complaint is not carried by sea from New York, or by sea and rail from Cincinnati and interior points, to Los Angeles, through San Pedro, appears from the evidence, and is confirmed by the fact that the rail rates are higher to San Pedro than to Los Angeles. If they were so carried through San Diego, they would necessarily go at the same rate to San Bernardino, which is a trifle nearer than Los Angeles by rail to San Diego. Possible competition by water is not sufficient to justify a greater charge for the shorter distance. Under the provisions of the fourth section of the act to regulate commerce, the competition must be actual and so counteracting as to take the freight if the lower charge for the longer distance was not maintained. Such competition to Los Angeles is not established by the fact that some of the articles named in the complaint were carried by sea to San Francisco seven or eight years ago."

Reference has already been made to the subsequent case of *Rice v. Railroad Co.*, where the facts were by the commission held to be such as to establish the claim of the defendant that Los Angeles is such competitive point in respect to the transportation of petroleum and its products as to justify a less charge for the longer haul to that city than for a shorter haul to intermediate points. When the present case was before the commission, one port, (Redondo,) through which the evidence shows large quantities of freight of various kinds are almost daily received at Los Angeles, was not shown to have existed at all. This port

is distant about 18 miles from Los Angeles, and is connected therewith by two railroads,—one formerly known as the “Redondo Beach Railway Company” and the other as the “California Southern Railroad Company.” Through the port of San Pedro, also, which is distant from Los Angeles about 22 miles, and connected therewith by rail, large quantities of freight, of almost all kinds and classes, are almost constantly received. All of the freight thus brought to Redondo and San Pedro for Los Angeles is brought by steamer or sailing vessel, much of it in original packages, from New York to San Francisco, and from there transhipped to Los Angeles by way of Redondo or San Pedro; some of it by the Canadian Pacific Railroad to Vancouver, and thence by the Pacific Coast Steamship Company’s ships to Redondo or San Pedro. Some freight is also brought by water to San Francisco and San Diego, and thence down or up the coast, as the case may be, by rail to Los Angeles. The evidence shows that in addition to the five overland railroads, to wit, the Canadian Pacific, the Northern Pacific, the Central Pacific, the Atchison, Topeka & Santa Fe, and the Southern Pacific, with their various connections, by which freight is transported from the eastern and middle states to California, there is what is called the Dearborn line of sailing vessels between New York and San Francisco, the Sutton line of sailing vessels between New York and San Francisco and Portland, the Pacific Mail Steamship Company’s line of vessels from New York to Aspinwall, connecting there with the Panama Railroad running to Panama, and at that place with the company’s line of steamers to San Francisco, and that recently there has been established a line of steamships between New York and San Francisco by way of the straits of Magellan, on some of which, at the time of the taking of the testimony herein, there was afloat a large amount of freight of various kinds and classes for some of the Los Angeles merchants. Los Angeles is a city of about 60,000 people, and because of its location in respect to transportation facilities, and because it is the most important point in southern California, it was made one of the terminal points of the Pacific coast by the transportation companies. The evidence shows that a number of the large mercantile firms of San Francisco, dealing in some or all of the commodities mentioned in the petition, have branch houses there, some have agents, and that some of the local firms do business to the amount of \$3,000,000 per annum. It is not strange, therefore, that there should be active competition between the carriers for the transportation of its freight. The witness A. M. Sutton testified, among other things, that he represents in San Francisco the line of clipper ships which are and have been for years running from New York and Philadelphia around Cape Horn to San Francisco; that they carry almost every kind and class of freight, including the commodities mentioned in the petition; that they charter and load from 30 to 35 ships a year, have no fixed rates, but make rates so as to compete with the other water carriers, and with the overland railroads, and so as to get the business; that they solicit business as far west as Kansas City, St. Paul, Milwaukee, Pittsburg, and Chicago; that they solicit freight for

all parts of California, Oregon, and Washington; that they carry freight constantly to southern California, chiefly to Los Angeles; that their ships take all California freight to San Francisco, and, if billed to Los Angeles, it is reshipped to San Pedro or Redondo in original packages, and then by rail to Los Angeles. The witness Edwin Goodall testified, among other things, that he represents in San Francisco the Pacific Coast Steamship Company; that their ships go to San Pedro and Redondo, to which ports within the last two years freights from San Francisco have been as low as one dollar a ton by reason of competition with other water carriers and the railroads; that they are engaged in the transportation of all kinds and character of merchandise; that goods shipped in New York by steamers or clippers for Los Angeles and San Bernardino are constantly reshipped at San Francisco in original packages to San Pedro and Redondo, from which they are taken by rail; that they sometimes run two or three freight steamers a week to those ports, and including their passenger steamers, which also carry freight, they would probably average one every other day; that they endeavor to fix their rates so as to successfully compete with whatever opposition they may have, whether from carriers by water or rail.

In the report and opinion of the commission, in finding, as it did, from the evidence before it, that practically there was no such thing as water competition or a water route from the Missouri and Mississippi rivers and interior cities to the Pacific coast in the carriage of the articles named, it is said: "Many of them, such as stoves, ranges, black hollow ware, when carried over a water route, are liable to injury from rust." In the case here, A. A. Watkins, a member of the firm of W. W. Montague & Co., whose principal place of business is in the city of San Francisco, with a branch house in Los Angeles, testified that his firm deals largely in stoves, ranges, registers, radiators, black iron stove furniture, and hollow ware, and that of those commodities they ship what would probably amount to about 75 car loads a year, and that about 75 per cent. of them they ship by water to San Francisco, and from there reship by steamer to Redondo or San Pedro what is intended for Los Angeles and vicinity; that they ship by water because it is cheaper to do so than by rail, after deducting their estimate of 3 per cent. for loss by rust; and that any increase in the rail tariff would result in their shipping still more largely by water. The testimony in the case is altogether too voluminous to refer to in detail, but I think it is safe to say, generally, that it shows that the water carriers mentioned are now, and that some of them for years past have been, competing with the overland railroads for the carriage of general freight, including the commodities mentioned in the petition, from the cities and country east of the Missouri river to the Pacific coast, including the city of Los Angeles; that they are and have been actively engaged in such transportation, soliciting the freight, and carrying what they can get; and that they actually do carry an important part of many of the commodities mentioned in the petition. The fact that such means of transportation actually exists, and is actually and actively seeking the traffic, constitutes compe-

tion, and was doubtless one of the most important factors in making Los Angeles a terminal point. Not only does the evidence show that such water competition exists, but it shows that the shipments by water are increasing; and a number of the witnesses testify that, in the event the all-rail rates should be increased from what they are now, it would result in much larger shipments by water, both in quantity and kind. For the reasons stated I am of the opinion that the circumstances and conditions attending the transportation of the commodities in question to Los Angeles and San Bernardino are essentially dissimilar, and therefore that the long and short haul clause of the interstate commerce act does not apply to the case. As has been said, it is not claimed that the rates to San Bernardino are otherwise unjust or unreasonable. If they are, other provisions of the act will afford relief. It results from these views that petitioner is not entitled to the relief it seeks in this court. It is accordingly ordered that the petition be dismissed, at its cost.

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**WARE v. WISNER.**

(*Circuit Court, D. Iowa, C. D. February, 1882.*)

**1. WILL—REAL ESTATE—LEX REI SITÆ.**

The validity of a will conveying real estate is to be determined by the law of the place where the land lies.

**2. SAME—REVOCATION—BIRTH OF HEIR.**

By the law of Iowa, a will is revoked by the birth of an heir after its execution.

**3. SAME—PROBATE—EFFECT OF.**

The probate of a will, while it settles the question of due execution, does not establish validity, or determine its force and effect upon titles to real estate claimed under it.

**4. ALIENS—CAPACITY TO TAKE BY DESCENT OR DEVISE.**

Under Revision Iowa 1860, § 2498, an alien non-resident could not take lands lying in the state either by descent or devise.

**5. SAME—MARRIAGE TO CITIZEN.**

A non-resident alien woman who marries a citizen of the United States is capable of inheriting in Iowa, since she thereby becomes a citizen of the United States, under Rev. St. U. S. § 1994.

**6. CITIZENSHIP—CHILDREN BORN OF AMERICANS IN FOREIGN COUNTRY.**

Persons born in a foreign country, of American parents, who resided there, but who never renounced their citizenship, are citizens of the United States.

This is a bill in equity, brought to quiet title to 1,288 acres of land located in Franklin county, Iowa. Said land was entered by Asahel Gage, who was a non-resident alien residing in Canada. Patents were issued to him; and he held title until his death, which occurred July 1 1861. He left surviving him eleven children, two of whom have since died. At the time of his death, it is conceded that two of his children, John M. Gage and James D. Gage, resided in Iowa, and were citizens of the United States. It is also conceded that all the remaining children,

except two, were at the time of the death of said Asahel Gage, and still are, non-resident aliens. The two children about whom the question is made are two daughters, Sarah and Elizabeth, who married two brothers, named Cummings, whose parents are native-born citizens of the United States, who had emigrated to Canada, but who had never formally renounced their allegiance to this government. The sons were born in Canada, but never formally renounced their allegiance to this government. Both the father and the sons, however, engaged in business in Canada, and several times voted there upon their property qualifications, as provided by law. The father always refused to take the oath of allegiance to the government of Great Britain. The complainant, Ware, is the owner by purchase of all the interest of John M. and James D. Gage in the real estate in controversy. Respondent is the owner by purchase of the interest of five of the remaining heirs, including the said Sarah Cummings and Elizabeth Cummings. In 1854, Asahel Gage made a will, in which he directed the sale of a farm owned by him in Canada, and also directed that "the balance or residue of my estate, both real and personal, after being sold as before mentioned, and the money arising therefrom, together with the cash on hand, notes, bonds, etc., that shall be collected by my executors, shall be divided, as near as can be, share and share alike, to my children, that is, John, James, Asahel, Rufus, Mary Ann, Sarah, Elizabeth, Lorintha, Martha, and Keziah," etc. After the making of this will, and before the death of the said Gage, to-wit, 1859, another child, May, was born to him.

*McKenzie & Hemingway*, for complainant.

*John Porter and William Phillips*, for respondent.

McCRARY, Circuit Judge. My conclusions in this case are as follows:

1. The validity of the will under which the respondent claims title must be determined according to the laws of Iowa, where the land is situated. 1 Redf. Wills, p. 398; *Lynch v. Miller*, 54 Iowa, 516, 6 N. W. Rep. 740.

2. By the law of Iowa, as interpreted by the supreme court of the state, the will was revoked by the birth of an heir after it was executed. *McCullum v. McKenzie*, 28 Iowa, 510; *Negus v. Negus*, 46 Iowa, 487; *Fallon v. Chidester*, Id. 588; *Carey v. Baughn*, 36 Iowa, 540.

3. The probate of the will in Iowa, while it settles the question of its due execution, does not conclusively establish its validity, or determine its force and effect, when title to real estate is claimed under it. *Fallon v. Chidester*, *supra*, and authorities cited.

4. I am furthermore of the opinion (1) that the will does not cover the land in controversy, and (2) that by a fair construction of section 2493, Revision 1860, an alien non-resident could take nothing by will unless such alien, subsequently to the making of the bequest, became a resident. *Krogan v. Kinney*, 15 Iowa, 242.

5. It follows that as to the land in controversy there is no valid will, and the same is to be disposed of according to the Iowa law of descent.

6. It is the settled law of Iowa that non-resident aliens could not inherit under the statute in force at the time of the death of Asahel Gage. *Kroger v. Kinney, supra*; *Rheim v. Robbins*, 20 Iowa, 45; *Brown v. Pearson*, 41 Iowa, 481; *King v. Ware*, 58 Iowa, 97, 4 N. W. Rep. 858.

7. I find that Sarah Cummings and Elizabeth L. Cummings, daughters of said Asahel Cummings, were capable of inheriting by reason of the citizenship of their husbands, which determines their own. Rev. St. U. S. § 1994; *Kelly v. Owen*, 7 Wall. 496; Bish. Mar. Wom. § 505. It appears that the husbands were both born of parents who were citizens of the United States. They were therefore citizens of the United States by birth. Rev. St. U. S. § 2172. It does not appear that they ever renounced their citizenship, within the rule laid down in *Talbot v. Janson*, 3 Dall. 133. Neither the father nor the sons ever ceased to be citizens of the United States, within the doctrine of expatriation as laid down in that case.

8. It follows from the foregoing conclusions that the title to the land in controversy at the death of Asahel Gage vested in John M. Gage, James D. Gage, Sarah Cummings, and Elizabeth L. Cummings, each being entitled to the undivided one-fourth thereof.

9. As complainant, Ware, is the owner by purchase and conveyance of the interests of John M. and James D. Gage, he is entitled to a decree confirming and quieting his title to the undivided one-half of said land; and as the respondent, Wisner, is the owner, by purchase and conveyance, of the interest of the said Sarah Cummings and Elizabeth L. Cummings, he is entitled to a decree confirming and quieting his title to the remaining undivided one-half thereof.

10. The decree will be to quiet the title to one undivided half of the land in complainant, Ware, and to the other undivided half thereof in respondent, Wisner, and the costs will be equally divided between them.

### BOUND v. SOUTH CAROLINA RY. CO. *et al.*, (QUINTARD, Intervener.)

(Circuit Court, D. South Carolina. April 26, 1902.)

#### NAVIGATION COMPANIES—FORECLOSURE OF MORTGAGE—RECEIVERS—PRIORITY OF CLAIMS.

The general freight and passenger agent of a navigation company which has passed into the hands of a receiver has a valid claim for the arrears of his salary, but has no equity to be paid in priority to the mortgage creditors. *Fosdick v. Schall*, 99 U. S. 235, distinguished.

In Equity. Suit by Frederick W. Bound against the South Carolina Railway Company, the New York & Charleston Warehouse & Steam Navigation Company, and others, for foreclosure of a mortgage. Heard upon the claim of James W. Quintard for preference in payment of his salary.

*D. B. Gilliland and Fitzsimons & Moffett*, for intervener.

*A. T. Smythe*, for navigation company.  
*Brawley & Barnwell*, for receiver.

SIMONTON, District Judge. On the 7th October, 1889, by an order of his honor, Judge BOND, D. H. Chamberlain was appointed temporary receiver of the South Carolina Railway Company, at the suit in behalf of holders of second mortgage bonds. At the same time, by the same order, in the same suit, he was directed to take charge, as receiver, of the assets and property of the New York & Charleston Warehouse & Steam Navigation Company. This last-named defendant is a corporation under the law of South Carolina. It had close relations with the South Carolina Railway Company, holding and controlling the connection between its depots and the ocean. The majority of the stock in the navigation company was in the name of the railway company. They had the same president. At the return of the rule to show cause, issued when the temporary receiver was appointed, a large number of the mortgage bondholders and stockholders of the navigation company came before this court, and concurred in the application to make the temporary receiver permanent receiver, against the protest of the president and corporation. This appointment was made. No final hearing has been had in the cause, nor have the exact relations between these two corporations been decided. The New York & Charleston Warehouse & Steam Navigation Company, besides owning wharves and warehouses in Charleston, was authorized by its charter to own or charter steam or other vessels, and to use them in transporting merchandise and passengers between Charleston and New York and elsewhere. 17 St. at Large S. C. p. 628. The company, as such, never owned any vessels, but, being a controlling stockholder in the New York & Charleston Steamship Company, its steamships were used between Charleston and New York, and the petitioner was the general freight and passenger agent of the warehouse and navigation company, stationed at New York. Evidently it was engaged in business as a common carrier. The contract with the petitioner was in writing. The engagement began 1st January, 1886. Its term ended 1st January, 1891, but, after 30th April, 1887, either party could terminate it after six months' notice in writing. Salary, \$10,000 per annum. In 1887 all the steamships of the steamship company were sold and taken off the line, the navigation company losing its control over them. In May, 1888, the petitioner, having given the six-months notice required by contract, severed his connection with the navigation company, and brought this action in one of the courts of New York for \$5,280.33, about six months' salary. In January, 1890, he obtained a verdict, and entered judgment in the sum of \$2,791.66 and costs. He now sets that up. He avers that the navigation company is solvent. It was solvent at the time he contracted with it, and up to the time it went into the hands of the receiver, but the recent loss of all Clyde's business has made it insolvent. At least, its income does not pay its expenses. Interest was paid on its mortgage bonds in January, 1891. No cash dividend has been paid to stock-

holders since 18th March, 1886. Some surplus bonds were divided among them in March, 1887.

The claim of the petitioner is this: He is a creditor, whose contribution kept the navigation company a going concern. After his debt accrued, funds properly applicable to it were diverted to pay bond creditors and stockholders, and he has an equity requiring its restoration. The navigation company, during his service and the accrual of his demand, was a common carrier. He relies upon the current of cases beginning with *Fosdick v. Schall*, 99 U. S. 235, there being no difference in principle between the case of a railroad company and this case, the public being interested in keeping the company a going concern.

Before noticing the other questions in the case, this will be met. It has never yet been squarely decided by the supreme court. *Wood v. Safe-Deposit Co.*, 128 U. S. 421, 9 Sup. Ct. Rep. 131. But the doctrine of *Fosdick v. Schull* has never yet been applied in any case except that of a railroad. *Id.* Why? All the cases go upon the ground that a railroad is a peculiar property of a public nature, discharging a great public work. No railroad designed for any public benefit can be built without the active interposition and assistance of the sovereign power. It is necessary not only to furnish the money to construct it; it is more essential to secure the land upon which it is to be constructed. This requires the exercise of the right of eminent domain. Without it, money would be powerless. Railroads connect distant points. That they are common carriers is but a small part of their office. They are not only the arteries of trade; they civilize, develop, and enrich large sections of country; cities, towns, and villages, farms and factories, spring up on their line; they make intercommunication of vital importance to thousands; they are the means of transporting troops, munitions of war, and supplies, promoting and preserving tranquillity in times of peace, connecting and creating strategic points in times of war; they are public highways. Public interest, the highest public interest, requires that when constructed they be kept up; be kept, as the phrase is, a "going concern." The cost of building and maintaining them is enormous. Their earnings are fluctuating. The state and national governments so far have not been able to build railroads required by the necessities of our country. Subscriptions to the stock in very few cases furnish money enough to build them. Capitalists are invited to assist in investing in the railroad bonds. So, in order to construct a railroad, two parties must concur,—the stockholders and capitalists, who put in the money and the work; the sovereign power, which contributes the right of eminent domain. Without the money and without this sovereign right, the road cannot be built. The consideration which moves the sovereign to bestow this high sovereign prerogative—the right of eminent domain—is the public use of the railroad, when built; that it remain of use; that it be and remain a going concern. To this end the first application of its earnings must be made. The stockholder subscribes, and the bondholder lends his money, with knowledge of this. Neither of them can get anything until the current expenses are paid. Upon this as-



surance, all persons who furnish labor and supplies are encouraged to give credit to the railroad, and to contribute to keeping it a going concern; and if, perchance, through inadvertence, or for any other cause, any portion of the earnings have been applied to interest or dividends, leaving current expenses unpaid in whole or part, this is a diversion which the court will certainly correct. Railroads are of public concern, not simply because they benefit the public; the sovereign power has contributed to their construction in a way in which none but the sovereign can contribute, and they are devoted to a public use. It does not follow, because other kinds of property are of great benefit to the public, they also come within this category, and are devoted to a public use, and, as such, that the courts will see that they are maintained. "This public use," says Justice BREWER, "is very different from a public interest in the use." *Budd v. People*, 12 Sup. Ct. Rep. 478. The public use arises when the sovereign power is essential to the enterprise, and is exercised because of such use. This consideration does not exist in the case of a steamship company, or of any common carrier by water, or of any warehouse company. There are no sovereign, exclusive privileges granted to this navigation company. Anyone can be a common carrier. If the business be profitable, anyone can inaugurate and carry on business between New York and Charleston. The field is open for competition. The act of incorporation is not essential to the business. The public have no special interest in keeping up this company. Of course, the public have an interest in it, as the public have in every kind of business. "No man liveth to himself alone, and no man's property is beyond the touch of another's welfare. Everything, the manner and extent of whose use affects the well-being of others, is property in whose use the public have an interest." BREWER, J., *supra*. But this does not necessarily give the public the right to control such use. The principles established in *Fredick v. Schall*, and the cases following it, do not apply to the case made by the petitioner.

There are other questions made in the case, but for the present let it rest here. Although the petitioner has no equity to be paid in priority to the mortgage creditors, he has a valid claim. Let an order be taken establishing this claim as that of a general creditor, in the amount of the principal and interest and costs of his judgment.

**WALTERS *et al.* v. ANGLO-AMERICAN MORTGAGE & TRUST CO.***(Ottawa Court, D. Nebraska. April 10, 1892.)***1. CIRCUIT JUDGE—AUTHORITY AT CHAMBERS—DISCHARGE OF RECEIVERS.**

A circuit judge has authority to hear at chambers a motion to discharge a receiver.

**2. CORPORATIONS—RECEIVERS—AUTHORITY OF PRESIDENT.**

The president of a corporation has no power, without the authority of the directors or stockholders, to consent to the appointment of a receiver to wind up the affairs of the corporation.

**3. SAME—RECEIVERS—DISCHARGE.**

The president, secretary, and treasurer of a corporation being about to be turned out of office by the directors, the latter two filed a bill alleging that the company was insolvent, and asking the appointment of a receiver to wind up its affairs. The president immediately appeared in court, and consented thereto in behalf of the company. The receiver was thereupon appointed, without any consideration of the bill, and without the court's attention being called to the president's want of authority to enter consent. *Held*, that the receiver would be discharged on the application of the directors; it appearing that the bill was entirely without merit, and that the proceeding was instituted for the purpose of wrecking the company, and obtaining control of its business.

**In Equity.** Bill by Edwin H. Walters and Joseph V. McDowell against the Anglo-American Mortgage & Trust Company for the appointment of a receiver. Heard at chambers on motion to discharge the receiver. Granted.

*John L. Webster* and *H. D. Estabrook*, for complainants.

*James Gardner Clark* and *John P. Breen*, for defendant.

**CALDWELL**, Circuit Judge. **L. W. Tulleys** was president, **John V. McDowell** secretary, and **Edwin H. Walters** treasurer, of the Anglo-American Mortgage & Trust Company. The governing body of the corporation consisted of a board of seven directors. A majority of the directors, and a majority in value of the stockholders, were in favor of removing Tulleys, McDowell, and Walters from the offices held by them, respectively, in the company. The board of directors and stockholders had effected such removal, or were about to do so, when McDowell and Walters filed the bill in this case, alleging that the company was insolvent, and praying for the appointment of a receiver and the winding up of the affairs of the corporation. The bill was filed by them as stockholders; McDowell being the owner of 12 and Walters the owner of 5 shares of the capital stock of the company, of the par value of \$100 per share. The capital stock of the company is \$99,250. Tulleys, the president of the company, without the authority or knowledge of the directory or the stockholders, voluntarily appeared in court the same day the bill was filed, and filed an answer in the name of the company, confessing the allegations of the bill, and consenting to the appointment of a receiver. The court, supposing that the answer was filed by the authority of the corporation, entered an order appointing a receiver, as prayed for in the bill, and consented to in the answer filed by its president, Tulleys. As soon as the board of directors of the company were advised of the filing of the bill, and of the appointment of the receiver,

the action of the president in consenting to the same was disaffirmed and denounced as a fraud upon the corporation; and counsel were immediately employed by the company to defend the suit, and to procure the discharge of the receiver. A motion was soon thereafter filed by the company, by authority of its board of directors, to vacate the order appointing the receiver, and to discharge the receiver.

The judge of the district being absent, in a foreign country, due notice was given that the motion would be heard before the circuit judge at chambers. In conformity to such notice, counsel for each side have appeared and argued the motion. The judge of the circuit court undoubtedly has jurisdiction to hear the motion at chambers; but it is a jurisdiction which I would not be inclined to exercise if the district judge was to be found in his district. For many purposes the circuit courts of the United States, as courts of equity, are always open. Equity Rules 1, 3, 4. The authority of a judge at chambers is the authority of the court itself. Per TINDAL, C. J., *Doe dem. Prescott v. Roe*, 9 Bing. 104. The practice and the jurisdiction of the judge at chambers in chancery suits is in many instances so intimately blended and incorporated with the practice and jurisdiction of the court that it is sometimes difficult to separate the one from the other. The exercise of chambers jurisdiction in equity cases is absolutely essential for the purpose of preventing the delay, injustice, expense, and inconvenience which must inevitably ensue if applications for relief had to be made in all cases to the court in session. A motion to discharge a receiver may be heard at chambers, upon due notice, and will be granted when it appears that he was improvidently appointed, or that there is any other sufficient reason for his discharge. *Railroad Co. v. Sloan*, 31 Ohio St. 1; *Crawford v. Ross*, 39 Ga. 44; Beach, Rec. § 778.

The bill on its face makes no case for the appointment of a receiver. It may well be doubted whether a court of chancery, in the absence of a statute authorizing it, has jurisdiction, at the suit of a stockholder, to wind up the affairs of a corporation on the ground of its insolvency. It is said courts of equity have no greater control over the affairs of a private corporation when it becomes insolvent than they have over the affairs of an individual. They are not courts of bankruptcy. *Glenn v. Liggett*, 47 Fed. Rep. 472, 474; *Mor. Priv. Corp.* §§ 281, 282. But, assuming that such jurisdiction exists, the bill in this case does not show that the corporation is insolvent, or that it owes any debt which it has refused or is unable to pay. The stockholders and directors of the company are denounced as a body of "conspirators," and other hard adjectives applied to them. But, when critically examined, the alleged conspiracy consists only in a purpose of the stockholders and directors of the company to turn the plaintiffs out of the offices of the company which they hold; and, as the purpose of the company was to turn its president out of office also, he cheerfully made common cause with the plaintiffs, and by concerted action with them appeared in court at the instant the bill was filed, and undertook to confess for the company the allegations of the bill, and consent to the

appointment of a receiver to wind up its affairs. This, of course, he had no right to do. As president of the company, he had no authority to confess the bill, and consent to the appointment of the receiver to wind up the affairs of the corporation. This was, in effect, to consent to the dissolution of the corporation of which he was president. He could give no such consent without the authority of the stockholders or directors of the corporation. The order appointing the receiver was therefore obtained without any notice to the corporation, or its appearance by any one having authority to speak for it.

It is alleged in the bill that some \$40,000, coming into the possession of the corporation, has not been invested or appropriated as it should have been. But as this money came into the hands of the very officers who are now making this complaint, and was used and appropriated in the manner that it was by them, it comes with exceeding ill grace from them to complain of their own action.

From the bill and the affidavits in the case, it appears that the plaintiffs and the president of the company, who is acting in concert with them, at one time composed a firm carrying on the same kind of business which the defendant corporation is now conducting. The corporation succeeded to the business of that firm, and the members of that firm became stockholders and officers in the corporation. Finding that they were about to be displaced as officers of the corporation, of which they had had the chief management and control, they conceived the idea of wrecking it, by filing the bill in this case, and procuring, without the knowledge of the corporation, the appointment of a receiver. Coincident with this action, they took steps to reorganize the old firm, and resume the business conducted by them previous to the organization of the corporation. It was evidently their expectation that the proceeding instituted for the appointment of a receiver would discredit the corporation with its patrons, and enable them to secure the business of the company. This, and nothing else, was the real purpose of the bill. The bill is utterly without merit. The appointment of the receiver was procured without notice to the company, and without bringing to the attention of the court the fact that the officer assuming to speak for the company had no authority to do so. The judgment of the court was not invoked on the sufficiency of the case made by the bill, because it was understood the company was consenting to the order made. This was an error of fact, which misled the court. But for this error, there is no reason to suppose the order appointing the receiver would have been made. The receiver must be discharged, and all the costs of the receivership, including the fees and expenses of the receiver, taxed against the plaintiffs.



## GRAMES v. HAWLEY.

*(Circuit Court, D. Kansas. February, 1883.)***1. JUDGMENT—VACATING AFTER END OF TERM.**

After the end of the term a court has no power, merely upon motion, to set aside its order dismissing a cause in pursuance of a compromise, even though fraud be charged in procuring the compromise.

**2. ATTORNEY AND CLIENT—CONTINUANCE OF RELATION—PRESUMPTIONS.**

There is no presumption of law that the relation of attorney and client continues after the termination of the litigation and the end of the term at which final judgment is rendered, except for the purpose of receiving service of citation, or other process in the nature of error or appeal; and notice to the attorney of a motion to set aside the judgment is not notice to the former client, unless the continuance of the relation be affirmatively shown.

Action at law upon transcript of a judgment in favor of plaintiff and against defendant for \$3,835.29 and costs, rendered September 22, 1878, by the supreme court of New York in and for the county of Steuben. The defense is that the judgment is void because the court by which it was rendered had no jurisdiction of the defendant. The facts upon which this defense is based are as follows: Plaintiff is a citizen of New York, and defendant a citizen of Kansas. In 1873, while defendant was temporarily in New York, the plaintiff sued him to recover damages for an alleged fraud in the sale of certain lands. Process was served on defendant, and he was also, at the instance of plaintiff, arrested, and confined in prison. While defendant was so confined, and pending the suit, a written agreement of compromise and settlement was entered into, whereby defendant agreed to and did execute to plaintiff a mortgage on his homestead in Kansas for \$2,000, and the plaintiff agreed to and did dismiss the suit. Prior to this settlement one W. W. Oxx had appeared as counsel for defendant in the cause. After the settlement, and the same being shown to the court, an order of dismissal, dated January 8, 1876, was entered of record in the case. Thereupon the defendant paid off his counsel, Mr. Oxx, discharged him from his service, and returned to Kansas. On the 29th day of August, 1878,—more than two years after the order of dismissal, and after the close of the term at which that order had been entered,—plaintiff filed a motion to set the same aside on the ground that it had been procured by fraud, and to restore the case to the calendar of the court for trial. Notice of this motion was served upon Oxx, as counsel for defendant, but he refused to appear. The court sustained the motion, no one appearing to resist it, ordered the case to be restored to the calendar, proceeded to try it, and rendered judgment as above stated. It is upon this judgment that suit is now brought.

*William Littlefield and S. O. Thacher, for plaintiff.*

*John W. Deford and A. W. Benson, for defendant.*

McCARY, Circuit Judge. 1. The order of discontinuance made by the court in pursuance of the agreement of compromise and settlement was in the nature of a final order disposing of the case. Whatever power

the court may have had over the case and the parties after that order was made and during the same term, I am of the opinion that after the term it had no power to set the same aside on motion. The power of the court over the action and over the parties to it had been exhausted by the final adjournment of the term at which the final order of dismissal was entered, and it could not resume jurisdiction either over the subject-matter or the parties without a new proceeding, and the service therein of the ordinary original process. *Cameron v. McRoberts*, 3 Wheat. 591; *Bank v. Moss*, 6 How. 31; *Sibbald v. U. S.*, 12 Pet. 488; *Assignees v. Dorsey*, 2 Wash. C. C. 433; *Becker v. Sauter*, 89 Ill. 596; *Jackson v. Ashton*, 10 Pet. 480. The rule is thus stated in *Sibbald v. U. S.*:

"No principle is better settled or of more universal application than that no court can reverse or annul its own final decrees or judgments for errors of fact or law after the term at which they have been rendered, unless for clerical mistakes."

And in *Jackson v. Ashton* the court said:

"We have no power over the decrees rendered by this court after the term has passed, and the cause has been dismissed or otherwise finally disposed of."

The fact that fraud in the settlement of this suit is charged in no manner affects the question of jurisdiction or the mode of acquiring it. A judgment can no more be set aside upon motion after the term upon the ground of fraud than upon any other ground. A hearing upon proper notice upon that question is the right of the party charged with the fraud. We cannot assume the truth of the charge for the purpose of affecting the decision of the question of jurisdiction. What we are now to consider is whether the New York court had jurisdiction of the defendant for the purpose of trying the question of fraud. And the rule governing the decision of this question of jurisdiction is that at the end of the term at which there is a final disposition of the case (final in the sense that, if not appealed from, it ends the controversy) the parties are dismissed *sine die*. If they are citizens of foreign states, they may safely depart for their homes. If they had employed an attorney, they may then discharge him with the assurance that the controversy is at an end, and can be renewed only by proceedings in the nature of error or appeal, and that, except in the event of such proceedings, no valid service of process can be made upon the attorney. Such is the doctrine recognized by the federal courts, and it has peculiar force in all cases where parties are compelled to litigate in foreign tribunals. There is no presumption of law that the relation of attorney and client continues after the termination of the litigation, and after the final adjournment of the term at which a final judgment is rendered. *Weeks, Attys. at Law*, 425, 426. And it is but fair and reasonable—especially in cases like the present—to hold that a party who relies upon service made upon an attorney after final judgment and after the end of the term (unless it be service of a citation or other process in the nature of error or appeal) must take the chances of showing that at the time of such service the relation actually existed. Even if it could be shown that a different rule prevails with respect to suits between citizens of the same state in

some state courts, I should not be inclined to apply it here. That it might lead to great injustice is very apparent when we look at the circumstances of this case. The defendant had been sued in a foreign state, a thousand miles from his home. He had been thrown into prison. He employed counsel from the necessities of his situation. His case was settled. He was released from imprisonment, and thereupon paid off and discharged his attorney, and returned to his home in Kansas. Must he hold himself in readiness to return to New York and renew the litigation upon motion of his antagonist and notice to his former attorney upon an allegation that the settlement was fraudulent? If so, for how long? Certainly not for two years. Certainly not for any period beyond the end of the term, if until that time. To hold him bound for two years to answer to any motion thus made would be in effect to compel him to have an attorney in a foreign state during that period, whether he will or not. The consequences of being sued in a foreign jurisdiction are serious enough, without adding this unusual and unreasonable requirement.

2. I am also of the opinion that, even if, after the term, it had been competent for the court, upon motion, to set aside the order of discontinuance, notice to the former attorney of defendant was not notice to him. The relation of attorney and client had long been ended, so far as it was possible for the parties to end it. It was possible for them to end it for all purposes except the service of such process as was necessary to the exercise of the appellate jurisdiction of the courts of the state of New York. A motion to set aside a judgment for fraud after the term has in it all the elements of a bill in chancery. It is in its nature an original proceeding. It is not a part of the original suit, and therefore service upon the defendant is necessary. As the court which rendered the judgment had no jurisdiction, its proceedings are without force or validity, and the question is properly raised here.

Judgment for defendant for costs.

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POPE MANUF'G CO. v. WARWICK CYCLE MANUF'G CO. *et al.*

(District Court, D. Massachusetts. April 30, 1892.)

PATENTS FOR INVENTIONS—EXTENT OF CLAIM—PRIOR ART—INFRINGEMENT—BICYCLE HANDLES.

Letters patent No. 245,071, issued August 2, 1881, to George Ilston, for a device for readily adjusting the vertical height of bicycle handles, or rendering them entirely detachable, by making a dovetail or grooved seat on the bicycle head, in which a slide carrying the handle bar works, the same being fixed at any desired height by a set screw, are limited by the prior state of the art to the devices described, and are not infringed by a handle bar connected with a spindle which slides in a socket, and is secured by a set screw.

In Equity. Suit by the Pope Manufacturing Company against the Warwick Cycle Manufacturing Company and others for infringement of a patent. Bill dismissed.

v.50F.no.4—21

*William A. Redding and Charles E. Pratt, for complainant.*  
*John L. S. Roberts, for defendants.*

COLT, Circuit Judge. The bill in this case is based upon the alleged infringement of letters patent No. 245,071, granted to George Illston, August 2, 1881, for improvements in bicycles. The invention relates to the construction of the head of a bicycle so that the handle on the head may be adjusted and readily removed from the machine. The specification says:

"On one face of the head, I make a vertical dovetail or grooved seat, on or in which a slide works; the said slide being fixed in any position on the said seat by means of a set screw. In the upper part of the said slide the handle bar is secured. The handle bar may either be permanently fixed to the said slide, or be capable of detachment therefrom. When it is required to adjust the height of the handle on the head, it is only necessary to slacken the set screw of the slide, when the said slide carrying the handle bar may be raised or lowered on its seat, and refixed in its adjusted position by driving home the set screw."

Instead of this arrangement, there is another form of mechanism set forth in the patent, consisting of a vertical slot on the face of the head of the bicycle, in which a sliding socket works. This sliding socket carries the handle bar, and is fixed at the required height by a screw nut. The first form of the device is covered by the first claim of the patent, which is as follows:

"(1) The improvements in constructing the heads of bicycles and tricycles hereinbefore described and illustrated in Figs. I., II., III., IV., V., VI., and VII. of the accompanying drawings, for the purpose of readily adjusting the vertical height of the handles on the said heads, and rendering the handles detachable from the heads, that is to say, making on the face of the head a dovetail or grooved seat, on or in which a slide carrying the handle bar works, the said slide being adjusted at any desired height on the said seat, and fixed in its adjusted position by means of a set screw or other equivalent arrangement, substantially as described and illustrated."

The scope of the Illston invention seems to me to be clear. He describes in his patent two forms of mechanism for adjusting the handle on the head of a bicycle "with great nicety." In the present suit, we are only concerned with the first form, which consists in placing on one face of the head a dovetail grooved seat, in or upon which a slide carrying the handle works; the slide being fixed in any position on the seat by means of a set screw. This mechanism is simple and easily understood, and the elements are specifically set out in the first claim.

Stress is laid by the complainant upon the fact that the specification says that "the slide carrying the handle bar and the seat on the head may have a figure other than the dovetail figure represented." I do not think that this language should be construed to include other and different forms of adjustable mechanism, but that, within the sense of the patent, it can only include, at most, a modification of the dovetail form in which the slide works. The claim itself, by reference to the figures shown in the drawings, and by its specific language, refers to the dove-



tail construction. An examination into the prior state of the art forbids any such broad construction of this claim as the complainant contends for. In the Hanlon patent of July 7, 1868, there is found adjustable mechanism for the seat and the cranks of a velocipede, and that patent says, after describing these devices, that "the handles may, if desired, be also made extensible." In the McCleave patent of April 13, 1869, the handle in connection with the frame of the machine is raised and lowered for the purpose of adjusting the distance of the crank from the seat to the size of the rider. The use of a dovetail seat with a slide and set screw for the purpose of adjustability appears to be old in other branches of the art. In the old milling machine what was known as the "back rest" or "back center" was constructed after this form. In view of the prior state of the art the Illston patent must be limited to the forms of devices therein described.

The defenses to this suit are non-infringement, and want of patentability. In the defendants' device the handle bar is connected with a spindle which slides in a socket upon the head of the machine, and is fastened at any desired place by a set screw. I question, in view of what was old and well known, whether there is anything patentable in the defendants' device; but, however this may be, it is perfectly clear to my mind that the defendants' device is no infringement of the first claim of the Illston patent. Although argued with much force by complainant's counsel, it would be going beyond all sound rules in the construction of patents to so construe the first claim of the Illston patent as to cover the defendants' mechanism, not only because of the position which that patent occupies in the art, but also because the defendants' device is different in construction. The spindle, socket, and set screw which make the defendants' handle adjustable are not the dovetail grooved seat on the face of the head, with its slide carrying the handle bar, of the Illston patent. Taking the Illston patent to mean what it says, and construing it in the light of the prior state of the art, I am clearly of opinion that no case of infringement has been made out.

It is unnecessary to consider the second ground of defense.

Bill dismissed.

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### THE DAVIDSON.

(*District Court, E. D. Wisconsin. January, 1880.*)

#### **SEAMEN—SALVORS—PRIORITY OF LIENS.**

It is the duty of seamen to remain by the wreck of a vessel so long as their personal safety will permit, and save as much as possible from the vessel; and when they have done so the fragments of the vessel, and the outfit saved, constitute a fund pledged for payment of their wages, superior to the claim of the salvors.

In Admiralty. Libel by seamen for wages. Intervention by salvors. Decree for libelants.

The facts in this case, as shown by the pleadings, were these: On the 15th day of October, 1879, the schooner Davidson left Chicago on a voyage to northern ports on Lake Michigan. The libelants shipped on board as seamen. On the next day the vessel was stranded on Pilot Island reef. On request for assistance from the master, Wolf & Davidson, of Milwaukee, dispatched the tug Leviathan with steam pump and other apparatus to the relief of the vessel. Efforts were made to get the vessel off, and were continued until November 26th, but unsuccessfully. From the time the vessel was stranded until exertions to relieve her were abandoned, libelants continued on board. On the 25th day of November, the master of the tug, being convinced that the vessel could not be relieved, deemed it advisable to save her outfit, consisting of boats, tackle, rigging, apparel, and furniture, and ceased his efforts in behalf of the vessel. Thereupon the master and crew of the tug, with the assistance of the crew of the vessel, removed the vessel's outfit to the tug, and brought it, together with the master and crew of the vessel, to the port of Milwaukee. Libelants were then discharged, but were not paid their wages, and thereupon libeled the outfit. Decree was rendered in their favor, the outfit sold, and the proceeds were paid into the registry of the court. Thereupon the owners of the tug intervened by petition, as salvors, insisting that their claim for salvage service was prior to that of the seamen, and asked for payment as having the prior right to the proceeds of sale.

*Markhams & Smith*, for seamen.

*M. C. Krause*, for salvors.

DYER, District Judge. The seamen were not discharged from the obligation of their contract of service by the happening of disaster to the vessel. It was their duty, so long as their personal safety permitted, to remain by the wreck, and save as much as possible, and upon compliance with this obligation the fragments of the vessel constituted a fund pledged for payment of their wages; but upon abandonment by them of the wreck the contract between them and the owner of the vessel would be dissolved, and they would then lose their privilege against the vessel, and their claim for wages. As libelants remained by the wreck, and did not abandon it until the outfit was removed, their right to wages and their lien continued in force. Under the circumstances of the case the wages earned while they remained on board, and until the vessel was finally abandoned, did not constitute antecedent wages, in a sense which would postpone them to the claim of the salvors, and the proceeds of the outfit must be first applied to payment of their demands, although it would have been otherwise had they abandoned the wreck before the salvage service was begun.

## ERQUIT v. NEW YORK &amp; CUBA MAIL S. S. Co.

(District Court, S. D. New York. April 18, 1892.)

## SHIPPING—NEGLIGENCE—IMPROPER HATCH COVER—PERSONAL INJURIES.

Owing to the warping of their supports in hot weather, the hatch covers of a ship did not fit tightly over the hatch, which fact was unknown to libelant, who had recently shipped as sailor on such ship. In consequence of such defect, as libelant was, under orders, covering the hatch, one of the covers fell, precipitating libelant into the hold. *Held*, that the ship was liable for his injuries.

In Admiralty. Libel for personal injuries.

*Alexander & Ash*, for libelant.

*Charles C. Nadel* and *Mr. Moore*, for respondent.

BROWN, District Judge. On the 28th of September, 1891, about 5 o'clock P. M., as the libelant, who was an able seaman on the steamship *City of Washington*, at Tampico, was putting on the hatch covers for the night upon the main deck, with three other seamen, under the direction of the boatswain, he fell through the hatch into the lower hold and sustained some injuries, for which the above libel was filed.

The hatch was covered by means of 9 covers, 3 rows of 3 covers each. Two strong-backs, consisting of beams 15 feet long by 6 inches wide and 12 inches deep, ran lengthwise of the ship to serve as the interior supports of the hatch covers. The 3 covers on the port side were first put in place, then the 2 forward covers in the middle row. To sustain these covers a ledge, or rest, was cut in the strong-backs about an inch and a half wide, upon which the covers were designed to rest. The libelant had stepped upon the middle cover of the second row, and had taken hold of the ring of the aft cover to put it in place in that row, when the port side of the middle cover fell in underneath the libelant, and the cover went down with him into the hold, while the other cover followed on top of him. The libelant claims that the middle cover on which he was standing was apparently put in the proper place; but that the port beam, or strong-back, had been warped and bowed to port in the middle, so that the port edge of the central cover did not get proper support and fell in under his weight.

The respondents contend that the accident could not have happened in that way. They gave evidence tending to show that there could not possibly have been less than half an inch of support for the cover upon the port ledge, if the cover was down in its proper place, even if the cover was shoved over to starboard to the utmost limit possible. They also gave evidence tending to show that the starboard beam or strong-back was warped or bowed to port, to the same extent as the port strong-back, so as not to increase the space between those two beams. They contend, therefore, that the cause of the accident was that the middle cover was not put down in place. Other evidence shows, however, that the spaces for the covers were affected considerably by wet or dry weather. Not infrequently when wet, the covers on the port

side of the hatch had to be beaten down, because they fitted so tightly. Several witnesses besides the libelant have testified that the middle covers were carefully put down in their proper places before the libelant stepped upon them. Some unfilled space was noticed along the port edges, but no opening beneath.

I see nothing to warrant the rejection of the explicit testimony of these witnesses that the covers were in place. A considerable time elapsed between the accident and the time when the careful measurements were taken by the witness Weeks, above referred to. The accident happened in Mexico, in a hot climate, at the end of the summer season, when the covers and the beams would have been subjected seemingly to the utmost possible influence of long-continued dry weather, such as would shrink the covers to the utmost; while any shrinkage of the beams, if there was any, would also enlarge the hatch openings. The measurements testified to were made here in midwinter, and under opposite conditions. I must accept the facts, therefore, as sworn to in this particular by the libelant's witnesses.

The libelant was without fault. He was new to the ship; he was not acquainted with the imperfect fitting of the hatch covers; and he was putting them on for the first time, under the direction of the boat-swain, who hurried him in his work. The libelant is, therefore, entitled to recover his actual damages.

He was confined to his bunk for four days. After that he came upon the deck more or less, but was unable to work. On arrival in New York he went to the Marine Hospital, where he remained 39 days, and was then discharged. His own physician testifies that he finds evidence of a thickening of the pleura, which the respondent's expert testifies could only proceed from acute pleurisy. If he suffered any such acute attack, it must have been very short. All are of the opinion that, after a few months more, the libelant will be practically well; though a difference remains as to the thickening of the pleura, and its necessary consequences. Looking at all the circumstances, I think \$750 will be a reasonable allowance for his injuries; for which a decree may be entered, with costs.

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#### THE OSCEOLA.

#### THE NANNIE LAMBERTON.

#### EMERY v. THE OSCEOLA AND THE NANNIE LAMBERTON.

*(District Court, S. D. New York. April 14, 1892.)*

#### **COLLISION—NARROW CHANNEL—TIDE—RIGHT OF WAY—WHEN DUTY TO STOP.**

Where two tows are approaching each other in a narrow channel in such wise that by continuing on they will meet at a point where it is difficult and dangerous for them to pass, it is the duty of the tow going against the tide to stop before reaching such difficult point, and wait for the other tow to go by her.

In Admiralty. Collision between tows.

*Hyland & Zabriskie*, for libelant.

*Carpenter & Mosher*, for the Nannie Lamberton.

*Benedict & Benedict*, for the Osceola.

BROWN, District Judge. At about 9 o'clock in the evening of September 12, 1891, a collision occurred between the tow of the tug Nannie Lamberton, going up the Hudson river with the flood-tide, and the tow of the tug Osceola, coming down river, by which the libelant's canal-boat, the Nell Stone, sustained damages, to recover which the above libel was filed.

The collision occurred in the narrow channel-way about 400 feet wide, between the "Stone Light," so-called, on the west side of the Hudson river a fifth of a mile above Van Wie's point, five miles south of Albany, and the opposite ledge of rocks buoyed in mid-river, which there forms the easterly line of the channel. The Lamberton's tow consisted of about 30 boats, 3 or 4 abreast, towed by 2 hawsers, each about 90 fathoms in length. The libelant's boat was the extreme port boat in the third tier. The tow of the Osceola consisted of 3 barges in the front tier, in all about 92 feet wide, with 37 canal-boats in 9 tiers behind, towed upon hawsers about 100 fathoms in length. The port barge of the forward tier was loaded with lumber, and struck the libelant's boat about amid-ships on her port side. The lights of the two tows were seen by each other when about a mile and a half apart, the Lamberton then being about off Staats, about a mile below the light, and the Osceola about 3,000 feet above the light, where there was at that time a government drill occupying a part of the channel-way. There is a straight reach of about half a mile from the Stone light up towards the drill, with a channel-way 300 or 400 feet wide, of sufficient depth for such tows as these. In going up the channel-way boats turn a little to port in passing Staats, then a little to starboard in going between the light and the buoyed rocks.

It is not often that tows meet in that vicinity. Between Van Wie's and the drill the channel is unfavorable for tows to meet and pass. The strong weight of evidence, moreover, is that the meeting and passing of tows abreast of the light, or abreast of the drill, must by some means be avoided as dangerous; though some rare instances are mentioned in which tows have passed there without damage. The nearly unanimous testimony of the witnesses is also that in order to avoid meeting or passing at either of those places, the tow going against the tide should stop and wait above the drill or the light in order to allow the tow going with the tide to pass. This is in accordance with the usual and well-established rule as to the right of way in such cases.

The Osceola had already reached the drill when she saw the Lamberton a mile and a half below, off Staats. It was not proper for the Osceola to stop and wait at the drill by dropping back; and she, therefore, properly pulled ahead till her tow passed the drill. The Lamberton, recognizing the Osceola's situation, stopped her engine when a little above

Staats and drifted in the flood-tide, in order to give the Osceola's tow time enough to pass the drill, but expecting that she would stop in the straight stretch between the drill and the light. When the Osceola's tow had passed the drill, the pilot of the Lamberton gave a signal of one whistle, and the Osceola answered with one; the Lamberton thereupon started ahead, and the tows met abreast of the light, as above stated.

It was the duty of the Osceola to stop before reaching the light. Her answer was evidently drawn in recognition of that duty, for it avers that the "Osceola continued on her course slowly till she had passed" the drill "and then *stopped* to let the Lamberton pass," but that she continued on after seeing that the Lamberton had stopped. The evidence, however, shows that the Osceola did not stop before she reached the light, but kept on till she reached a point near the shore 600 or 700 feet below the light, although before she reached the light the Lamberton's whistle was heard and answered. The captain says he could have stopped before he reached the light had he chosen to do so. When the Osceola came to a stand-still, about 600 or 700 feet below the light, the forward tier of her tow was between the light and the buoy. There were two other tugs abreast of the Osceola assisting her, and all their officers testify that the tug on the westerly side when she came to a stand-still was actually aground, and that the three tugs were close along-side of each other; that the barges were apparently directly astern, and the tow in line. The Lamberton in coming up passed the three tugs at about the time they came to a stand-still and at a good distance from them, heading somewhat over towards the easterly side of the channel-way, and she passed, as I find upon her testimony, as near to the buoy on the rocks as was proper or safe.

The Lamberton's tow while she stopped and drifted had become somewhat irregular. Her witnesses, however, say that before passing the Osceola's tow the Lamberton's tow had got straightened up; and no witnesses for the Osceola testify to any irregularity in the line of the Lamberton's tow as she approached them before collision. The tug Ronan was on the Osceola's port side. Her pilot testifies that the forward tiers of the Lamberton's tow passed some little distance away from the Ronan, heading a little across the stream to the eastward. This accords with the testimony of the pilot of the Lamberton, that he went as near the buoy as possible; and unless that was substantially true, I do not see how that heading of the tow could have been given to it and maintained. The last four or five tiers of the Lamberton's tow, however, rubbed along against the Ronan, while the port side of the libellant's boat in the third tier collided with the Osceola's barge 600 feet above.

There seems to be no dispute concerning most of the above facts, except as to the distance at which the Lamberton passed the buoy. No explanation of the collision consistent with them has been offered, except that of the witnesses Noble and Atherton, in behalf of the Osceola, who testify that it is dangerous to pass abreast of the light, because the flood-tide sets towards the light, and if the tow going up with the flood gets any swing to the westward, it is impossible to stop it. This account for

the fact that the latter half of the tow rubbed along against the Ronan, while the front went well clear, heading to the eastward, as well as for the continued set of the forward tiers towards the westerly shore, notwithstanding the fact that the Lamberton was doing all she could to prevent it, and that the boats were heading somewhat across to the eastward.

Another circumstance tending to explain the collision appears in the testimony of Atherton. He was the pilot in charge of the tug Hazel Dell, a helper of the Osceola, who says that after passing the drill, he came along the east side of the Osceola's tow for the purpose of keeping it close to the dike; and that while doing so, he was hailed by the tow on the other side not to push any further or they would be on the dike. But he also testifies that he heard the crash of the collision, that he immediately went to it, and that he *worked his way* through on the east side by *shoving over the forward boats* of the Osceola's tow towards the westerly shore. He also says that some boats of the Lamberton's tow drifted *over the buoy*. These circumstances show that whatever may have been the position of the middle or tail-end of the Osceola's tow, the forward tier which struck the libellant's boat had not been over on the westerly side of the channel, as is claimed by the respondent, and that the Lamberton's tow must have been near the buoy. The force of the blow would have tended to set the barges somewhat towards the westerly shore before the Hazel Dell came up; yet when she arrived, she shoved them over further yet.

The captain of the Osceola claims that nothing was added to the difficulty of the Lamberton's tow in passing his own tow, by going, as he did, a few hundred feet below the light before stopping, although that brought the forward tier of his tow abreast of the light; because, as he says, there was quite as much breadth of water abreast of the light as above it. According to other testimony, however, the difficulty there is not alone in the narrowness of the channel-way, but also from the bend in the channel, and in the set of the flood-tide towards the light; so that it is difficult, if not impossible, to go around the buoyed rocks without swinging the tail of the tow to the westward. This must have been well known to the Osceola; and for this reason, according to the great weight of the testimony, the Osceola should have stopped before reaching the light. This accords not only with the implication of the Osceola's answer, but with the expectation and the signal of the Lamberton. After the Lamberton's tow coming up had passed the light and got into the straight reach above it, there would be no further swinging of the tow; and a straight course and a safer passage would become practicable, though the channel was no broader than abreast of the light.

Had the Osceola stopped before she reached the light, her tow could have laid just as easily between her and the drill, and with much less danger of collision. On the weight of testimony upon this point, and the captain's statement that he could have made this stop had he thought best, I must find that it was his duty to do so, under the rule that gives the right of way to the vessel going with the tide. He could have done this, as he says, after the exchange of signals and after he saw

that the Lamberton had resumed her forward motion. The answer of one whistle that he gave her imported, under the circumstances, the same duty. It was an acquiescence in her coming forward; and in doing so she had the right of way. Had he wished not to acquiesce, he should have given several short blasts to indicate it; and in agreeing to the Lamberton's coming on, it was his duty to stop in the safer place above the light. The Lamberton, having the right of way, was not required to wait longer below drifting upwards, even if she could have safely done so, which is at least doubtful; the evidence on that point is hardly sufficient to form a certain judgment.

As I do not find the Lamberton, therefore, in fault, the libellant is entitled to a decree against the Osceola only, with costs; and as against the Lamberton, the libel should be dismissed, with costs.

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### THE PHOENIX.

### THE ATLANTA.

### ROGERS v. THE PHOENIX and THE ATLANTA.

(District Court, S. D. New York. April 20, 1892.)

#### COLLISION—FOG—STEAM-VESSELS CROSSING—DELAY IN BACKING.

The steam-lighter P., in a fog, light above but thick near the water, saw at a considerable distance the smoke-stack of the tug A. crossing her course, and somewhat on her starboard hand, and knew by the signals of the A. that she had a tow. Nevertheless she did not reverse until the A.'s tow appeared through the fog, 50 feet away. Held, that such delay fixed upon the P. the blame for the collision which ensued, and that the A., being in doubt as to the P.'s course, was justified in reversing under rule 21, even though going on might have avoided the collision.

In Admiralty. Libel for collision.

*Buller, Stillman & Hubbard and Mr. Cromwell*, for libellant.

*Gherardi Davis*, for the Phoenix.

*Goodrich, Deady & Goodrich*, for the Atlanta.

BROWN, District Judge. On the 23d of December, 1891, the libellant's canal-boat was taken in tow at the Morris canal basin, Jersey City, by the steam-tug Atlanta, to be towed to the Atlantic basin, Brooklyn. The canal-boat was the outer of two boats on her port side, there being another boat on her starboard side. The morning was foggy, and after waiting about an hour at the mouth of Morris canal basin, the fog lifted and the Atlanta started on her way. When less than half way across the North river, the fog shut down again somewhat thick near the water, but much less higher up. Shortly afterwards the libellant's barge was struck a little forward of amid-ships by the stem of the steam lighter Phoenix which was on her way from pier 1, North river, to Communipaw.



After the fog shut down the Atlanta proceeded slowly under one bell, and her pilot testifies that the hull of the Phoenix, as well as her mast, became visible at a considerable distance. The Atlanta was a little on the starboard hand of the Phoenix. Fog signals indicating a tow had been regularly given by the Atlanta, and an additional signal of one whistle was given to the Phoenix when she was seen at a sufficient distance to keep away, which the Phoenix answered with one whistle. Afterwards the pilot of the Atlanta, seeing that the Phoenix was not keeping away, but kept coming towards him, reversed when some 200 or 300 feet distant. The Phoenix was but one-third loaded, and after the fog shut down upon her in mid-river she also slowed.

The evidence leaves no doubt that the Phoenix had timely notice of the Atlanta's presence with a tow a little on her starboard hand, and that she saw the smoke-stack of the Atlanta in abundant time to have avoided her, as it was her duty to do, either by going to starboard, or by stopping and reversing. She delayed reversing, according to her own pilot's testimony, until the canal-boat came in sight not over 50 feet distant. This delay fixes the blame upon the Phoenix. The Atlanta, seeing that the lighter kept coming towards her, reversed as was her duty under the old twenty-first rule. Had she kept on, she might possibly have cleared; but that is not enough to charge her with fault. She did not know and could not tell, what the Phoenix was doing, or why she did not keep away in accordance with the previous exchange of signals. There was no such clear case as justified or required the Atlanta to disregard the twenty-first rule. The error, if any, was an error of judgment *in extremis*, brought about by the previous fault of the Phoenix.

Decree for the libelant against the Phoenix; and for the dismissal of the libel against the Atlanta, with costs.

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### THE HAVILAH.

#### PRATT v. THE HAVILAH.

(Circuit Court of Appeals, Second Circuit. January 18, 1892.)

#### 1. COLLISION—SAILING VESSELS MEETING—FREE AND CLOSEHAULED COURSES--LIGHTS.

A brig and a schooner approached each other on a clear night, the brig sailing free on a course W.  $\frac{1}{4}$  N., and the schooner closehauled on an E. by N. course. On conflicting evidence the court found that the schooner held her course, except for a luff *in extremis*, continually exhibiting to the brig her green light, and that the red light of the brig was seen on the schooner's starboard bow some time before the collision. The brig collided with and sank the schooner. Held, that it was the duty of the brig, sailing free, to have avoided the schooner, sailing closehauled, and for her failure so to do the brig was in fault.

#### 2. DAMAGES—EXPENSE OF RAISING SUNKEN VESSEL—WHEN NOT ALLOWED.

The mere fact of a vessel's sinking by reason of a collision is not sufficient to warrant a finding that she and her cargo are a total loss; and where it appears probable that they may be raised without much expense, and the vessel repaired, owners are not allowed to insist upon damages, as for a total loss, when they have

not employed reasonable measures to mitigate the loss. But when a vessel worth \$3,800 was sunk in deep water, and was afterwards raised at a cost of \$1,900, and repairs were put upon her to the extent of \$3,800, *held*, that the wrongdoer was liable only for the value of the ship, cargo, freight, and personal effects on board before the collision.

83 Fed. Rep. 875, reversed.

In Admiralty. Appeal from the circuit court of the United States for the southern district of New York, affirming *pro forma* a decree of the district court for said district. The latter court held the brig Havilah solely in fault for the collision, and claimants appealed. Modified.

*Henry D. Hotchkiss* and *Robert D. Benedict*, for appellants.

*Henry Arden*, for appellee.

Before WALLACE and LACOMBE, Circuit Judges.

LACOMBE, Circuit Judge. On the morning of December 9, 1887, a collision occurred in Long Island sound, a few miles to the westward of Faulkner's island light, between the libelant's schooner, Helen Augusta, and the brig Havilah. The schooner was sailing before the collision, by the wind, on a course about east by north on the port tack, the wind being about north-northeast; the brig was sailing west-half-north, having the wind free. The vessels sighted each other just at the break of dawn, the breeze was moderate, the weather clear and good for seeing lights, and both vessels had their regulation lights burning. The brig struck the schooner on the starboard side, a little forward of the mainmast, and she went down soon after. The district court held the brig solely in fault for the collision. This decision was affirmed in the circuit court, and the claimants have appealed to this court.

We have reached the same conclusion as the district judge on this branch of the case, but the facts are so elaborately and carefully discussed in his opinion that it is unnecessary to rehearse them. As the brig was sailing free, and the schooner closehauled on the wind, the former is to be held responsible unless the collision was brought about by inevitable accident or by some fault of the schooner. Of inevitable accident, there is no suggestion. It is claimed, however, that the schooner changed her course to the northward and thus misled those who were in charge of the navigation of the Havilah, and that this change was made, not *in extremis*, when collision was inevitable, but was itself the cause of the collision, which but for such change would not have happened. The witnesses for the schooner insist that no such change was made; that they saw the brig's red light for several minutes before the collision off the schooner's starboard bow, and apprehended no collision until the brig came near, supposing the latter would avoid her. If the course of the schooner and the bearing of the brig were as testified to by libelant's witnesses, the brig could at no time have seen the schooner's red light, and, as a persistent green light would have indicated a sailing vessel hauled on the wind, it would be the brig's duty to avoid her. This testimony is flatly contradicted by the second mate and the lookout of the brig, who insist that they first saw the red light of the schooner, and then, after a brief interval when no lights were seen, her green one.

The testimony of the opposing witnesses is wholly irreconcilable. Error in those called from the brig, who did not see the light continuously, may be accounted for on the supposition that they mistook some other red light for that of the schooner; but if the evidence of those called from the schooner, who insist that they watched the brig's lights continuously till the time of collision, is false, it must be a deliberate fabrication. We concur with the district judge in believing that the schooner's witnesses told the truth when they asserted that, down to the time of collision, she exhibited to the brig only her green light; and that, except for a luffing up in the very jaws of the collision, there was no change of the schooner's course. For the resulting catastrophe, therefore, the brig is solely responsible.

There remains a question as to what is the measure of damage. There was a wide difference between the estimates of the witnesses who testified before the commissioner to the schooner's value before the collision. The weight of unbiased evidence, however, is strongly in support of his finding that her value then was \$3,800. Her cargo was coal, worth about \$1,200. She was 22 years old, and sank 2 minutes after collision, in the open sound in 100 feet of water. The libel alleges that she became a total loss. After the decision of the district judge, hearings began before a commissioner to take proof of damages, and proceeded till eight witnesses had been examined by the libellant, touching the value of the vessel before collision, on the theory of a total loss. Then, in April, 1888, four months after collision, libellants finally decided to raise her; an operation, which as his counsel testified, "involved much difficulty and hazard." After one wrecking company had declined to undertake it, they employed another, at an estimated price of \$1,800 to \$2,000, to do the work. Thereupon, but without giving any information as to such estimate or refusal, libellants' counsel, at one of the hearings before the commissioner, asked claimants' counsel to stipulate that the vessel was a total loss, which the latter declined to do. The vessel was raised by libellants at a cost of \$1,900. Her value when raised was from \$1,100 to \$1,200, and such of the cargo as was raised sold in its damaged condition for \$275. Libellants thereupon placed the vessel in the hands of a ship-builder near New Haven, without limit as to price, to be repaired and put in as good condition as she was before. The repairs cost \$6,800. They claimed the cost of raising and of the repairs, with freight, demurrage, value of cargo, (less \$275,) and personal effects, with interest on the several items. The commissioner allowed their claim, except that he reduced the repairs to \$3,850, the value of the vessel before collision. The district court disallowed the demurrage, and adopted the commissioner's recommendations as to the other items. Claimants insist that they should be held only for the value of schooner, cargo, freight, and personal effects before collision. We think that is the correct measure of damage. It is no doubt true that the mere fact of sinking is not sufficient to warrant a finding that vessel or cargo is a total loss, (*The Baltimore*, 8 Wall. 377; *The Bristol*, 10 Blatchf. 537; *The Thomas P. Way*,

28 Fed. Rep. 526;) and where it appears probable that they may be raised without much expense, and the vessel repaired, owners are not allowed to insist upon damages, as for a total loss, where they have not employed reasonable measures to mitigate the loss. So, too, allowance has been made for the cost of raising the sunken vessel, even though she was not subsequently repaired, when it was necessary to raise her in order to ascertain whether she should be abandoned as a total loss or not, and also whenever the owner is required to remove her as an obstruction to navigation. *The Empress Eugenie*, 1 Lush. 139; *The Venus*, 17 Fed. Rep. 925; *The America*, 11 Blatchf. 485; *The Nebraska*, 3 Ben. 261; *The Mary Eveline*, 14 Blatchf. 497. But in these cases the vessels were sunk in rivers or harbors or comparatively shallow water. None are cited or have been found where, under circumstances similar to those in the case at bar, it has been held incumbent upon the owner to go to any expense for the purpose of raising her. *The Columbus*, 3 W. Rob. 161; *The Falcon*, 19 Wall. 75; *The Franconia*, 16 Fed. Rep. 153; *The Scow*, 8 Ben. 181. It is true that the averment in the libel that the schooner and cargo were a total loss was controverted by the answer; but upon the issue thus raised the proof in this case falls far short of that which in *The Baltimore*, *supra*, was held to warrant the conclusion that vessel and cargo might be raised without much expense. A wrongdoer who has struck and sunk a vessel in deep water must show a very different case from this before he can insist that the duty of raising her should be imposed on her owners. Nor did the refusal of claimants' counsel to stipulate that she was a total loss change the situation. Whether they would or would not abandon was for the owners of the ship to determine. Their knowledge of the true value of the ship, and of the estimated cost of raising her, supplied them with information material to the determination of that question, which was not in the possession of the other side, who by the request to stipulate were challenged to determine as to facts not known to them. The decree of the circuit court should be reversed, and the case remanded to that court, with instructions to enter a decree for the libelants for the value of ship, cargo, freight, and personal effects, as found by the commissioner, with interest from December 14, 1887, the date of the probable termination of the voyage, and costs of the district court. Disbursements of the circuit court and costs of this court to the claimants.

PENNSYLVANIA R. CO. v. WASHBURN *et al.*

(District Court, S. D. New York. March 26, 1892.)

**DAMAGES—INJURY TO VESSEL—DUTY TO PREVENT SUBSEQUENT INCREASE OF DAMAGE.**

A canal boat sank at low water at defendants' wharf by their fault, and careened on her side at about 4:45 A. M. The tide began to rise about 6 A. M., and before the cargo was removed some portions of it were damaged. There had been men on the dock before the tide began to rise, but as they demanded double the ordinary stevedores' wages, their services were refused both by the master and the foreman of the libellant. *Held*, that the well-settled rule of the obligation of the ship to use all reasonable diligence after an injury to prevent subsequent increase of damages, should have led the master to employ help at once, even at advanced wages; and that the owners of the canal boat could not recover for such damage to the cargo as might have been saved by employing such labor.

In Admiralty. On exceptions to commissioner's report.

*Robinson, Bright, Biddle & Ward* and *Mr. Hough*, for libellants.

*Horace G. Wood*, for respondents.

BROWN, District Judge. Exceptions have been taken to the commissioner's report upon the damage caused by the sinking of the libellant's barge, F. A. Murphy, at respondent's wharf through the fault of the latter. The ground of exception is that at least a part of the loss is attributable to the negligence of the libellant's men, in not removing the cargo at once, before it was injured by the rise of the tide.

The canal boat sank at low water, and careened on her port side at about 4:45 A. M. The tide began to rise at about 6 A. M. It was half past 9 A. M. before the removal of the cargo was begun in earnest. During this interval a considerable portion of the cargo, which consisted of barrels of flour, hay in bales, and feed in bags, which was all on deck, and which had shifted to port as the boat careened, was wet and damaged by the rising tide.

Upon the conflicting evidence I am not satisfied that at low water when the boat careened, there was any such depth of water on the lower rail as three or four feet. Besides the contrary testimony of the claimants, there are other undisputed circumstances as to the amount of the rise of the tide, the depth of the water, the slant of the boat, and the work of the men in the water, which indicate that the port rail was not at low water submerged to that amount. But whether that depth of water was exaggerated or not, there can be no doubt that a considerable part of the cargo was damaged through the rise of the tide five feet up to high water a little before 11 o'clock.

Between 5 and 6 o'clock in the morning, some half a dozen men were on the dock willing to work, but demanding from 90 cents to \$1 an hour wages, the regular wages of stevedores being only 40 cents an hour. The captain declined to employ them in removing the cargo, because he considered the wages exorbitant; and also because, as he says, he considered the men loungers and untrustworthy. At 7:45 in answer to a telegram, one of the foremen of the libellant arrived, who set to work about eight men to unload the cargo. After working for about 10 minutes they demanded from 50 cents to 60 cents an hour, which the foreman declined

to pay, offering 36 cents to 40 cents; whereupon they all stopped work, except one man who continued with the master and mate of the canal boat and two others, until half past 9, when the libellant's barge Lamokin with 12 other men arrived, who went immediately at work. These 17 were all that could work advantageously.

I am of the opinion that the demand of the men to be paid extra wages was not a sufficient reason for permitting the cargo to be damaged by the rising tide. The situation was one somewhat analogous to that of salvage, in the need of immediate help to extricate the cargo from threatened danger. For great additional damage would manifestly ensue unless the cargo was speedily removed before the rising tide should cover it. There was no question of the master's authority, nor of the ordinary wages of stevedores in such a case. I cannot conceive that a man of reasonable prudence, looking after the interest of his own property, would hesitate a moment under such circumstances to employ any effective labor that was at hand, without regard to the rate of wages demanded, within any such limits as the present case presents. It was therefore, the reasonable duty both of the captain of the canal boat, and of the foreman when he arrived on the scene, during the four or five hours that elapsed after the canal boat careened until the Lamokin arrived, to remove all the cargo that was possible, and to accede to the price of wages demanded, if other timely help was not procurable. That the men should demand extra wages for such a service, I do not consider any evidence against their character, or their efficiency; on the contrary, I think they had a right to expect some extra compensation in such an emergency. The obligation to use all reasonable diligence after an injury in cases of collision, or other maritime torts, to prevent subsequent increase of damages, is well settled in courts of admiralty; and the rule at law is similar. *The Baltimore*, 8 Wall. 377; *Warren v. Stoddart*, 105 U. S. 224, 229; *The Thomas P. Way*, 28 Fed. Rep. 526; *The City of Chester*, 34 Fed. Rep. 429, 430; *Pettie v. Tow-Boat Co.*, 1 U. S. App. 57, 62, 49 Fed. Rep. 464; *The Havilah*, 1 U. S. App. 138, 50 Fed. Rep. 331.

It is impossible to determine precisely how much of the dry cargo was damaged that would have been saved by the employment of the men who were willing to work. As it was, 100 bales of hay and about 12 barrels of flour were removed dry. This was a little more than half of the flour, and about two-fifths of the hay. The feed and grain were all damaged. The unloading was completed at about 10 p. m. the same evening. The loss on the damaged portion as found by the commissioner was the sum of \$1,687.88.

Considering that the cargo could have been much more quickly handled before it was wet, and that so considerable an amount was removed dry with the few men employed before the tide rose, I am satisfied upon the evidence that had the men present and offering to work from the first been employed as they should have been, at least \$400 of the damage would have been saved. So much, therefore, with interest, should be deducted from the commissioner's report, which is in other respects confirmed.

## PATTEN v. CILLEY. (No. 1.)

(Circuit Court of Appeals, First Circuit. April 23, 1892.)

## 1. WRIT OF ERROR—DISMISSAL—FINAL JUDGMENT—REFUSAL TO REMAND.

The denial of a motion to remand a cause to the state court is not a final judgment or order, and the circuit court of appeals has no jurisdiction in error in such stage of the case.

## 2. SAME—COSTS.

On the dismissal of a writ of error, defendant in error is entitled to judgment for the costs arising on the motion to dismiss. *Bradstreet Co. v. Higgins*, 5 Sup. Ct. Rep. 880, 114 U. S. 262, followed.

Error to the Circuit Court of the United States for the District of New Hampshire.

On petition of William A. Patten, the will of one Matilda P. Jenness was admitted to probate in solemn form by the probate court of Merrimack county, N. H. Horatio G. Cilley, one of the heirs at law of the testator, took an appeal to the supreme court of the state; and he afterwards procured the removal of the cause to the circuit court of the United States on the ground that he was a citizen of Iowa, while plaintiff, Patten, was a citizen of New Hampshire. Patten's motion to remand the cause to the state court was refused, and he brings error. Writ dismissed.

For former report, see 46 Fed. Rep. 892.

*Harry Bingham, John M. Mitchell, and Frank S. Streeter*, for plaintiff in error.

*William L. Foster, Harvey D. Hadlock, and Daniel Barnard*, for defendant in error.

Before PUTNAM, Circuit Judge, and NELSON and WEBB, District Judges.

WEBB, District Judge. We think that there has been no final decision in the circuit court, and that this court has no jurisdiction in error in the present stage of the case. Under the decision of the supreme court in *Bradstreet Co. v. Higgins*, 114 U. S. 262, 5 Sup. Ct. Rep. 880, the defendant in error is entitled to a judgment for the costs arising on the motion to dismiss. It is accordingly ordered that the writ of error be dismissed, with costs for the defendant incident to the motion to dismiss, including any costs incurred by him in printing the record, and that a mandate issue forthwith.

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CLARKE v. CENTRAL RAILROAD & BANKING CO. OF GEORGIA *et al.*CENTRAL TRUST CO. OF NEW YORK v. COMER *et al.*

(Circuit Court, S. D. Georgia, E. D. May 14, 1892.)

## 1. RAILWAY COMPANIES—ILLEGAL CONSOLIDATIONS—TRANSFER OF STOCK—RIGHT TO VOTE.

The Ga. Co. of North Carolina acquired by purchase a majority of the stock of the Cent. R. Co. of Georgia, which it afterwards deposited with the Cent. Trust Co. of New York, and finally transferred to the Terminal Co., a system composed of several competitive lines of railroad. This company created a directory of the Cent. R. Co. to suit its purposes, which directory leased the Cent. R. R. to the R. & D. R. Co., a competing line. The lease was enjoined as contrary to Const. Ga. 1877, art. 4, § 2, par. 4, prohibiting the merger of competing corporations. The injunction order directed the election of a new board of directors for the Cent. R. Co., and provided that the stock of the company controlled by the Terminal Co. should not be voted in such election unless transferred in good faith. The stock in question consisted of 42,000 shares, 40,000 of which were those deposited by the Ga. Co. with the C. Trust Co. and transferred to the Terminal Co., and the remainder, 2,000 shares, acquired by the Terminal Co. from other sources. The Terminal Co. and the Ga. Co. filed a paper relinquishing to the Cent. Trust Co. any right they might have to vote such stock. *Held*, no interest in the stock appearing in the Cent. Trust Co., other than that of a mere stakeholder, that the relinquishment in question did not entitle it to vote.

## 2. SAME—INCAPACITATING TRUST.

The Cent. Trust Co. was also incapacitated to vote such stock by the fact that it was trustee for a large amount of indebtedness of the Cent. R. Co., and, besides, its charter apparently gives no such power.

## 3. SAME.

The Cent. Trust Co. was unfit to be intrusted with the voting power in question because of the fact that its president, a financial expert, was engaged in an attempt to bring about a merger of the Cent. R. Co. with competing lines of railroad in the state of Georgia, and place them under the sole control of the Terminal Co., contrary to the constitution of the state.

## 4. SAME—COMITY BETWEEN THE STATES.

Comity between the states will not authorize a foreign railroad corporation to exercise powers within the state which a domestic corporation would not be permitted to exercise under the constitution and policy of the state.

## 5. SAME—COMPETING CORPORATIONS—ACQUISITION OF STOCK.

The fact that the charter of the Cent. R. Co., granted before the adoption of the constitution of 1877, permitted municipal corporations to purchase its stock, would not authorize a competing corporation to acquire such stock after the adoption of the constitution.

## 6. SAME—DISQUALIFYING INTERESTS.

The fact that the Terminal Co. has no appreciable interest in the stock of the Cent. R. Co., because of a mortgage on the railroad executed by the Terminal Co., does not remove the objection to its voting in person or by representative in the election of the directors of that railroad company, in view of the fact that it has large pecuniary interests in two directly competing lines of railroad.

In Equity. Bill by Rowena M. Clarke against the Central Railroad & Banking Company of Georgia and others, and bill by the Central Trust Company of New York against H. M. Comer, receiver, and others. Motion by the Central Trust Company to modify an interlocutory decree. Motion denied.

*Butler, Stillman & Hubbard* and *H. B. Tompkins*, for the motion.

*Lawton & Cunningham*, *Denmark*, *Adams & Adams*, *Daniel W. Rountree*, *Marion Erwin*, and *A. O. Bacon*, opposed.

SPEER, District Judge. It is essential to a clear understanding of the questions involved in this motion that a brief statement be made of the



proceedings heretofore had in the equity cause in which the motion is presented. It is also essential to direct attention in the outset to paragraph 4 of section 2, art. 4, of the constitution of the state of Georgia. This clause of the constitution is as follows:

"The general assembly of this state shall have no power to authorize any corporation to buy shares or stock in any other corporation in this state or elsewhere, or to make any contract or agreement whatever with any such corporation, which may have the effect, or be intended to have the effect, to defeat or lessen competition in their respective businesses or to encourage monopoly; and all such contracts and agreements shall be illegal and void."

The constitution in which this clause is found was adopted in the year 1877. It was evident at that time, and has become more plainly evident since then, that it was indispensable, by comprehensive and imperative enactments of fundamental law, to arrest the tendencies of corporate bodies towards abnormal and destructive aggregations of power; tendencies which could not have been foreseen, and which therefore had not been restricted and limited by the legislation of the past; tendencies which endanger the salutary purposes for which such corporations were created by the state, and which threaten to inflict upon vast multitudes of the people the most destructive injustice and injury,—injustice and injury against which it is obviously the duty of the government to afford them protection. It would be perhaps difficult to express in such narrow compass a restriction of corporate power more conclusive in its inhibitory effect, or more difficult to evade by those who for any motive would seek to avoid its legal force. *Langdon v. Branch*, 37 Fed. Rep. 449; *Hamilton v. Railroad Co.*, 49 Fed. Rep. 412. The original bill and interventions filed in this cause seek to apply to the facts of the case the legal effect of this constitutional provision, and, further, to invoke the doctrine following, announced with great force and clearness by Mr. Justice GRAY in the supreme court of the United States in the case of *Central Transp. Co. v. Pullman's Palace Car Co.*, 139 U. S. 46, 11 Sup. Ct. Rep. 489:

"A contract of a corporation which is *ultra vires* in the proper sense, that is to say, outside of the object of its creation as defined in the law of its organization, and therefore beyond the powers conferred upon it by the legislature, is not voidable only, but wholly void and of no legal effect. The objection to the contract is not merely that the corporation ought not to have made it, but that it could not make it."

Further:

"That the lease by one corporation of its property and franchises to another corporation is unlawful and void, because beyond the corporate powers of the lessor, and involving an abandonment of its duty to the public."

It appears from the record before the court that on or before the 30th day of May, 1887, certain persons formed a design to obtain control of a majority of the capital stock of the Central Railroad & Banking Company of Georgia. While this company has assets amounting to many millions of dollars, its capital stock is only \$7,500,000. For the purpose of retaining an exemption from state taxation granted by the original charter the capitalization of the stock had been preserved at that com-

paratively low figure. From this fact it became relatively an easy matter to obtain a majority of the stock bearing the voting franchise. To accomplish this purpose, D. Schenke, Samuel H. Wiley, and Thomas B. Keogh organized, or attempted to organize, at High Point, in North Carolina, a corporation bearing the significant name of "The Georgia Company." The charter was granted by the clerk of the superior court of Guilford county, and the business of the company was, as therein stated, "to purchase, acquire, and to hold, or guaranty, to indorse the bonds or stocks of any railroad company in this or any adjoining state; to lease any railroad in this or any adjoining state; to engage in the business of transportation, and to operate railroads in this and adjoining states; to aid any railroad company in this or any adjoining state; 'except building any railroad,' which is forbidden in said statute." The charter does not appear to have any validity. See St. N. C. Acts 1885, p. 70. This appears to be both a banking and railroad corporation, and such corporations can be created by the legislature only.

It appears, however, that the persons mentioned in the original bill, who had bought about 40,000 shares of the stock of the Central Railroad & Banking Company of Georgia, turned over their entire holding to said Georgia Company; and it was further stipulated and agreed that this stock should be held in a block, with the view to permanently control the management of the Central Railroad and its properties. Thereafter it appears that the Georgia Company deposited with the Central Trust Company of New York its entire holding of this stock, and had issued thereon and sold to the public four millions of the bonds of said Georgia Company. In the mean time, by virtue of its majority control, it had taken charge, through a president and board of directors elected in the main by this block of stock, of the Central Railroad & Banking Company of Georgia. Thereafter the Georgia Company transferred all of its capital stock to the Richmond & West Point Terminal Railway & Warehouse Company. This latter company thus came into control of the Central Railroad & Banking Company. It also had control of the Richmond & Danville Railroad Company, and of the East Tennessee, Virginia & Georgia Railway Company, both of which are directly competitive lines of the Central Railroad & Banking Company. The Terminal Company (as we shall call it for the sake of brevity) now put out, through the Central Trust Company of New York, a large issue of its bonds, secured by a mortgage deposited with the Central Trust Company, on its stock holdings, in all the properties under its control.

With reference to the 40,000 shares of stock of the Central Railroad deposited with it as collateral to secure the bonds of the Georgia Company, it was stipulated in the mortgage that whenever the Terminal Company presented a bond of the Georgia Company the Central Trust Company should issue in lieu thereof a bond of the Terminal Company. Two millions of the bonds of the Terminal Company were left on deposit with the Central Trust Company, with the avowed purpose of procuring by the use of said bonds the 32,000 shares of stock of the Central Railroad, which had not yet been secured by the Terminal Company or the pro-

moters of the scheme to possess and control the Central Railroad & Banking Company of Georgia. The Central Trust Company thus became the trustee for this mortgage, a salient feature of which was the design to compass the absolute and undivided ownership of the Central Railroad by a company controlling rival lines, largely by means of the use which had been made of a majority of its stock held in a block by this contract or voting trust, apparently a corporate purpose to obtain \$3,200,000 in stock of a company it controlled for \$2,000,000. The Terminal Company had obtained elsewhere 2,200 shares of stock, which it likewise deposited with the Central Trust Company; and with regard to all of this stock, thus deposited, it was stipulated by the promoters of the scheme that its voting power should be retained by the Georgia Company, and afterwards, when the Terminal Company absorbed that, by the latter. By means of this voting power the Terminal Company was now the master of the destinies of the Central Railroad, and its president and board of directors had become a directory which was in the control of the Terminal Company, and, if need be, removable by it. In pursuance of the scheme, this directory on the 1st day of July, 1891, leased for 99 years the Central Railroad & Banking Company of Georgia, and all of its property, nominally to the Georgia Pacific Railroad Company, but really to the Richmond & Danville Company, both of which were under the control of the Terminal Company, which now directed the operation of all the Central properties, with the most disastrous results to the immense and vital system of which it had thus become possessed. This lease and the proceedings of those in charge of the control of the Central Railroad & Banking Company are attacked by the original bill. A temporary receiver was appointed. While this officer was proceeding to take possession of the assets of the Central Railroad & Banking Company the Georgia Pacific and Richmond & Danville Companies threw up the lease, and formally abandoned the possession of all the properties. At the hearing of the rule to show cause why the injunction prayed for should not be granted, and the receiver appointed, after an investigation lasting through several days, the court (Judges PARDEE and SPEER presiding) granted an interlocutory order appointing receivers to take charge of the properties and assets of the Central Railroad & Banking Company, and all subsidiary railroads and steamship companies. The order directed an election for a board of directors to be held on the 16th day of May, 1892, and it enjoined the Central Railroad & Banking Company from receiving the vote of the 42,200 shares of stock controlled by the Terminal Company, and held by the Central Trust Company of New York. It provided, however, that, in case there should be a transfer of that stock in good faith, it might be voted, provided that the court approved the genuineness and legality of the transfer.

The proceeding now before the court is brought to have that order modified, so that the stock may be voted by the Central Trust Company and counted in the election on Monday next. The motion involves the control of the Central Railroad & Banking Company of Georgia, and the many millions of property which constitute its assets. The Central Trust

Company is a party defendant to the original bill, and, in the opinion of the court, might well be held to be bound by the former adjudication. Its counsel were present at the hearing. The cause had been continued in part upon the application of its counsel; they stating that they desired to be heard. It being insisted, however, that the situation of this stock has been changed since that judgment was rendered, the court has heard its application. There are now presented on the part of the Central Trust Company two written representations, one signed by the Georgia Company, by T. W. Scarborough, president, and the other by the Richmond & West Point Terminal Railway & Warehouse Company, by John A. Rutherford, second vice president. The representations both recite the fact of the deposit of the 40,000 shares of Central Railroad stock with the Central Trust Company for the purpose of securing the bonds above mentioned, and they both contain this further statement:

"It may be claimed that the adjudication by your honorable court bears the construction that this company shall not exercise the right to vote upon the said stock reserved by the said deed of trust, and in view of such decision this company yields, transfers, and surrenders any right which it possesses or possessed to vote upon the said stock, or any part thereof, at the election of the shareholders of the Central Railroad & Banking Company of Georgia to be held May 16, 1892, or at any adjournment thereof, in favor of the said Central Trust Company, representative of the said bondholders, the legal and equitable owners of the said 40,000 shares of stock. In making this surrender of any right to vote upon the said stock, the Georgia Company represents to the court that it has not entered into any arrangement, bargain, or understanding of any kind or nature whatsoever with the said Central Trust Company in respect to the exercise of the voting power upon the said stock by that company, and that it will not make or endeavor to make any such bargain, contract, or arrangement, and that the said Central Trust Company shall be entirely free, independent, and untrammelled, so far as the said Georgia Company is concerned, from any direction, interference, or control in the exercise by it of such voting power."

The representation of the Terminal Company purports only to surrender the voting right in 2,200 shares of stock. Both representations restrict the transfer of the voting right reserved by the Terminal Company to the election to be held on May 16, 1892, or at any adjournment thereof. It is difficult to perceive how this instrument differs in any matter of substance from an ordinary proxy. The transfer of the Georgia Company of its right to vote the stock is not considered by the court as material, for that company has really no control over the stock to which a court of equity will pay any attention. The Georgia Company has been wholly absorbed by the Terminal Company, but the Terminal Company omits to make any transfer of the right to vote the 40,000 shares of stock in question, and limits its representation to the court to 2,200 shares, which it has presumably acquired from sources other than the Georgia Company. It follows, therefore, that as to 40,000 shares of this stock the condition is precisely the same as when the court enjoined the Central Railroad from receiving or counting the votes thereof, for the reason that it had been purchased and held in violation of the laws and constitution of Georgia. But, as we have seen, the transfer of

the Terminal Company relating to 2,200 shares is nothing more than a proxy; and, the Terminal Company being enjoined from voting the stock directly, it cannot be permitted to vote it by proxy, unless, indeed, it is thought proper to set aside the former judgment of the court in this respect. There appears to be no consideration whatever for this transfer. The Central Trust Company of New York holds this stock merely as a naked trustee to secure certain bonds for which it was pledged as collateral security. Now, when those bonds were issued the stock thus pledged had attached to it no voting power, of which either the Trust Company or the bondholders had the right to avail themselves. Its voting power, therefore, was no part of their security. This transfer, even if it were efficacious to convey the voting franchise of all the stock, would be merely an attempt to ingraft upon the trust a new feature, which the beneficiaries of the trust did not seek, or expect, at the time of its creation. The voting of the stock was enjoined because it was deemed by the court that it would bring about a public wrong, the gravity of which cannot well be foretold. It was further deemed to threaten the continuance and perhaps the aggravation of the illegal and injurious results it had already accomplished. If the Central Trust Company was wholly relieved of any entanglement, with the perplexed and chaotic condition, which the voting power of this block of stock, and the illegal, reckless, and destructive management, its exercise, has entailed upon these properties, the court would even then hesitate long before it would avoid the injunction, which was the outcome of the most anxious consideration by the learned circuit judge, and by the district judge, merely because the Terminal Company, enjoined from voting itself, had gratuitously conveyed to the Trust Company the power which the latter apparently had not desired, and which was in no sense a part of the contract with its bondholders. But the Central Trust Company is not, in our opinion, in any view, a proper party to vote this stock. It has no interest of its own in the stock. It is simply a stakeholder. There are many situations in which stock may be so placed that it becomes inequitable or illegal for it to be voted. The law places the voting power of pledged stock in the pledgor or mortgagor, even where there is no express stipulation to that effect. *Schofield v. Bank*, 2 Cranch, C. C. 115; *Vowell v. Thompson*, 3 Cranch, C. C. 428. And where the pledgor or mortgagor is disqualified to vote the stock the disqualification extends as well to the pledgee or trustee. *Ex parte Holmes*, 5 Cow. 426; 1 Woods, Ry. Law, § 61, p. 149, and cases cited. See, also, *Bank v. Sibley*, 71 Ga. 726; *Burgess v. Seligman*, 107 U. S. 20, 2 Sup. Ct. Rep. 10. It may well be doubted if the charter of the Central Trust Company affords any authority for the exercise of such a power. It is what its name imports, a trust company, and, as was well said in the argument of one of the counsel, if the Central Trust Company "springs from the passive position of a naked trustee into the active operation of a great railroad system," the court must be clearly satisfied of its authority by law to do so. If it may do this, it has within its gift the appointment of every officer of this vast railroad system, from president to flag-

man; and all the vast and most important powers of the railroad, powers in which the people of states distant from the office of the Central Trust Company are profoundly concerned, are likewise within its control. It is moreover the trustee, as we are informed by its counsel and as it appears from the evidence, for twenty-six millions of the indebtedness of this road. It is, then, the agent for its creditors. Can it also be the agent for the debtor? If so, it is easily possible that when the agent of the creditor perceives a debt to be due the agent for the debtor may make default, and thus the entire property be brought to the block. In stating this possibility, no reflection is intended on this great financial institution, but the law will not permit conflicting trusts or conflicting interests to be reposed in one trustee.

Besides, it appears from the evidence that the accredited president of the Central Trust Company is and has been concerned as the financial expert seeking to bring about a consolidation and reorganization of all the railroads which are or have been under the control of the Terminal Company. These roads operate the competing lines in the state of Georgia, and in the statement of March 1, 1892, addressed by Mr. Frederick P. Olcott, president of the Central Trust Company, to the holders of securities of the Terminal Company, this appears:

"In view of the pending litigation affecting the Central Railroad & Banking Company of Georgia, and questions which are before the courts undetermined respecting its existing lease, and considering the legal difficulties attending a consolidation embracing that company, the committee has found it advisable to make no provision for the present for taking up the outstanding stocks or securities of the Central Railroad & Banking Company of Georgia, but the interest of the Richmond Terminal Company in these stocks and securities will vest in a new corporation, and form a part of the security on a new first mortgage bond."

The East Tennessee, Virginia & Georgia securities will be covered by the same mortgage, and the two roads will be under the same control. Can it be denied that this avowed purpose would have the effect, or be intended to have the effect, to defeat or lessen competition, and to encourage monopoly? And yet with the voting power of this stock in its control the Trust Company can accomplish this result. Not only is this true, but if it be competent for the Central Trust Company to operate one railroad system of which it holds securities, if a few words from the mortgagor, transferring the voting power of stocks pledged with it, can give it control, what it may do with one road it may do with another. If it may vote the stock of the Central, it may vote the stock of the East Tennessee, Virginia & Georgia, the Louisville & Nashville, and all the others, and thus the railroads of an entire section may be the playthings of the officers of this corporation. Surely this may tend to defeat or lessen competition and to encourage monopoly. But whatever may be the powers of the Central Trust Company elsewhere, it certainly cannot exercise such powers as we have described within the state of Georgia. A corporation of this state could not do so. Comity between the states authorizes a corporation to exercise its charter powers within another state, but it does not permit the exercise of a power where the policy of

that state, distinctly marked by legislative enactments or constitutional provision, forbids it. *Runyan v. Coster*, 14 Pet. 122; *McDonogh v. Murdock*, 15 How. 367; *Marshall v. Railroad Co.*, 16 How. 314.

It is said, however, that, by the charter of the Central Railroad & Banking Company, other corporations may own stock in that company. It is quite evident that the language upon which counsel for the movant rely relates to corporations of the classes mentioned in the charter. The cities of Macon and Savannah are mentioned, and other corporations are authorized. Under a familiar rule of construction, this would seem to mean other municipal corporations. Be this as it may, if any other corporation had not purchased the stock before the constitution of 1877, such other corporations cannot since then buy it, or hold it on any contract or agreement whatever which might have the effect, or be intended to have the effect, to defeat or lessen competition or to encourage monopoly. This would be especially true of a nonresident corporation, which, when it enters the state, does so with submission to the settled policy of the state. The court recognizes the soundness of the authorities cited by the learned counsel for movant in argument. It is, however, true that they do not apply to a case like this. It is perhaps true that there is no precedent precisely pertinent to the grave issues presented by this controversy. They have sprung into existence because of the marvelous railroad development of the country, and because of the ease and facility with which a trust owning a bare majority of the stock of a corporation can nullify and deaden the vote of all the minority stock, however great the minority, or however rightful and intelligent would be its exercise. The alarming effect of this power may be illustrated by the facts of this case. Forty thousand shares of stock have deadened the votes of 32,000 shares, and have controlled as many millions in values. These 40,000 shares have been deposited, and bonds issued thereon. If the voting power of the stock is apportioned among the bonds, 20,100 shares may control the policy of the entire block, and these 20,100 shares may thus control all the millions belonging to the Central properties, and yet stockholders who have 32,000 shares have no voice in the management of the properties, in which perhaps their all is invested.

Even where individuals form a combination to control the majority stock of a corporation, and agree not to transfer their shares to the opposition or not to vote against the combination, such contracts have been held to be void as in restraint of trade, and against public policy. Ordinarily any stockholder may withdraw from such a contract, although it is expressly agreed that it shall be irrevocable. 1 Beach, Priv. Corp. § 305, and cases cited.

It is insisted by the petitioners that the Terminal Company has no appreciable interest in the stock of the Central Railroad. The interest it formerly had was conveyed by the mortgage of 1889. The bonds executed under that mortgage, and secured by the Central stock, have long ago been sold, and the proceeds appropriated by the Terminal Company. But that company has a substantial and large pecuniary interest in the

Richmond & Danville and the East Tennessee, Virginia & Georgia Railroads. These roads are the natural competitors of the Central. Is it surprising, then, that the Terminal Company, controlling by this "voting trust" the management of the Central, should make the road in which it is not interested suffer for the benefit of its rivals, which it not only controls, but possesses? It is not difficult to perceive that a combination of corporations which produces a condition so inequitable cannot be sanctioned by the law. We believe that transactions of this character are within the spirit, if not within the letter, of the act of congress, known as the "Sherman Anti-Trust Law." Act July 2, 1890, (26 St. at Large, p. 209.) It certainly is, as we have seen, obnoxious to the law of Georgia, and it was certainly as obnoxious to the common law. The baleful effects of such an unlawful scheme have been most significantly illustrated by the record itself. The property of one of the oldest and most renowned railroads in the United States has been brought to the verge of ruin. These stocks were once so solvent and reliable that trust estates, the property of widows and orphans, of charitable and eleemosynary institutions, were invested in them, at the will of the trustees, without an order of court to sanction the investment. The properties have been impoverished in every department. Skillful artisans and mechanics, who from their apprenticeship have been in the service of the companies, have been turned away. Vast buildings which were once musical with the whirr of machinery and the voices of prosperous and contented workmen, earning by their useful and valuable labor a comfortable livelihood, are now voiceless. The ashes sleep undisturbed on the forge, and the hammer rusts on the anvil. Merchants and tradesmen who have depended upon the purchasing power of these operatives have been threatened with ruin; numberless houses once occupied by their happy families are now vacant; and those whose all is invested in the securities of this company are haunted with the expectation that the road may default upon its obligations, and be sold under the hammer on foreclosure, and the provision made for their declining years swept from existence. But this, and all of this, is unimportant, compared with the greater interest of the people in their rightful demand that the corporation created by them, and granted vast and valuable franchises, shall be managed as a railroad upon lawful business principles, in the transportation of freight and passengers, and for the development of the state, and that it shall not be the toy of the speculator, and that the franchises which they granted for nobler purposes shall not be made the instrument of their ruin and the degradation of the state. The possession of its stock does not give uncontrollable right in the management of a railroad corporation. The right of the state that the corporation should conform to the purposes for which the law created it is wholly paramount to any and all rights of stockholders. It may not be doubted that the values represented by these 42,000 shares of stock are entitled to the protection of the court, and they will be protected. When it is offered to vote them with the legitimate purpose for which the majority of shares of stock in a corporation may be lawfully voted, at the instance



of parties who have legal authority to hold and vote them, they will be voted. The court will be, moreover, happy to entertain any proposition for voting them which will result in the management of this road in such manner that it need not be wrecked; in such manner that its matchless properties may be utilized to pay its obligations as they mature, and to protect its values. It is well understood by the court that the mere fact that this stock may not be voted in its present illegal *status* is a menace to the credit of the Central Railroad, and to the power of the court and of its receivers to redeem it for the benefit of all concerned. We have no doubt that, properly managed in accordance with the law, with the encouragement of those who are friendly to it, which its great importance deserves, the Central Railroad & Banking Company cannot only pay its obligations as they mature, but rehabilitate its fortunes, imperiled as they are by this illegal trust voting a majority of the stock, the exercise of which the court has enjoined. The court is quite as solicitous to protect the interest of the creditors as of stockholders of this great property, but there is nothing in this motion which will justify the court in changing the order, which was mainly, indeed, we may say almost wholly attributable to the wisdom, experience, and acumen of the learned circuit judge; an order intended to preserve the property for the present, to gather anew its dissipated assets, and to restore it as speedily as possible to the lawful charge of those who may be found legally entitled to its management and control. Let an order be taken, denying the application.

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DANIELS v. BENEDICT *et al.*

(Circuit Court, D. Colorado. May 17, 1892.)

1. JURISDICTION OF CIRCUIT COURTS—PARTITION.

The circuit courts of the United States, sitting as courts of equity, have jurisdiction of suits for the partition of land.

2. PARTITION—FRAUDULENT DECREE OF DIVORCE—EVIDENCE.

Plaintiff, decedent's wife, in partition against trustees under his will, alleged that she agreed that a suit for divorce should be begun against her on the sole ground of desertion, and that a decree of divorce should be entered therein, in consideration of a sum of money needed for her temporary support; that such agreement was procured through decedent's paid agents, when plaintiff was greatly enfeebled by disease; and that decedent fraudulently obtained a decree of divorce on the ground of adultery, of which fact plaintiff did not learn until she had removed to the east. Plaintiff alleged that she was utterly ignorant of the pleadings in the suit, and denied the charge of adultery, and that, as soon as informed thereof, she brought suit to vacate the decree. *Held*, that the facts alleged showed a cause of action.

3. SAME—COLLATERAL ATTACK—EXTRINSIC FRAUD.

In such case the fraudulent matter alleged was extrinsic to the matter tried by the court in the suit for divorce, so that the decree was open to attack in the present collateral proceeding.

4. SAME—COLLUSIVE DECREE—"IN PARI DELICTO."

Though in such case plaintiff was in fault, to some extent, in consenting to a collusive decree, yet the parties were not *in pari delicto*, and she was not thereby estopped from attacking the decree.

**7. LIMITATIONS—TRUSTS.**

The suit, being to recover property held in trust by defendants, was not affected by the statute of limitations.

**8. SAME—PENDENCY OF SUIT.**

The running of the statute was also prevented by the suit brought in the lifetime of decedent to vacate the decree of divorce, which was pending at his death, about three months before the present suit was brought.

Statement by PARKER, District Judge:

In Equity. The plaintiff in this case, Lilyan B. Daniels, as the wife of William B. Daniels, deceased, brings this suit in equity, by her bill filed, to have a partition of a large estate, alleged to be worth as much as \$2,000,000. She alleges she was married to William B. Daniels on July 8, 1882, in the state of Connecticut; that they lived and cohabited together as husband and wife in the city of Denver; that William B. Daniels died in the city of Denver on the 24th of December, 1890, seised and possessed of the large amount of personal and real property described in the bill. Plaintiff further alleges that on March 2, 1891, the defendants, Mitchell Benedict, William G. Fisher, and Lewis C. Ellsworth, caused to be presented for probate the will of the said husband of plaintiff; that defendants conspired to prevent plaintiff from receiving anything from the estate of said husband. Plaintiff asks a partition of said estate. Plaintiff further alleges in her bill that—

Some time before the 1st day of March, 1886, the said William B. Daniels had arbitrarily and wrongfully refused longer to live or cohabit with the plaintiff, and had expelled and excluded her from his and her residence and home in the city of Denver, and had from such time thereafter refused and neglected to maintain or support her, or to furnish any means whatever for her maintenance or support, so that being, through the power and influence of her said husband, deprived of friends in the city of Denver, and being without money, she was compelled to leave said city of Denver, and to find a home and friends and assistance elsewhere; that thereupon she removed temporarily to the city of Cheyenne, in the then territory, but now state, of Wyoming; that, while residing at said city of Cheyenne, she became severely and dangerously ill, among strangers, and without money; that her mind, as well as her body, had become greatly impaired, and at times she was wholly bereft of reason and consciousness, and at all times during her said illness, when not wholly unconscious and mentally irresponsible, she was only partially able to think or act, and was at all of said times unable to act intelligently or advisedly; that, while so ill and in such condition, she was approached and surrounded by the agents, employees, and emissaries of the said William B. Daniels, and a settlement of her domestic troubles and difficulties with the said Daniels was proposed by the agents, emissaries, and confederates procured and paid by the said Daniels; that, while in the condition before mentioned, it was represented to and urged upon her that her said husband, the said William B. Daniels, would never live or cohabit with her again; that he would not support her, or furnish means for her support; that he had become thoroughly estranged; that he would use his great wealth and his influence in the city of Denver to cause her to be ostracized and practically driven and banished from the said city of Denver, and that she would be unable to assert or recover her marital rights except by long, tedious, and expensive litigation; that pending such litigation she would have no means of support; and that, for all of said reasons, it would be better and wiser for her to accept terms from her said husband, and that he was anxious to procure a divorce.

The plaintiff further states that the person who made such representations and arguments pretended to be a friend to her, and pretended to be greatly shocked and indignant at the conduct of the said William B. Daniels; that she fully confided in said person, and believed that he truly was what he pretended to be, and, so believing, put full faith and confidence in him; and that she thereupon authorized and caused said person to open negotiations with her said husband, or his attorneys, for the purpose of effecting some kind of a settlement or adjustment between them.

The plaintiff further states that on or about the 1st day of March, 1886, while she was still ill in body and in mind, and unable to attend to business, and while in great distress, mental as well as physical, as before stated, the said person reported to the plaintiff that the said William B. Daniels desired to be freed from the bond of matrimony then existing between him and the plaintiff, and the said person, for the purpose of procuring the consent of the plaintiff, represented to her that a suit might be commenced in one of the courts of the state of Colorado by the said William B. Daniels, as plaintiff, against her as defendant, on the ground that she (the plaintiff) had abandoned and deserted the said William B. Daniels, and that if such charge were not denied, and said suit were not defended, he, the said William B. Daniels, could and would procure a divorce upon the said ground of desertion and abandonment; and that for the purpose of procuring the assent of the plaintiff to said arrangement the said Daniels offered to pay to her a sum of money sufficient to meet her then pressing wants and necessities, and to make her for a time free from financial embarrassment, but which sum so offered was wholly out of proportion to the ability of the said Daniels to pay, and wholly insufficient to enable the plaintiff to keep and maintain herself in the station of life to which she had been accustomed, or commensurate with her position and standing as the wife of the said William B. Daniels. The plaintiff, being, as before stated, in great distress, bodily and mentally, being thereto advised and urged by said person, whom she still implicitly trusted, and being then dependent upon strangers, consented and agreed that a suit might be commenced against her in one of the courts of the state of Colorado for the purpose of enabling the said William B. Daniels to procure a decree of divorce upon the ground of desertion and abandonment, as before stated, but upon no other ground whatever. That pursuant to said arrangement the plaintiff, then being at Cheyenne, still sick and ill, and unable to move or travel of her own accord or without help, was brought or carried into this state at the instance and by the procurement of the said William B. Daniels, and under the control of his agents and emissaries, and while in said state a paper purporting to be a writ of summons in said suit of William B. Daniels against her was served or pretended to have been served upon her, and she, at the instance of the agents, emissaries, and confederates of the said William B. Daniels, was induced to and did accept service of said writ or paper, being informed at the time, and still believing, that the complaint in said suit, and the ground therein stated for the divorce to be obtained, was abandonment and desertion only; that at said time she was still sick and ill, mentally and bodily; that she was then at a house surrounded by persons and servants provided by the said William B. Daniels, and had but little if any control over herself, and during all of said time was wholly and completely under the dominion, influence, control, and supervision of the said William B. Daniels, his agents, servants, emissaries, and confederates, and in all things was made to do, and did do, as said Daniels, or his agents or confederates did or desired, until said decree of divorce was procured; that afterwards, on or about the 16th day of March, 1886, she was informed that the decree of divorce had been rendered in said cause upon the ground before mentioned, but she was not then informed, nor did she in any manner

have reason to fear or suspect, that the said divorce had been procured upon any other ground or statement than that of desertion and abandonment, as aforesaid; that thereafter she soon departed from the state of Colorado, and commenced to reside at the city of Chicago, in the state of Illinois, and continued there to reside until she removed to the city of New York, in the state of New York, where she now resides.

The plaintiff further represents that for a long time after the said 16th day of March, 1886, and after her removal to said city of Chicago, she remained seriously and dangerously ill, and did not recover her health until during the summer of 1887; that during all of said time her mind was so enfeebled by her continued illness and physical weakness that she was wholly unable to give any attention or consideration to her affairs, and by this time, owing to the expense caused by her illness, she was again without money; that about this time, and not before, she learned that the decree of divorce in said suit had been procured upon the ground that she (the plaintiff) had been guilty of adultery with a certain person named in the complaint in that suit, and that the charge of abandonment and desertion had not been made in said suit; that soon thereafter she learned and discovered that she had been deceived, duped, misled, and inveigled by the agents, emissaries, and confederates of the said William B. Daniels into giving her consent to the decree of divorce upon the ground stated and alleged in the complaint therein, and in the decree of divorce, and she then learned that the said person who came to her before said 1st day of March, 1886, and who professed to be her friend, and who also professed to be so greatly shocked and indignant at the conduct of the said William B. Daniels towards your plaintiff, was a spy and detective who had been procured, employed, and paid by the said Daniels for the purpose of deceiving, duping, and leading the plaintiff into the scheme and plan devised and concocted by the said Daniels, his agents, attorneys, employes, and confederates, and which was carried out as aforesaid.

The plaintiff further states that she never saw the complaint in said suit, nor was the same ever read to her, nor the contents thereof in any manner stated to her. She further avers that she did not read the paper stated to be a summons, nor was the same read to her, nor was she then able, physically or mentally, to read and understand the same, and that she signed the acceptance of service thereon at the request and instigation of one of the agents and confederates of the said William B. Daniels, on his representation that it was a mere formal matter, and at said time she had full faith and confidence in the integrity and good faith of the person at whose solicitation she signed the same, and then believed that the said suit, then commenced for the purpose of divorce, charged her with desertion and abandonment only, and she did not know, nor did she have in the slightest manner any suspicion, that any fraud, trick, or deception was intended to be practiced upon her.

And the plaintiff expressly charges that the said statements in said complaint made, accusing her of adultery with the person therein named, were and are absolutely and wholly false; and she expressly charges that the evidence given at the pretended trial or hearing of said cause, at which she was not present, and which occurred without her knowledge, was false and fraudulent; and she avers and charges that the persons who testified were suborned by the said William B. Daniels, or some of his agents or confederates, and by money paid to them by the said William B. Daniels, or paid to them by some of his agents or confederates, were induced to give and did give false, foul, and perjured testimony against the plaintiff in said suit, and that by virtue of said false, foul, and perjured testimony only was the said decree of divorce in said suit procured.

And the plaintiff further states and charges that, when she first heard that the divorce had been procured in said suit upon the ground of adultery, she

began to make diligent inquiries, and continued making them until she learned all the facts which could then be ascertained, and that, as soon as she became convinced that the fraud and deception hereinbefore mentioned had been practiced upon her, she caused to be commenced a suit in the county court of said county of Arapahoe, in which said divorce had been obtained, to set aside, annul, and cancel said decree, on the ground of fraud, and which said suit was still pending and undetermined on the 24th day of December, 1890, when the said William B. Daniels departed this life as aforesaid.

The plaintiff further charges that the said decree of divorce was and is otherwise void, invalid, and of no effect, for the reason that the said county court of the county of Arapahoe, under the constitution and laws of the state of Colorado, did not have and could not have jurisdiction of any suit for divorce; and she avers and charges that said decree of divorce in said pretended cause was and is utterly null and void for want of jurisdiction by said court over the subject-matter therein, or of the person of the defendant.

To the bill, William C. Daniels files a demurrer, and for cause thereof says—

That the said complainant hath not, by her said bill, made such a case as entitles her, in a court of equity, to any relief from or against this defendant, touching the matters contained in the said bill, or of any such matters; and that it appears by the said complainant's own showing, by her said bill of complaint, that the said complainant is not entitled to the relief prayed by her said bill against this defendant.

Sarah M. Kenyon and William D. Kenyon, two of the legatees under the will, file a demurrer, and for cause thereof say—

That said bill does not contain such statement of facts, nor does it contain any matter of equity, entitling the plaintiff to any relief against these defendants. And the said bill shows upon its face that this court has no jurisdiction of the subject-matter of the cause of action therein set forth.

The other defendants in the case file demurrers of the same character, setting out as cause—

That the said complainant hath not, in and by her said bill, made or stated such a case as doth or ought to entitle her to any relief, as thereby sought and prayed for, from or against any one of the said defendants.

Demurrers overruled.

*W. S. Decker and T. J. O'Donnell, (Hugh Butler and Hatch & Warren, of counsel,)* for complainant.

*Mitchell Benedict and Alford C. Phelps,* for Ellsworth, Parnell, Croke & Fisher.

*Mitchell Benedict, pro se.*

*Geo. J. Boal,* for Hart.

*Thos. M. Patterson, Wm. P. Hillhouse, Chas. Hartzell, and J. McD. Patterson,* for Daniels.

PARKER, District Judge, (*after stating the facts as above.*) This is a suit in equity for partition. The plaintiff claims that she, as the wife of William B. Daniels, deceased, under the laws of Colorado, is entitled by inheritance to one half the property of which he died seised; that there was but one child to inherit from the said Daniels,—his son, William C. Daniels. There can be no doubt that courts of equity have concur-

rent jurisdiction with courts of law of suits for partition. Pom. Eq. Jur. §§ 140, 174, 1387; Story, Eq. Jur. §§ 646, 658. In the last of these sections the law is thus stated by that learned jurist:

"The courts [meaning courts of equity] have assumed a general concurrent jurisdiction with courts of law in all cases of partition. So that it is not now deemed necessary to state in the bill any particular ground of equitable interference."

Mr. Justice BREWER, in *Smelting Co. v. Rucker*, 28 Fed. Rep. 220, fully recognized and declared the rule upon this subject. There can be no doubt about this court, as a circuit court of the United States, sitting as a court of equity, having jurisdiction of this suit in partition.

But it is claimed that plaintiff is not entitled to any interest in the estate of William B. Daniels, because at the time of his death she was not his wife, because upon or about March 16, 1886, she was divorced a *vinculo matrimonii* from the said Daniels by a decree of the county court of Arapahoe county, Colo. The fact that she was so divorced is fully set out in the bill, but it is further averred that said divorce was obtained by deceit, misrepresentations, duress, chicanery, and fraud, and that, therefore, this court should disregard the same. If the facts are proven as alleged, certainly a case of fraud will be shown. But can this court disregard the decree of divorce of the county court of Arapahoe county, if the same is shown to have been obtained by fraud? If it cannot, such decree is a barrier against any decree of partition by this court, because plaintiff has no interest in the property to be partitioned. It is well established that a court will not set aside a judgment, or disregard the same, because it was founded on a fraudulent instrument or perjured testimony, or on any matter intrinsic to the matter tried by the first court, or on a fraud in the matter on which the decree was rendered. But it is equally well settled that a court of equity will, on account of fraud growing out of matter extrinsic or collateral to the matter tried by the first court, set aside or annul a judgment or decree between the same parties. Mr. Justice MILLER, in *U. S. v. Throckmorton*, 98 U. S. 61, said:

"But there is an admitted exception to this general rule in cases where, by reason of something done by the successful party to a suit, there was in fact no illusory trial or deception of the issue in the case. When the unsuccessful party has been prevented from exhibiting fully his case, by fraud or deception, or deception practiced on him by his opponent, as by keeping him away from court by a false promise of a compromise; or where the defendant never had knowledge of the suit, being kept in ignorance by the acts of the plaintiff; or where an attorney fraudulently or without authority assumes to represent a party, and connives at his defeat; or where the attorney, regularly employed, corruptly sells out his client's interest to the other side,—these and similar cases which show that there has never been a real contest in the trial or hearing of the case are the reasons for which a new suit may be sustained to set aside and annul the former judgment or decree, and open the case for a new and a fair hearing."

The court, speaking in reference to authorities referred to in the above-named opinion, says:

"In all these cases, and many others which have been examined, relief has been granted on the ground that, by some fraud practiced directly upon the party seeking relief against the judgment or decree, that party has been prevented from presenting all of his case to the court."

A fraud practiced in the procurement of a judgment will furnish grounds for attacking it in a collateral proceeding. *Mayor, etc., v. Brady*, 115 N. Y. 599, 22 N. E. Rep. 237; *Murphy v. De France*, 101 Mo. 151, 13 S. W. Rep. 756; *Hass v. Billings*, 42 Minn. 63, 43 N. W. Rep. 797; *Stunz v. Stunz*, 131 Ill. 309, 23 N. E. Rep. 410. The same rule applies, in regard to attacking it for fraud, to a decree of divorce, as the one applicable to any other judgment or decree. 2 Freem. Judgm. p. 860, § 489, says:

"Decrees of divorce may, when obtained by fraud, be vacated in the same manner and under the same circumstances which would warrant the vacation of any other decree, although the party who obtained the fraudulent judgment has contracted another marriage."

Mr. Black, (1 Judgm. § 320,) says:

"Aside from legislation, the courts will generally hear motions to vacate divorce judgments on the same grounds and conditions as any other judgments, except, perhaps, that they proceed with greater caution, and with more anxious care of the intervening rights of strangers."

The above rule is sustained by *Adams v. Adams*, 51 N. H. 388; *Edson v. Edson*, 108 Mass. 590; 2 Kent, Comm. 655; Story, Conf. Laws, 597. In *Fermor's Case*, 3 Coke, 77, 78, it is declared that—

"The law so abhors fraud and covin that all acts, as well judicial as others, and which of themselves are just, yet being mixed with fraud and deceit, are in judgment of law wrongful and unlawful."

Without multiplying authorities, which may be done, I take it that the true rule is that a decree of divorce stands on the same footing as every other judgment or decree, and, if obtained by fraud growing out of matter extrinsic or collateral to the matter tried by the court rendering the decree, it will be set aside or disregarded.

The next question which presents itself is, does this court have jurisdiction in this case? We have seen that there is no doubt about its having jurisdiction to make partition. If so, can it, in the exercise of this jurisdiction, so far listen to an attack on the decree of the county court of Arapahoe county as to disregard it as fraudulent, if such fraud is proven? The law seems to be well settled by numerous decisions of the supreme court of the United States that it can. The last utterance by the supreme court on the subject is found in *Marshall v. Holmes*, 141 U. S. 589, 12 Sup. Ct. Rep. 62. The effect of the decision in the above case is that the federal court cannot require the state court to set aside or vacate the judgment, but it may, as between the parties before it, if the facts justify such relief, adjudge that the party practicing the fraud shall not enjoy the inequitable advantage obtained by his fraudulent decree. The principle announced is:

"A circuit court of the United States, in the exercise of its equity powers, and where diverse citizenship gives jurisdiction over the parties, may deprive  
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a party of the benefit of a judgment fraudulently obtained by him in a state court, if the circumstances are such as would authorize relief by a federal court if the judgment had been rendered by it, and not by a state court, as a decree to that effect does not operate on the state court, but on the parties."

The above doctrine is fully sustained by *Arrowsmith v. Gleason*, 129 U. S. 86, 9 Sup. Ct. Rep. 237. The whole subject was fully considered in *Johnson v. Waters*, 111 U. S. 640, 667, 4 Sup. Ct. Rep. 619. The court in that case said:

"The most solemn transactions and judgments may, at the instance of the parties, be set aside or rendered inoperative for fraud. The fact of being a party does not estop a person from obtaining, in a court of equity, relief against fraud. It is generally parties that are the victims of fraud. The court of chancery is always open to hear complaints against it, whether committed *in pais*, or in or by means of judicial proceedings. In such cases the court does not act as a court of review, nor does it inquire into any inequalities or errors of proceeding in another court; but it will scrutinize the conduct of the parties, and, if it finds that they have been guilty of fraud in obtaining a judgment or decree, it will deprive them of the benefit of it, and of any inequitable advantage which they have derived under it."

The same rule is declared in *Guines v. Fuentes*, 92 U. S. 10, and in *Barrow v. Hunton*, 99 U. S. 80.

There is no doubt in my mind that the tribunal and the form of action have been properly selected. There is no doubt but the bill of complaint in this case sets up sufficient facts to show a case of procuring a decree by fraud; and therefore it sets out sufficient facts to constitute a cause of action, and to authorize the relief prayed.

Some fault may be attributed to the plaintiff, growing out of her conduct in the divorce proceedings in the county court of Arapahoe county. But certainly, from the facts alleged in the bill, the parties were not *in pari delicto*; that is, they were not equally blameworthy. In such case a court of equity will, in furtherance of justice and a sound public policy, aid the one who is comparatively the more innocent. 1 Pom. Eq. Jur. § 403; 2 Pom. Eq. Jur. § 941. It cannot be asserted that plaintiff is estopped by her conduct from proceeding in this form of action, although the effect may be to disregard or treat as a nullity the decree of divorce granted by the county court of Arapahoe county; for she was not in a condition to assert her rights in that court, and she must have been in that condition before she can be estopped from attacking the decree rendered against her.

The statute of limitations was alluded to in the argument of the demurrers as being a bar to the plaintiff's recovery, although this is not set out as a cause of demurrer. This is a suit to recover property by plaintiff that is held in trust for her by defendants. If she has any property rights in this large estate, then the holding of the property which belongs to her creates an express trust in her favor. To such a trust relation the statute of limitation has no application. *Lewis v. Hawkins*, 23 Wall. 119. The principal aim of this suit is to obtain partition of property, and an incident thereto is to disregard or treat as a nullity the decree of divorce. Besides, by the allegations of the bill the plain-



tiff, as soon as she discovered the fraud which had been practiced upon her, brought a suit in the county court of Arapahoe county to set aside and annul the decree of divorce on the ground of fraud. This suit was pending on the 24th of December, 1890, when William B. Daniels died. Then, on April 2, 1891, she brought this suit in this court. The point is presented in the brief of counsel for plaintiff in support of the allegation in the bill, that the county court of Arapahoe county, under the constitution and laws of Colorado, did not have, and could not have, jurisdiction of any suit for divorce. It is not necessary, in passing on the several demurrers to the bill, to pass on the question involved in this proposition. It is a question of such delicacy, and one which may be so far-reaching in its effects, that I prefer that it should be settled, if to be settled at all, by my Brother HALLET, who is more familiar with the constitution and laws of Colorado than I am, and, because of his large experience on the supreme bench of the state and on the federal bench, is much better qualified than I am to pass on this question.

The demurrers of William C. Daniels, Sarah M. Kenyon, and William D. Kenyon, Lewis C. Ellsworth, Laura Parnell, Henry Martyn Hart, and Thomas B. Croke, Mitchell Benedict, and William G. Fisher, are overruled.

## NATIONAL EXCH. BANK OF DALLAS v. BEAL, (two cases.)

(Circuit Court, D. Massachusetts. May 4, 1892.)

Nos. 2,978, 2,979.

### 1. BANKS—COLLECTIONS—DRAFTS—RIGHTS OF OWNER—SPECIFIC PROCEEDS.

A bank which had received a draft for collection sent it to its correspondent bank at the residence of the drawee, and the draft was paid to such correspondent. There were no mutual accounts between the two banks, but it was the custom of the correspondent to remit the proceeds of collections at stated periods. *Held* that, until this remittance was made, or the principal bank had given the original owner of the draft credit for the avails, the original owner of the draft, as the owner of the proceeds thereof, was entitled to recover them from the correspondent bank.

### 2. SAME—PAYMENT—DEBTOR AND CREDITOR.

Though the correspondent was the agent of the first bank, and payment to it was to that extent a payment to the principal, yet until the proceeds were actually remitted to such principal, and mingled with its general funds, or were so credited, the owner of the draft had the option to decline to consider it his debtor, and to claim the proceeds in the hands of the agent.

### 3. SAME—INSOLVENCY—LIABILITY OF RECEIVER.

Where the principal fails, and a receiver is appointed, he takes the proceeds of the draft, when remitted to him, subject to the same right of reclamation by the owner that the latter had as against the agent.

### 4. SAME—SET-OFF—PARTIES.

Where, in such a case, there are mutual accounts between the two banks, the right of the agent to set off the amount of the collection against the principal's indebtedness to it cannot be adjudicated in a suit in equity between the owner of the draft and the principal without making such agent a party.

### In Equity.

It appears from the allegations of the bill that plaintiff sent to the Maverick Bank two drafts for collection and credit on general account,

payable, one in Fall River and the other in Taunton, and the Maverick Bank sent the first to the Massasoit Bank, at Fall River, for collection and credit, and the other to the Taunton National Bank at Taunton, and on October 31, 1891, the Massasoit Bank and the Taunton Bank collected the two drafts, and credited their amount to the Maverick Bank, and mailed letters to the Maverick Bank stating that they had done so. October 31st was the last day that the Maverick Bank did business, it being taken charge of the next day by a national bank examiner, and closed, by the direction of the comptroller of the currency. The letters written by the Massasoit Bank and the Taunton Bank did not, therefore, arrive until after the failure, and consequently no entry of credit on account of these drafts was made by the Maverick Bank to the plaintiff. At the close of business on October 31st there was a balance on general account, including this draft, due from the Massasoit National Bank to the Maverick Bank, of \$144.04, which was subsequently set off against collections made for the Massasoit Bank by the defendant as receiver of the Maverick Bank. The Taunton Bank had no mutual account with the Maverick Bank, and was in the habit of remitting the proceeds of paper sent it by the Maverick Bank for collection every five days, and sent a check for the amount of the draft collected by them to the receiver. The usage between the plaintiff and the Maverick Bank, as set forth in the bills, was that the Maverick Bank credited the amounts of drafts sent it by the plaintiff for collection on the day the same were collected on general account, and did not keep the proceeds of such drafts separate, but mingled them with its funds, and this was done with the knowledge of the plaintiff. The plaintiff files these bills, claiming to be entitled to receive from the receiver the amount of these two drafts in full.

*Ropes, Gray & Loring*, for complainant.

*Hutchins & Wheeler*, for defendant.

PUTNAM, Circuit Judge. These two cases were submitted together on bill and demurrer. If the opinion of Judge COLT, handed down in this court March 11, 1892, in *Bank v. Beal*, 49 Fed. Rep. 606, had been to the same point as now arises, I would be bound by it; but it was not. It, however, states a rule which is useful here, as follows:

"When payment was made and credit given, it seems to me the Maverick Bank ceased to be agent of the complainant, and the relationship between the two became that of debtor and creditor."

In *Commercial Nat. Bank v. Hamilton Nat. Bank*, 42 Fed. Rep. 880, Judge GRESHAM seems to have expressed the opinion that, notwithstanding credit given by a collecting agent having the same relations which the Maverick National Bank has to this case, the primary owner might make claim against the subordinate agent until the subordinate agent had actually remitted; but I am concluded by the rule laid down by Judge COLT, and, as I state further on, the cases at bar do not require any consideration of the conclusions of Judge GRESHAM on this particular point. The facts in No. 2,978, in which payment was made to the Taunton National Bank, are in the simplest form for the preservation of

complainant's title to the bill or draft and its proceeds, and for the application of the principles which seem to me to underlie these suits. In that case there were no mutual accounts between the local bank and the Maverick; so that, after payment to the former, the proceeds were held by it free from any equities of its own, and segregated throughout from all other transactions. Consequently the owner, whoever the owner might be, could have identified and followed the avails as easily as he could have identified or followed the draft or bill itself. In this case, No. 2,978, the fact that the indorsements on the draft or bill were made expressly "for collection" did not change the nature of the transaction, and are of no value; although, whenever claims of strangers intervene, or, indeed, whenever the state of accounts between the collecting bank and its subordinate correspondent is such as to be concerned in the transaction, the notice given by this special and limited phraseology may be of importance. That the draft or bill, when received by the Taunton National Bank, and until paid by the acceptor, or other person on whom drawn, remained the property of the complainant, cannot be successfully disputed; and it is also an elementary principle that the proceeds, so long as they remained with that bank, and were segregated and unmistakably identified, as in the present case, stood presumably in lieu of the collection paper, and were held by the same ownership and title. If, therefore, the respondent claims that in No. 2,978 the complainant has not the same title to the proceeds as it had to the draft, or that its right is less than that of a manufacturer to pursue and reclaim his consigned goods, or the accounts due for them, through the hands of the commission merchant or other factor, into the hands of or from the agents or customers of the latter, the burden is on him to show the special facts which justify the distinction. For these he must look, if anywhere, to the rule given by Judge COLT, already quoted.

The nature of these transactions has been fixed by a practice so extensive, uniform, and long continued that the courts must take cognizance that, when the proceeds of collections have been actually received into the vaults of a bank bearing the relation to the primary owner of the collection paper which the Maverick National Bank bore to the complainant, and have been credited by the former to the latter, the agency ceases, the avails can no longer be traced, or claimed as trust assets, and the matter is merged into one of mere debit and credit. Whether or not, when the proceeds are so clearly identified and so free from new equities as in No. 2,978, the primary owner does not have the option of treating the intermediate bank as its creditor, or of demanding from the local bank the avails, so long as the latter continues to hold them, it is not now necessary to consider. It is enough for the present that, so far as the rule already quoted from Judge COLT concerns this case, the complainant is affected only by the state of accounts between it and its immediate correspondent; and its title to the paper, or its proceeds, is not prejudiced by the mere fact that some other bank holds either as the immediate agent of the complainant's correspondent, until the latter has by suitable entries on its books completed and recognized the relation-

ship of creditor and debtor. Until this is accomplished, the rights of the complainant are no less than those of the manufacturer already spoken of, who might pursue the price of his goods into the hands of the factor's vendee, although the latter had made himself in fact and in form primarily the debtor of the middleman.

What is the ultimate limit to which the *spes recuperandi* may reach it is not necessary now to decide, and it may vary according to special circumstances of differing cases; but that, in the present instance, it continued until the proceeds had actually been remitted by the Taunton National Bank, or were at least so entered by the Maverick to complainant in the usual course of business that the right of complainant as creditor was absolutely and fully recognized, as well as fixed, seems to be implied in what was said by Judge COLT, and appears to me to be the correct rule. No intervening rights are prejudiced by sustaining complainant's claim for the avails of the draft collected by the Taunton National Bank, and, therefore, none need be considered so far as concerns No. 2,978. *Exchange Nat. Bank of Pittsburgh v. Third Nat. Bank of New York*, 112 U. S. 276, 5 Sup. Ct. Rep. 141, and the earlier case of *Hoover v. Wise*, 91 U. S. 308, are conclusive on this court, to the effect that in this transaction the Taunton National Bank was the agent of the Maverick, and that the latter would have been responsible for any insolvency or lack of diligence of the former, although the complainant knew when it forwarded the bill or draft to the Maverick that it must transmit the same to Taunton for collection, and although the bank at Taunton exercised an independent occupation, and was not a mere servant of the Maverick. The respondent claims that, as the relations of the bank at Taunton to the Maverick are thus defined by the supreme court, the money, when collected at Taunton, became at once the money of the Maverick, in fact and in contemplation of law; so that from the moment of payment to the local bank the Maverick became a debtor to the complainant, and the complainant was entitled to all the rights of a creditor. It is to be noticed that this proposition was not passed on by the supreme court, but is sought to be built up from what it did decide. It must be admitted that the right of the complainant was not concluded by the mere fact that the Maverick became from a certain instant its debtor, if it did; because the question still remains the leading one in the case, whether, notwithstanding that fact, the complainant did not retain an option to decline to regard the Maverick as its debtor, and in lieu thereof to look to the proceeds of its draft, wherever it might find them. By analogy, the factor who sells goods on a guaranty commission becomes the debtor of the manufacturer from the instant the goods are sold; and yet it must be conceded that the latter has the choice of declining to accept the credit, and of making claim to the account held by the vendor against his customer. It seems to me the case turns on the proposition that, while it must be admitted that the avails of goods or of choses in action, when they come in fact into the hands of a bank or factor authorized to deal with them, are thus so mingled with the mass of assets as to lose their ear-marks, yet they preserve their identity so long as they remain

in the possession of a subordinate party, whether he be technically vendee, bailee, or agent, unless, from a peculiar course of dealing or state of facts, the proceeds have necessarily lost their identity in the hands of the latter. Therefore the law sustains the just result that at the close of business on the 31st day of October the proceeds of this draft, then lying in the hands of the Taunton National Bank, might have been recovered from it by the complainant. Before there was any change in the *status*,—that is, before the opening of business on the next secular day,—the statutory insolvency of the Maverick National Bank had been declared; so that at the instant of this declaration the avails of the draft were still subject to reclamation by the primary owner. The receiver, like an assignee in bankruptcy, took only the mere equities of the insolvent bank, and holds by relation whatever he did take as of the 1st day of November, 1891, in behalf of whom it may concern, and as trustee for all interests as they then existed. My conclusions with reference to this case—No. 2,978—seem to be in harmony with all the decisions in the other circuits. Had they not been so, yet, inasmuch as the latter have been uniformly in favor of the rule claimed by the complainant, I would have felt constrained to follow them; and the result would have been the same. I have not attempted to scrutinize with strictness the allegations of the bill, but have assumed them to be in harmony with the settled practice between banks of deposit to which the case must ultimately conform, because the allegations must be construed in connection with those things of which the court necessarily takes judicial notice. Neither have I considered whether the appropriate remedy is not at law, because the counsel for each party expressed at the hearing a desire that no point of jurisdiction should be taken, and my doubts on this do not require me to challenge, of my own motion, the apparent course of practice to which these bills conform.

As to case No. 2,979, in which the sub-agent was the Massasoit National Bank, it seems to me that, until this bank is made a party, it is not proper to adjudicate whether it can maintain the offset which it has attempted, whether the remedy of the complainant is against it for all except \$144.04, or against the receiver, if it has any remedy at all, or whether or not the rule of *Freeman's Nat. Bank v. National Tube-Works* 151 Mass. 413, 24 N. E. Rep. 779, or that of *Commercial Nat. Bank v. Hamilton Nat. Bank*, already cited, applies, or even to adjudicate at all. If this was an action at law, it might, perhaps, on the principles applied in No. 2,978, be maintained for the item of \$144.04; but in equity it does not seem suitable to thus split up a controversy. In No. 2,979, there will be a decree sustaining the demurrer, and dismissing the bill, with costs, unless the Massasoit National Bank is brought in by amendment filed on or before the June rules next; and in No. 2,978 the demurrer is overruled, and the defendant ordered to plead or answer on or before the same June rules, the costs to abide the final decree.

**SANTEE RIVER CYPRESS LUMBER CO. v. JAMES *et al.***

*(Circuit Court, D. South Carolina. April 30, 1892.)*

**1. FEDERAL COURTS—FOLLOWING STATE DECISIONS—ADVERSE POSSESSION—COLOR OF TITLE.**

The law of the states as to possession of lands under color of title, being a rule of property, are of controlling authority in the federal courts.

**2. ADVERSE POSSESSION—COLOR OF TITLE.**

In South Carolina, when one enters on a body of land under color of title, the actual possession of a part is the possession of the whole, except such parts as are in actual possession of others.

**3. INJUNCTION—POSSESSION OF LANDS.**

Plaintiff, being in possession of a large tract of timber land under color of title, and engaged with numerous laborers in getting out logs for his lumber mill, in which a large capital is invested, and which is dependent upon this tract for a supply of logs, is entitled to a temporary injunction against one who, under claim of title, with force and firearms, enters upon the tract, destroys plaintiff's logging implements, and spreads terror among his workmen; but as a court of equity cannot determine the title to the land the parties will be required to frame an issue of law on that question, to be tried to a jury, pending the injunction.

**In Equity.** Bill by the Santee River Cypress Lumber Company against R. B. James and others for an injunction against interfering with the possession of certain lands. Temporary injunction continued.

*Smythe & Lee and E. W. Moise*, for complainant.

*M. C. Galluchat and A. G. Magrath*, for defendants.

**SIMONTON, District Judge.** The bill was filed for an injunction. The complainant, claiming to be in peaceful possession of a tract of land, alleges that the defendant, with actual force and firearms, entered upon its premises, destroyed its boats, drove away its laborers, terrorized and demoralized its labor, caused a temporary suspension of its operations, and threatened complete destruction of them. A temporary injunction was granted to prevent a flagrant breach of the peace, which seemed imminent. Leave was reserved to defendants to move to set it aside on short notice. Defendants have answered, and admitted the entry, justifying it under claim of ownership. The testimony in the cause has been taken. It appears that the complainant purchased and holds under conveyance in fee simple a body of swamp land consisting of several adjacent tracts of land lying along the Santee river, containing in all some 13,000 acres. A plat was made of the land in one body, and it, with the deed, was duly recorded. The land is valuable only for the timber upon it, and is overflowed every freshet in the river. This land was purchased for the purposes of a lumber business in which complainant is engaged. It has erected lower down the river a large mill for preparing lumber for market, attached to which is a pond in which logs are kept for use. The operations of this mill are dependent upon the supply of lumber from the 13,000 acres of land. This is cypress, in a swamp which cannot be traversed by wheeled vehicles. It is traversed by small creeks and water ways. The complainant had dug out these creeks and waterways, and had constructed canals, one leading through the length

of the tract. The mode of operation is first to kill the trees by girdling them. After they have died, they are cut down, and whenever a freshet occurs and fills the water ways the logs are floated out of the swamp, carried by the river to the mill, and stored in the pond. Thus the mill and these forests constitute the enterprise. Any interruption in felling and floating the timber tends to shut down the mill and stop the enterprise. The capital invested is very large,—claimed to be \$300,000. The adventure is an experiment. The complainant, for the purposes of the work, has formed camps in several parts of the large tract, from which the laborers go out to their daily task of girdling and felling trees. For this purpose they use small boats, of which they had a considerable number, owned by complainant.

The defendants, denying in their answer all claim of title in complainant, setting up title in themselves, in the evidence lay claim to two tracts, alleged to be part of the entire tract, of 1,000 acres each. As evidence of title they produce two grants, dated in the last century, to the ancestor, as they claim, of the defendants Robert B. James, and David W. Brailsford. They never were in actual possession of the land until the day of their entry upon it. Indeed, their evidence goes to show that the land never was in actual occupancy of any one. The possession which they could claim, then, was only constructive possession, which the law will presume when legal title is established. Code Civil Proc. S. C. § 101; *Moseley v. Hankerson*, 25 S. C. 524.

The first question is, was the complainant in possession of the entire tract, including, if it does include, these two 1,000-acre tracts? The preponderance of the evidence shows that it was in the exercise of acts of ownership on that part of the tract which one of the grants is claimed to cover, cutting timber and girdling trees, digging the main channel, of which these particular tracts are the key. But, without such acts, complainant was in possession. The law of the state of South Carolina upon this subject, being a rule of property, controls this court. When one enters upon a body of land under color of title the actual possession of a part is the possession of the whole tract, except such parts thereof as are in actual possession of some one else. *McColman v. Wilkes*, 8 Strob. 470; *Gourdin v. Davis*, 2 Rich. Law, 481. The complainant entered with its deed and plat, duly recorded, as color of title, showing the full quantity of its claim. It erected camps in various places, removed the soil, cut down trees, and girdled a large number. The possession was open and notorious. At times there were employed over 300 men at work in the swamp. No one else was in actual occupancy of any part of the tract. The entry of defendants in the manner charged was not denied. They justify by title. In this court the title to the land cannot be determined. The only questions are, was the possession disturbed? Were the circumstances such as call for the extraordinary remedy of this court? This court cannot interfere unless the injury threatened is of such a character as cannot be compensated in an action at law,—is irreparable. *Jerome v. Ross*, 17 Johns. Ch. 315. We have seen that in the operations of the company the mill and forests were in-

dependent parts of one whole. In order to keep up the enterprise, there must be a full supply of lumber to the mill, and if this be suspended or stopped the enterprise, in which large capital was embarked, must fail. The acts of the defendants, not confined to a peaceful entry and claim, but accompanied with actual force, with firearms, and the destruction of the boats of the complainant, were calculated to excite alarm among the colored people engaged by complainant; to terrorize them, to the last degree; to demoralize and disperse them; and to deter others from taking their places. This would result in destruction to the whole enterprise. No damages which could be recovered in any action of trespass could compensate for this. The injunction must be continued until the further order of the court. *Erhardt v. Boaro*, 113 U. S. 536, 5 Sup. Ct. Rep. 560; *Irwin v. Dixon*, 9 How. 9. But this will not do exact justice between these parties. The defendants should have an opportunity of establishing such rights as they have. Let an issue be made up on the law side of this court, and tried before a jury therein. Let that issue be whether the defendants Robert B. James and David W. Brailsford, or either of them, have any title to the lands claimed by the complainant, or any part or parts thereof, and the nature and extent of that title. The finding of the jury to be reported to this court, with the charge of the judge to them. As the possession is in the complainant, and as the said defendants set up adverse title, let them be the actors in said issue. See *Muldrow v. Jones, Rice, Law*, 64.

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IRWIN *et al.* v. WEST *et al.*

(Circuit Court, N. D. Illinois. January 4, 1892.)

1. FORECLOSURE—EVIDENCE—SUBSTITUTION OF SECURITIES.

In a suit to foreclose a trust deed it appeared that the defendant had afterwards given the complainant another note, with other security, for the same debt. Defendant and his clerk both testified that this other security was taken in place of the trust deed, but defendant contradicted himself, and the clerk showed that he was under defendant's influence. The receipt taken by defendant to show what the second note was security for did not state that it was to take the place of the trust deed. *Held*, that the preponderance of the evidence did not show that the second note, with its security, was taken in substitution of the trust deed.

2. SAME—PLEDGE.

Where the only proof that a note secured by trust deed was pledged to secure a liability in no way connected with the origin of the trust deed is the testimony of the person to whom such liability was incurred, and he is contradicted by the maker of the note, the evidence fails to show that the note was so pledged.

In Equity.

*Runnels & Burry*, for complainants.

*Weigley, Bulkley & Gray, C. H. Remy, Flower, Smith & Musgrave, C. H. Leaming, Holden & Farson, Campbell & Ouster, Dupee, Judah & Willard, W. G. & A. T. Ewing, G. Frank White, Wilbor & Clarke, John S. Cooper, and Gardiner, McFadden & Gardiner*, for defendants.



BLODGETT, District Judge. This is a bill in equity to foreclose a trust deed, given by the defendants West and wife, June 26, 1889, and recorded July 19, 1889, to W. T. Rankin, to secure the note of West to the complainants for \$64,000. The proof shows that the note secured by this trust deed was in fact given to indemnify the complainants Irwin and Rand in that amount against certain liabilities they had incurred as sureties for West; and the master has found and reported as a part of the case that complainants have paid the sum of \$33,000 principal, as sureties for West, which this note and trust deed were intended to indemnify them against, and, if the trust deed is still in force, it stands as security to complainants for that amount with interest and costs. The master, however, finds and reports that, by an agreement made between complainants and West, subsequent to the giving of the note and trust deed in question, and on the 22d day of July, 1889, West gave complainants an assignment of his equity in 5,001 shares of the capital stock of the Chicago Times Company, to secure his note for \$64,000, in substitution for and in place of the note described in this bill and trust deed, and that complainants, by reason of such substitution of security, have no right to the foreclosure of this Rankin trust deed. Complainants have filed exceptions to the findings of the master in this regard. It also appears from the master's report that the property covered by the trust deed was, at the time of the giving of the said trust deed, subject to two prior mortgages for purchase money, both of which are now held by the defendant George F. Bogue, on which there is found to be due the sum of \$23,966.83, and no exceptions are filed by any one to this finding. The master also reports and finds that on the 29th day of April, 1889, West and wife gave to one Frederick P. Reed a trust deed, to secure the notes of West for the sum of \$30,000, which trust deed was not filed for record until the 24th day of June, 1889, and that this last-mentioned trust deed stands as security for the sum of \$13,758.54, due from J. J. West to the First National Bank of Chicago, and \$14,595.60, due from J. J. West to Frank S. Weigley, for money paid by him to the Commercial National Bank of Chicago, as surety upon notes of West, and that this last trust deed is a lien on the property in question immediately after the Bogue mortgages. Defendants Winfield S. Shepard and J. J. West and the complainants in the original bill have excepted to the finding of the master in regard to the amount as to which the Reed trust deed stands as security to Weigley. The case therefore stands:

- (1) On exceptions of complainants Irwin and Rand to the finding of the master that the note of June 26th, for \$64,000, and the trust deed to Rankin to secure the same, were to be canceled and given up, by reason of the substitution therefor of the note for \$64,000 of July 22, 1889, secured by pledge of the 5,001 shares of Chicago Times Company stock.
- (2) On exceptions of West and Shepard and Irwin and Rand to the findings of the master that the Reed trust deed stands as security to Weigley for the \$13,000 note and accrued interest, paid by Weigley to the Commercial National Bank, as surety for West.

As to the master's finding that a preponderance of proof shows that the note and trust deed for \$64,000 set out in the bill was satisfied by the note for the same amount, secured by the Chicago Times Company stock as collateral, I feel, after a careful reading of the proof, compelled to differ in my conclusions from those of the master. The burden of proof to show the substitution of this latter security for the note and trust deed set out in the complainants' bill is upon the defendant West, who sets up this defense. No release or agreement in writing is produced, and it is not pretended that any was ever given to West, or any other person, evidencing such an agreement to substitute securities. West and Graham testify to a parol agreement that the last paper should be in substitution for the former note and trust deed, and upon the testimony of these two witnesses in regard to this substitution the master finds there is a preponderance of proof in favor of this line of defense. West has so far contradicted himself in the various answers and positions he has taken in regard to this transaction as to fully justify the court in disregarding his testimony, and holding it for naught as bearing upon the question at issue. Graham was West's clerk. His testimony justifies the conclusion that he was largely under the influence of West, and was a willing witness in his behalf; and his testimony, when you read the examination and cross-examination, bears quite satisfactory evidence of his having been schooled in regard to what he should testify to. One of the most pregnant items of evidence upon this branch of the case is the fact that, while West was careful to take from Irwin a receipt showing exactly what this note secured by Times stock was to stand as security for, he should have wholly failed to put into the same document a clause to the effect that it was to take the place of the security given on the 26th of June. This receipt, fully and carefully as it is prepared and executed, must be held to represent the entire contract made between the parties at the time this collateral note was given, and excludes, of itself, the idea that it was to effect any other matter than what is set out in the receipt. The proof shows that Irwin and Rand learned about the 7th of July that the \$30,000 Reed trust deed had been given by West before he gave his trust deed to Rankin for them, and they wrote at once to West, reproaching him for his duplicity in assuring them that the Bogue incumbrance was the only incumbrance on the premises prior to the one he had given Rankin for them. In answer to this letter West wrote a long one to Irwin, explaining the emergency in which he was placed, and attempted to explain to him how the giving of the Reed trust deed was no breach of faith towards Irwin and Rand; and he further explained that he had given to H. C. Huiskamp a note for \$64,000, payable to Irwin and Rand, and secured the same by a pledge of his equity in this same block of 5,001 shares of Times stock, with directions to Huiskamp to deliver the note to the complainants, and in this letter he does not say a word about this being in substitution for or to take the place of the Rankin trust deed; on the contrary, speaks about its being proper that he should have a receipt stating what the trust deed is given for; evidently, I think,

alluding to the Rankin trust deed now in suit. The transaction between Irwin and West, by which the note and Times collateral was made on the 22d of July, is but a consummation of what West had said in his letter of the 7th of July he was willing to do in the way of security, to make the complainants good for the Reed mortgage having been placed ahead of theirs upon the record. Much weight is attached to the expression in Irwin's letter to West, after he had discovered that the Reed trust deed had been put on record, to the effect that his lien upon West's real estate was worthless; but this expression cannot be tortured into evidence that he released, or intended to release, whatever of value this trust deed was to himself and Reed. Its value was undoubtedly greatly impaired by the fact which he had just learned that the Reed trust deed was a prior lien to the one now in suit; and this hasty expression, used in a letter written on the discovery of the Reed mortgage, is, to my mind, of no weight in support of the alleged argument of July 22d. I might spend much more time in analyzing this testimony, but suffice it to say that I think all the proof in the case, when taken together, fails to sustain the theory now advanced by West,—that the note and trust deed in question were to be canceled by reason of the note and collateral pledged on the 22d of July.

As to the exceptions taken by the several complainants and cross complainants in regard to the finding of the master that the Reed trust deed is to stand as security to Weigley for the amount Weigley had paid as surety for West to the Commercial National Bank, I think it is sufficient to say that the only evidence we have of any pledge of the \$30,000 to secure this is from Weigley himself. This is denied by West; and, as this security had nothing to do with the origin of the trust deed, it seems to me that it ought to take more conclusive and positive testimony to import this Commercial National Bank debt into the Reed trust deed. The exceptions of the complainant to the report of the master are therefore sustained, and also the exceptions of West and Shepard to that part of the master's report in which he gives Weigley the benefit of the \$30,000 trust deed to secure him against liability to the Commercial National Bank. A decree may be prepared sustaining the exceptions as above, and directing a sale of the premises covered by the trust deed, and that out of the proceeds the incumbrances be paid in the order of priority found by the master.

ANCHOR *et al.* v. HOWE *et al.*

(Circuit Court, D. Idaho. April 16, 1892.)

## PUBLIC LANDS—LAND-OFFICE REGULATIONS.

Department regulations for the disposal of public lands must be appropriate, reasonable, and within the limitations of the law for the enforcement of which they are provided, and when otherwise they are void.

(*Syllabus by the Court.*)

In Equity. Bill by H. E. Anchor and others against Benjamin S. Howe and others to determine an adverse claim to public lands. Plea in abatement disallowed.

*Albert Hagan and Richard Z. Johnson*, for plaintiffs.

*W. B. Heyburn*, for defendants.

BEATTY, District Judge. It is alleged by the bill that this action is instituted in pursuance of the provisions of section 2326, Rev. St., and that "complainants made their protest and adverse claim under oath and in due form of law, and filed the same in the United States land office," etc. The defendants plead, in abatement of the action, that no adverse claim was filed or allowed in such land office. It sufficiently appears that an adverse claim in due form was presented to the land office for filing, but was rejected because it did not appear therefrom that a survey of the disputed premises, and a map thereof, had been made by a deputy United States surveyor. Said section 2326 requires that the adverse claim filed "shall show the nature, boundaries, and extent" thereof. This statute is in all particulars complied with by the adverse claim presented to the land office, and no question is or can be raised that the statute itself is not fully observed. But by the forty-ninth rule, issued by the commissioner of the general land office, approved by the secretary of the interior, the plat showing the boundaries of the conflicting premises "must be made from an actual survey by a deputy United States surveyor." Must this rule be regarded as a part of the law, and be closely followed? is the only question for determination. The plat and certificate attached comply with the rule, except that it does not appear that the surveyor who made them and the survey was a United States surveyor. In support of the effect of this rule, the department decisions found in Sickles, Min. Dec. 263, 265, 277, are cited. In those cases it appears the adverse claims were very irregular, and wholly failed to comply with said rule in not showing that any survey had been made, and in omitting the certificates required. Their conclusion is not based alone upon the fact that the surveyor was not a United States deputy, but, on the contrary, it is stated in one that "no surveyor," and in another that "no United States deputy or other surveyor," had performed the required acts. It may fairly be inferred from these cases that the performance of such acts by any surveyor would be sufficient. Weeks on Mineral Lands, 190, says they may be performed by a United States deputy or other surveyor. But admitting that such rule can be complied with

only by procuring the services of a United States surveyor, the question still remains whether the rule itself has the force of positive law; and by what authority can the land department make it. It is clearly invested by the statute with the executive duties in the disposal of the public lands; and by section 2478 "the commissioner of the general land office \* \* \* is authorized to enforce and carry into execution, by appropriate regulations, every part of the provisions" applicable to the disposal of the public lands, including mineral lands. Under this section the validity of all departmental regulations which are appropriate, and within the limitations of the law, cannot be doubted. This, however, is not a grant of power to legislate; to add to the law; to render its enforcement difficult; to burden the proceedings under it with unnecessary expense or hardship; or to incumber them with onerous and technical conditions. It is designed that the permitted regulations shall simplify and explain, not embarrass, the administration of the law; and certainly they must not only be appropriate, but they must be reasonable, and within the limitations and intent of the statute. By the requirement that the boundaries and extent of the conflict shall be shown, it was not designed that the representation thereof made in the land office should be final, in that office or elsewhere; for that question is remitted to the courts for decision, and they are not in any way dependent upon the adverse claim as filed, but base their action upon a full development of all the facts. The most apparent, if not the only, object of this statute is that the applicant for patent may have a definite notice of what is claimed against him, which he may then concede or contest. Any adverse claim, apparently made in good faith, and which clearly and definitely notifies the applicant for patent of the conflict between his and the adverse mining claim, would seem to meet and comply with the object of the statute, and certainly would be sufficient to so put in issue the question of contest that the interest of all parties could be protected by the courts. It is suggested that the government does not design that its mineral lands shall be patented upon a survey made by any surveyors except those specially appointed by it. No patent, however, is issued upon such unofficial survey, or, at least, not until after an investigation by the court, where any error can be detected and corrected, and neither the government nor others can be injured thereby. I am unwilling to say that this and all the department regulations, regardless of their encroachment upon or variation from the law, and the needless expense, inconvenience, and hardship which they may entail beyond those which would result by following only the provisions of the law itself, shall be literally and technically construed and enforced. Such a rule would not be conducive to the ends of justice. When they must be followed, and when they may be disregarded, may not be easy to define by any general rule; but in all cases they must be appropriate, and within the limitations of the statute in the enforcement of which they are designed to aid, and which they cannot supplant. It has frequently been held by the supreme and other United States courts that regulations in conflict with the law are invalid; those which enlarge its requirements, though not in exact con-

flict with or contradiction of it, should be likewise regarded. If this rule is not clearly within the former, it is within the latter class. The defendants' plea, therefore, is disallowed.

*CLAIBORNE et al. v. WADDELL et al.*

(Circuit Court, N. D. Georgia. March 11, 1892.)

1. **FEDERAL COURTS—JURISDICTION—CITIZENSHIP—DISMISSAL OF PARTY.**

When, on arranging the parties according to their interests in the controversy, the jurisdiction of the federal court will be taken away because of the citizenship of one party, such party may be dismissed, and the question will then remain whether she is a necessary party. *Horn v. Lockhart*, 17 Wall. 570, followed.

2. **SAME—DELAY IN RAISING THE POINT.**

In passing upon a question of jurisdiction the court will take into consideration any excessive delay in raising the point.

In Equity. Bill by John M. Claiborne and others against John O. Waddell and others. Heard on motion to dismiss for want of jurisdiction.

The citizenship and residence of the parties is stated in the bill to be as follows: John M. Claiborne, guardian of the person and property of Sarah Vienna Phillips, is a citizen and resident of the state of Texas, his ward being a citizen and resident of Missouri. Margaret L. Guthie and her husband, who is joined with her, are citizens and residents of the state of Texas. All of said parties are complainants, and John O. Waddell, William Peek, E. H. Richardson, Thomas Berry, Alfred Shorter, and John M. Berry, partners under the name and style of Berrys & Co., and Mrs. Augusta Phillips, who was formerly Mrs. Augusta Colville, citizens of and residing in the state of Georgia, in said northern district, are defendants. The purpose of the bill is to recover assets of the estate of Hiram Phillips from John O. Waddell, who was his guardian, (Phillips having been adjudged a lunatic,) and afterwards his executor. The interest of Mrs. Phillips, who is made one of the defendants, was really with the complainants. It appears that she had an equal interest with each of the complainants in whatever might be recovered by the bill. This motion is made to dismiss the bill for want of jurisdiction on account of citizenship of the parties; the contention being that Mrs. Phillips should be a party complainant, and should now be considered such, and therefore her citizenship and residence in Georgia would defeat the jurisdiction.

*Fulton Colville*, for complainants.

*B. H. Hill*, for defendants.

NEWMAN, District Judge. It will be perceived that this bill has been pending in court for 14 years, and no question of jurisdiction has ever been raised in it. The defendant Waddell, who now makes the ques-

tion of jurisdiction, filed an answer to the bill in July, 1878. It seems clear that with the present parties to the case the court is without jurisdiction. In arranging the parties according to their interests, and as to their respective sides in the controversy, it will be necessary to place Mrs. Phillips with the complainants; and the fact of her residence and citizenship in this district will be fatal to the jurisdiction. *Bland v. Fleeman*, 29 Fed. Rep. 669; *Covert v. Waldron*, 33 Fed. Rep. 311; *Rich v. Bray*, 37 Fed. Rep. 273. Where there is great delay, as in this case, in raising the question of jurisdiction, the court will consider the delay in passing upon the question. See *Deputron v. Young*, 134 U. S. 241, 10 Sup. Ct. Rep. 539. The counsel for complainants suggested to the court his right to dismiss as to Mrs. Phillips, which would obviate all difficulty as to the jurisdiction of the court on the ground of citizenship; and the question would then remain as to whether or not it is necessary to retain Mrs. Phillips as an indispensable party, under the equity practice of the court. In *Horn v. Lockhart*, 17 Wall. 570, a case very much like this, being a suit to recover assets of an estate in the hands of an executor, the suit was brought in Alabama, where the executor resided, and two of the parties made defendants resided in the state of Texas, which was the residence of the complainants. The objection to the jurisdiction was met by the dismissal of the suit as to the two defendants resident in Texas. The dismissal as to these parties, thereby obviating the question of jurisdiction, was sustained by the supreme court, and I am unable to see the difference in principle between that dismissal and the dismissal here of the case as to Mrs. Phillips. The two defendants as to whom that case was dismissed had interests identical with the interest of Mrs. Phillips in this case; and, if a decree could be rendered in that case without their presence as indispensable parties, I see no reason why it may not be rendered in this case. Upon the authority of the case just cited, I am of the opinion that, if counsel for complainants desire, an order may be taken, dismissing this case as to Mrs. Phillips; otherwise, the case must be dismissed for want of jurisdiction.

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### HOHNER v. GRATZ.

(Circuit Court, S. D. New York. May 7, 1892.)

#### FOREIGN JUDGMENTS—RES ADJUDICATA—INFRINGEMENT OF TRADE-MARK.

In an action in equity to restrain the defendant from selling in this country harmonicas made in Germany, and protected by the complainant's trade-mark, a motion will not be granted, after the cause is in readiness for hearing, giving leave to interpose a supplemental answer setting up a judgment rendered against the same complainant in a suit in Germany to restrain an alleged violation of the same trade-mark there, in which the defendant there was the principal of the defendant here; because foreign adjudications, as respects torts, are not binding, and because the granting of an injunction depends in part upon circumstances which vary in different jurisdictions; and also because neither the parties nor the subject-matter of the two suits are the same, and neither comity nor public policy require or

admit that the protection of the citizens of this country against imposition or fraud committed here should in any degree be held subject to the decisions of a foreign tribunal.

In Equity. Bill by Mathias Hohner against William R. Gratz to restrain the violation of a trade-mark. Motion for leave to file a supplemental answer setting up a foreign judgment, denied.

*Louis C. Raegerer*, for complainant.

*Benno Loewy*, for defendant.

BROWN, District Judge. The recent adjudication in Germany which is sought to be set up as a supplemental answer in bar of the complainant's demand, is not, in my judgment, entitled to the force of an adjudication in an action like the present. The relief prayed for is to restrain the violation of the complainant's trade-mark in harmonicas, through any sales of the infringing harmonicas by the defendant in this country. The granting of such relief has reference not merely to the complainant's rights, but to the protection of the American public against imposition. *Medicine Co. v. Wood*, 108 U. S. 218-223, 2 Sup. Ct. Rep. 436. The question whether the alleged infringement is likely to impose upon the public, or whether it involves an unfair and inequitable business competition, depends upon the circumstances of the place. An injunction might be properly refused in Germany, and yet properly granted here, from the different circumstances which would necessarily enter into the decision.

Comity, moreover, does not require, nor does public policy permit, that the protection of the citizens of this country against imposition in transactions within its own territory, should in any degree be held subject to the decisions of any foreign tribunal. See *Brimont v. Penniman*, 10 Blatchf. 436. Cases like the present have no analogy to suits upon foreign judgments rendered on contracts, or other subjects of ordinary common-law right, and are not within such adjudications as that of *Hilton v. Guyott*, 42 Fed. Rep. 249, and the cases there cited. Here the subject-matter is a tort, and an imposition upon the public alleged to be committed or about to be committed here. Such subjects are not concluded by foreign adjudications, even when the acts referred to are the same identical acts. Whart. Conf. Laws, §§ 793, 827.

But here the particular subject-matter of the two actions is not identically the same. Though similar torts or imposition in Germany may have been the subject of the suit in the German tribunal, those acts are not the same as similar torts committed here; nor is the defendant the same, though he may be the agent of the German defendant. What is sought here is to restrain this defendant's torts within this country, and his imposition upon the American public; and that is a different subject from a restraint upon the principal in Germany against similar torts committed there. The motion is, therefore, on both grounds denied.



## JOYCE v. CHARLESTON ICE MANUF'G Co.

*(Circuit Court, D. South Carolina. April 30, 1892.)***1. TRIAL—CONFLICT OF EVIDENCE—PROVINCE OF COURT AND JURY.**

When there is a conflict of evidence as to material facts, which conflict can only be solved by determining the credibility of the witnesses, the court has no authority to direct a verdict.

**2. NEW TRIAL—MISCONDUCT OF WITNESS.**

The fact that a witness, on an objection to his testimony, intentionally deceived the court as to the statements he was about to make, is not sufficient ground for a new trial when the statements thus introduced were not in fact irrelevant, and had already been given in evidence.

**3. SAME—WEIGHT OF EVIDENCE—OPINION OF COURT—THIRD TRIAL.**

Although a federal judge may give his opinion as to the weight of the evidence, yet, after two concurring verdicts opposed to that opinion, he cannot grant a third trial, except for substantial errors of law.

**At Law.** Action by E. F. Joyce against the Charleston Ice Manufacturing Company to recover damages for an unlawful detention of personal property. Heard on motion for a new trial. Overruled.

*Bryan & Bryan*, for plaintiff.

*Samuel Lord and J. N. Nathans*, for defendant.

**SIMONTON**, District Judge. This case has been before two juries. At the first trial, which was had in Greenville, the verdict was for the plaintiff. After hearing argument on motion for a new trial, the verdict was set aside, the court being satisfied that the jury were influenced by prejudice. The second trial was had at the present term in Charleston. The plaintiff again obtained a verdict. A motion for a new trial.

The action is for damages for the unlawful detention of personal property. The plaintiff was under contract with the defendant to dig an artesian well on its premises in the city of Charleston. The location of the proposed well was within the inclosure of the defendant. While the digging of the well was in progress, disputes arose between the plaintiff and the defendant respecting the performance of the contract. This dispute pending, plaintiff desired to remove from the inclosure of the defendant certain 10-inch tools and 10-inch pipe, rope, and some other materials needed by him for a well in Florence, S. C., and, as he alleges, not needed at the well in Charleston. Prior to this he had, at his own pleasure, brought to and removed from the premises of the defendant plant and materials used about the well without seeking the permission or consent of the defendant. On this occasion—13th February, 1890—such consent was asked for the removal of the articles specified. It was not given. The 10-inch plant and other material were not removed. One or more efforts were made by plaintiff with the same result. On 18th March following, a formal demand was addressed to the president of the ice company for the entire plant of the plaintiff of every description on the premises of defendant. This demand was mailed to the president, who was absent from the city. On the 24th March he replied in writing, acceding to the demand. This letter was received by

plaintiff on 28th. The entire plant was removed within two weeks afterwards. The business of plaintiff is to dig wells. He was under contract for wells in Florence, and in Savannah, Ga. The same witnesses, and no others, testified at this trial who gave evidence at the other. The testimony offered by the plaintiff purported to establish these facts: That when his desire to remove the 10-inch plant, etc., was made known to defendant, it was met with such language, attitude, and action upon the part of the agents of defendants as induced those acting on his behalf to believe that the removal of the articles desired would be resisted, even if it involved a breach of the peace. On the other hand, the testimony of the witnesses for the defendant was to the effect that, although the desire to remove these articles did not meet the approval of the defendant, no other mode of resistance was offered or threatened than a resort to legal proceedings to prevent or remedy the removal. The facts on each side were minutely detailed. The issue of fact thus raised, supported by conflicting testimony, was submitted to the jury for solution. They were instructed that there was no necessity whatever requiring the plaintiff to seek the assent of the defendant before or at the time of the removal of the plant and other articles. That, as a necessary result of his contract without any stipulation to that effect, he had free right of ingress to and egress from the premises of the defendant for the purpose of working on the well, and of carrying to it such plant and material as he deemed necessary, and of taking away from it such as he found useless. But if, before exercising his right of removal, he consulted the wishes of defendant, and met a refusal, and if in so refusing there was anything in the language, attitude, or action of the agents of the defendant which would induce a man with ordinary courage to believe that the refusal would be maintained, if need be, by a breach of the peace, the plaintiff need not assert his right by force, but could resort to this action. This issue of fact was presented in these words: "In short, was there an absolute refusal to permit the removal at all events, or was there a notification that an attempt to remove would be met by legal proceedings?" The verdict answered the first question in the affirmative.

The next question was as to damages. The jury were instructed, if they found for the plaintiff upon the issue above stated, that defendant was liable for all actual damages arising to the plaintiff by its act in any delay in or loss of contract thereby occasioned. Besides these, plaintiff sought punitive damages. The facts his witnesses sought to prove were these: That the agents of defendant had full knowledge that they had no right to hold or to refuse or prevent the removal of the property of the plaintiff, and that he had the right to remove it at his own pleasure; that, notwithstanding this, while negotiations were pending between him and defendant respecting the breach of contract, with the purpose of coercing him to their views, they unlawfully took possession of the property of plaintiff, and refused him access to it, accompanying the refusal with conduct indicating violent resistance if he attempted to remove any part of the entire plant. The evidence of the defendant went

to show that it never held or had possession, and that no refusal was made as alleged, and that nothing was done or said indicating any other purpose than an assertion of the rights of defendant within the law. This issue was submitted to the jury in these words:

"If the agents of the defendant acted with the high hand, regardless of the well-known right of the plaintiff, with a view to oppress and harass the plaintiff, you may find, if you find for him, punitive, exemplary, and vindictive damages, not exceeding in the aggregate \$5,000. If, however, the defendant had no purpose but to resort for protection of its right to legal proceedings, or if it *bona fide* hesitated, fearing a compromise of its rights, you cannot find such exemplary, punitive, or vindictive damages. And, with no desire to control your verdict, I express to you the opinion that there is not room for such damages here."

The jury found for the plaintiff \$2,500, a sum largely in excess of any actual damage proved. The defendant's motion for a new trial is on these grounds:

*First.* Because C. L. Parker, one of the plaintiff's witnesses, and, by his own testimony, interested in the event of the suit, by a trick upon the court and upon the counsel for the defendant brought out before the jury incompetent testimony, and such incompetent testimony must have influenced the minds of the jury in arriving at their verdict. This refers to an unpleasant incident at the trial. The witness Parker, the manager of the plaintiff, was on the stand. He had, among other things, testified to the conversations had with agents of the defendant. He was asked: "Did you have a conversation with any representative of the ice company on 28th March?" This was excepted to, as no part of the *res gestae*, but was admitted. He then proceeded to read from a memorandum, purporting to have been made at the time, what he, the witness, said. During this reading the court interrupted him, saying, "We do not wish to know what you said, but what they said." Upon his replying that "you cannot understand what they said until you hear what I said," he was permitted to go on. After reading through his memorandum, he was asked, "What was said by them?" He answered, "Nothing further on this matter." He is a man of unusual intelligence. He must have known that when he was asked as to a conversation the replies of the other party were sought. His answer, when interrupted, distinctly intimates that he did have a reply. He did not have any conversation on the matters in issue, or any reply. His conduct misled the court, and was rebuked, not for what he said, but for resorting to deception gratuitously. All that he read out was in evidence already. Had it not been in evidence, a frank statement of the question would have brought the reply in evidence. No irrelevant testimony, however, came in, and this improper conduct of this witness is not of such character as to require a new trial of the case. The remaining grounds deserve and have received careful consideration.

*Second.* Because the verdict is excessive and against the evidence.

*Third.* Because the damages assessed by the jury could have been arrived at only by disregarding the instructions of the court. The jury found punitive damages, against the expressed opinion of the court.

This opinion was given under the sanction of *Lovejoy v. U. S.*, 128 U. S. 173, 9 Sup. Ct. Rep. 57; *Rucker v. Wheeler*, 127 U. S. 93, 8 Sup. Ct. Rep. 1142. The counsel for the defendant earnestly press the argument that the trial judge should have instructed the jury not to find punitive damages. The judges in courts of the United States have a discretion in the matter of the verdict. They are bound to assist the jury in reaching a conclusion, and may express an opinion upon the facts. At times they must assume the responsibility of instructing them how to find, thus taking the verdict from them. This is a large and dangerous power. The supreme court, in a long series of decisions, has carefully established the rules of its exercise, and have laid down the limits which it cannot pass. "When the evidence given at the trial, with all the inferences that the jury can justifiably draw from it, is insufficient to support a verdict, the court is not bound to submit the case to the jury, but may direct a verdict." *Randall v. Railroad Co.*, 109 U. S. 478, 3 Sup. Ct. Rep. 322. "If the evidence, giving the plaintiff the benefit of every inference to be fairly drawn from it, sustained this view, then the direction to find for the defendant is proper," (*Kane v. Railway Co.*, 128 U. S. 94, 9 Sup. Ct. Rep. 16;) "whilst, on the other hand, the case should be left to the jury, unless the conclusion follows as a matter of law that no recovery can be had upon any view which can properly be taken of the facts the evidence tends to establish," (*Railroad Co. v. Woodson*, 134 U. S. 621, 10 Sup. Ct. Rep. 628.) These cases cite all the authorities, and fix the principle.

The testimony of this case did not permit the court to instruct the jury. There was a grave conflict, to be solved only upon the credibility of the witnesses. According to those of the plaintiff, there was a stubborn disregard of his known right, without any reason assigned, with a view to coerce him to terms, with an apparent intention to maintain the position at all hazards. That of the defendant contradicted all this. The facts, and all inferences from the facts, were left to the jury. Had the judge instructed them, he would have invaded their province. Will the court now set aside their conclusion? In *Henning v. Telegraph Co.*, 43 Fed. Rep. 132, this court deduces the following conclusion as the result of authorities cited:

"The right of the court, after verdict, to look into and test the evidence upon which the jury came to their conclusion cannot be doubted. Whenever there is no evidence to sustain the verdict, or when there is evidence, and it is insufficient, or when the preponderance of testimony is so great against the verdict as to raise the presumption that it was rendered through inadvertence or bias or prejudice in favor of or against one of the parties, or through some corruption, misconduct, or objectionable behavior on the part of the jury, the court will and should set it aside. But when there has been competent evidence submitted on both sides, and the result depends upon the credibility which the jury attaches to testimony of the witnesses, without regard to the number of these witnesses, and the jury reach their conclusion, it is not competent for the court to interfere with it. It is not the opinion of the judge as to the credibility of the witnesses which governs such a case, nor his conclusion as to the preponderance of the evidence, based upon his opinion as to their relative credibility, nor what verdict he would find were he a juror. The

jury alone can determine this. It is their exclusive province; and, were judges to interfere with it, the value of a trial by jury would be destroyed."

Every precaution was taken at the second trial to secure a fair verdict. The cause was heard on the first day of the term,—the first case called. The names of the entire panel, drawn from every portion of the state, were put in the hat, and 12 men drawn. The jury was an excellent representative of the people. It will be difficult, perhaps impossible, to get a better jury. Although my own conclusion differs essentially from that reached by them, it is an opinion formed from weighing the evidence and watching the witnesses. I cannot say that the jury were guilty of inadvertence, or were controlled by bias or prejudice, or that they disregarded the law as expounded to them. If the verdict be set aside, it will be simply because, on an issue of fact presenting conflict of testimony, the judge does not agree with the jury. "I confess," says TILGHMAN, C. J., in *Griffith v. Willing*, 3 Bin. 317, "that neither at the trial nor since further reflection has it struck me in the same point of view in which it appears to the jury. But that is not sufficient ground for awarding a new trial. I cannot discover any principle of law which the jury have violated, nor will I undertake to say that they have done so decidedly against the evidence as would justify the court in setting aside the verdict." "After two concurring verdicts, the court will not grant a new trial if the questions to be tried depend wholly on matters of fact, and no rule of law be violated, although the verdict be against the weight of the evidence." Grah. & W. New Trials, No. 54. The language of WATIES, J., in *Frost v. Brown*, 2 Bay, 139, 140, seems to fit this case:

"A second trial has already been granted, and two juries have concurred in finding the same facts. I think we have no authority to proceed any further, for, although I would never surrender a plain and certain rule of law to the caprice of a jury, or any number of juries, yet in a case where the law is complicated with facts, so that the construction and application of it must depend on the findings of facts, two concurring verdicts, even against the opinion of the judges, ought to be conclusive. As the present case appears to me to be such a one, I think that a third trial ought not to be granted."

Two juries have found from these facts that punitive damages should be awarded. The motion for a new trial is refused.

ASPLEY *v.* MURPHY *et al.*

(Circuit Court, N. D. Texas. February 21, 1902.)

**1. PROBATE COURTS—JURISDICTION—SPECIFIC PERFORMANCE—REPEAL OF STATUTE.**

Act Tex. 1846, entitled "An act to organize probate courts," which in section 37 (Hart. Dig. art. 1108) expressly repeals "all laws relative to the duties of probate courts and the settlement of successions," was applicable only to laws conferring general probate jurisdiction, and not to Act 1844, § 2, (Hart. Dig. art. 1070,) which vests in those courts the special power of enforcing specific performance of contracts to convey lands.

**2. COURTS—JURISDICTION—REPEALING ACTS—CONSTRUCTION.**

Where jurisdiction in special cases is conferred upon a court by legislative act, and its exercise in a particular instance is questioned after the lapse of 45 years, on the ground that the act was subsequently repealed, the court will resolve any doubts as to the scope of the repealing statute in favor of the jurisdiction.

At Law. Action by R. F. Aspley against J. P. Murphy *et al.* to recover an undivided two-ninths interest in and to block 77, in the city of Dallas, Tex. Heard on a question as to the admissibility in evidence of certain records of the probate court.

*Chas. I. Evans, G. J. Gooch, and Bassett, Seay & Muse, for plaintiff.*

*E. J. Simkins and Simkins & Morrow, for defendants.*

MAXEY, District Judge, (*orally.*) The question in this case arises upon the offer on the part of defendants to introduce in evidence a transcript of certain orders and proceedings of the probate court of Houston county, passed in 1847. From an inspection of the transcript, it appears that a petition was filed by the administrator of John Grigsby's estate, one Edens, praying for authority to execute a deed to the heirs of Crawford Grigsby for 1,000 acres of the John Grigsby league and labor. That petition was filed and granted by the probate court on the 29th day of March, 1847. On the same day, as a basis for the petition, an affidavit was filed by William Grigsby, in which he deposed to the execution of a contract entered into between John Grigsby and his son, Crawford, in 1840 or 1841, by the terms of which the father agreed to convey to his son, Crawford, 1,000 acres of the league and labor, in consideration of services to be rendered by the latter in locating the land, etc.; the affiant further deposing that Crawford fully complied with his part of the agreement. The order of court granting the application, it appears, was filed on September 28, 1847. The deed of the administrator was executed in pursuance of the order on July 17, 1847.

While counsel for the plaintiff object to the validity of all the papers embodied in the transcript, their particular objection goes to the order of the court; they insisting that the probate court of Houston county was without authority or jurisdiction in 1847 to pass the order in question. On the other hand, counsel for the defendants maintain—*First*, that the court had jurisdiction under the act of 1844, which they say was then in force; or, *secondly*, if repealed, the probate court had jurisdiction, under the general power granted by the constitution of 1845

and the act of 1846, construed in connection therewith, to make the order; or, if mistaken in the positions assumed, they further maintain, *third*, that the recognition of the claim for land, under the thirteenth section of the act of 1846, is a judgment which cannot be collaterally attacked.

The question then is, did the probate court have jurisdiction—was it clothed with power—in 1847 to entertain the application of the administrator, and pass the order prayed for by him? It is clear that, if the court was without jurisdiction, every order passed in the proceeding was a nullity; for orders, judgments, and decrees cannot be rendered by a court in the absence of power to make them. Jurisdiction is the power to hear and determine a cause, and, when the power is wanting, acts performed by the court are without validity. If, then, there was no jurisdiction, the order was void; and if the jurisdiction depended alone upon the act of 1844, and that act was repealed when the order was made, then was also the order a nullity. I say if the jurisdiction depended alone upon the act of 1844, and that act had been repealed by the statute of 1846, then the order passed in 1847 was without validity. That position is clearly sustained by the supreme court of the United States in the case of *Bank v. Dudley*, 2 Pet. 523, 524, and so it is held by the same court in the case of *Insurance Co. v. Ritchie*, 5 Wall. 541. See, also, *Houston v. Killough*, (Tex. Sup.) 16 S.W. Rep. 57. Was the act of 1844, then, repealed by the act of 1846? By reference to the early laws of Texas, it will be seen that the first act conferring jurisdiction upon the probate courts generally in reference to the estates of decedents was passed in 1840, beginning with article 995 of Hartley's Digest. The caption of that act reads as follows: "An act regulating the duties of probate courts and the settlement of successions." Without consuming time to call attention to all of the intervening acts directly relating to the settlement of successions, we pass to the consideration of the act claimed to have been repealed, the act of 1844, with this caption, "An act to define and fix the practice of probate courts in certain cases." The second section of that act (article 1070 of Hartley's Digest) vests in courts of probate the power to enforce specific performance of contracts to convey land. Then follows the act of 1846, the caption of which employs these words: "An act to organize probate courts." The repealing clause of that act will be found in section 27 or article 1108 of Hartley's Digest, and is in the following language: "That all laws and parts of laws heretofore in force relative to the duties of probate courts and the settlement of successions be, and the same are hereby, repealed."

It is not claimed in this case, as I understand the argument of counsel, that the act of 1846 repeals by implication the act of 1844. There seems to be no irreconcilable conflict or repugnancy between the two acts, and it could not be successfully claimed that the one, by implication merely, repeals the other. *U. S. v. Railway Co.*, 40 Fed. Rep. 769, and authorities there cited. Does the repealing clause of the act of 1846 expressly repeal section 2 of the act of 1844? In the construction of statutes courts discover, if possible, the legislative intent. See *Oates v.*

*Bank*, 100 U. S. 244. In support of that view, reference is also made to the case of *Ellis v. Batts*, 26 Tex. 706.

The question, then, as I have said, which presents itself to the court in all cases of this kind, is this: What was the intention of the law-makers? Courts carry out the intention of the lawmaking power without reference to the policy of statutes. Did the legislature, by the words employed in the clause repealing all laws and parts of laws relative to "the settlement of successions," intend to embrace laws conferring the power to enforce performance of executory contracts for the conveyance of title to lands? This is the first proposition to be considered.

It is clear, by reference to the authorities, that it did not so intend, and in support of that view reference is again made to the case of *Bank v. Dudley*, reported in 2 Pet. 524; also to *Kegans v. Alcorn*, 9 Tex. 25, and the case of *Houston v. Killough*, reported in 16 S. W. Rep., decided by the supreme court of this state. It is evident that the words embodied in the repealing clause of the act of 1846—that is, those words which repeal all laws and parts of laws relative "to the settlement of successions"—cannot be construed to include a statute which confers jurisdiction on a probate court to enforce the performance of an executory contract to convey land. That is clearly decided by both the supreme court of the United States and the supreme court of Texas. What then, in reference to the particular point before the court, is the source of the power to enforce performance of an executory contract to convey title to land? Whence does it originate? Out of what does it grow? The supreme court of Texas leaves no doubt upon that point. Proceeding, in the case of *Houston v. Killough*, Chief Justice STAYTON, delivering the opinion, says:

"In *Booth v. Todd*, 8 Tex. 137, it was held that the general grant of probate powers would not confer on county courts the power to decide litigated accounts between the representatives of partners, and it was said that there was perhaps but one case in which litigation on a claim against the deceased is conducted before the probate court, and that is for the enforcement of an executory contract to convey title to lands. The source of this power was not in the general grant of probate jurisdiction, but in the statute which specifically gave it."

Hence it becomes apparent that the source of this power will not be discovered in the general grant of jurisdiction to the probate courts; it is not to be found there, and, if it exists at all, it must be found in the statute which specifically gives it. It must be presumed that the legislature, in passing the act of 1846, had in view this distinction; that they passed the act with the understanding and with the knowledge that the power to enforce the specific performance of contracts to convey lands did not originate in the general grant of jurisdiction to the probate courts as such. If that be true, does the language "repeal all laws and parts of laws in force relative to the duties of probate courts and the settlement of successions" operate to repeal all prior laws, both general and special, prescribing duties of probate courts, etc., or only those general laws relating to the settlement of successions and the general duties of



probate courts as purely courts of probate? If the intention had been to repeal all laws, was not the act of 1841, relating to deceased soldiers' estates, obliterated? That act, which is embodied in articles 1053 and 1054 of Hartley's Digest, passed in 1841, relates to estates of deceased persons, and confers upon the probate courts certain powers and duties in reference to the administration of those estates. In *Duncan v. Veal*, 49 Tex. 613, the question was directly presented to the supreme court of this state whether the act of 1846 repealed the act of 1841. Chief Justice MOORE, or, rather, Mr. Associate Justice MOORE, at that time, in holding that the act of 1841 was not repealed, uses this language:

"Evidently to hold the act of January 14, 1841, enacted for the special purpose of protecting the estates of volunteer soldiers from foreign countries who had fallen in battle, or otherwise died in the republic, repealed by the repealing clause of this general act of 1846, organizing probate courts, would do violence to the well-established canons for the construction of special and general laws, and their proper relation and bearing to each other."

That decision is referred to with approval by the supreme court in the late case of *Cattle Co. v. Boon*, reported in 73 Tex. 554, 11 S. W. Rep. 544. The supreme court then, as late as the time when the opinion in 73 Tex., 11 S. W. Rep., was rendered, cited with approval the rule announced in the case of *Duncan v. Veal*. If the act, then, of 1841 was not repealed, the question arises, why was it not? Mr. Justice MOORE replies that, under the well-recognized canons of construction, the act of 1846 could not be held to repeal it. The act of 1846 was "to organize probate courts," and in that act the general duties of the court and of administrators and executors were prescribed; it was a law general in its nature. The act of 1841, while a general law, was special in its character, and the court evidently held that a law general in its nature, prescribing the general duties of probate courts, would not be held to repeal a statute prescribing special duties in certain cases. See, also, *Ellis v. Batts*, 26 Tex. 708. If we look to the act of 1841, we find that it has reference to estates of deceased persons; there can be no escape from that conclusion. We find, also, that it prescribes the duties of the court. Now, the language of the repealing clause of the act of 1846, as I have already said, provides for the repeal of "all laws and parts of laws heretofore in force relative to the duties of probate courts and the settlement of successions." It would seem that the act of 1841 was embraced within that provision, but, under the accepted canons of construction, the supreme court of this state has held otherwise; that the act was not affected, but was in force after the act of 1846 was passed.

What is the act of 1844? We have seen, and it has been repeatedly held by the supreme court in the authorities referred to by counsel, that the probate courts had no jurisdiction to enforce the specific performance of a contract to convey title to land, until the act of 1844 was passed. We have seen that the general grant of jurisdiction to the probate courts, as such courts, did not include the power to enforce the performance of such a contract. Then, the act of 1844 was what? By its caption it was an act "to define and fix the practice of probate courts in certain

cases." It was an act to confer jurisdiction upon the probate courts in cases, among others, in which they, before that time, had no jurisdiction; it was a new law, originating a special jurisdiction, conferring special powers and special duties.

The act of 1846, as has been shown, did not repeal all laws relating to the duties of probate courts and the settlement of successions, and, as I have said, the law of 1841 embraced both of these subjects. What, then, did the legislature mean, in employing the words of the repealing act of 1846, "all laws and parts of laws heretofore in force relative to the duties of probate courts?" The meaning was to repeal all general laws relative to the settlement of successions, and all such laws relative to the general powers and duties of the probate courts as courts of probate. The intention was not to repeal a statute prescribing duties in special cases, touching the settlement of successions, as in effect held in *Duncan v. Veal*, nor a statute which conferred jurisdiction in special cases, where such jurisdiction was not embraced in the general grant of jurisdiction to probate courts. As has been seen, the power to enforce performance of an executory contract to convey title to land was not included in the general grant of powers and jurisdiction of the probate court, and the repealing clause, therefore, of the act of 1846 did not affect section 2 of the act of 1844. As indicative of the legislative intent, it may be pertinent to add that the repealing clause of the act of 1846 employs the words used in the caption of the act of 1840, thus evidencing the purpose to repeal that act and statutes of a similar nature. But no reference is made to the act of 1844, nor to the jurisdiction conferred by its second section. It follows from what has been said that the second section was in force in 1847, when the order of the probate court of Houston county was passed.

In this connection I go one step further, and I trust that counsel will not misunderstand the court in what it will now say. The act of 1844, if not repealed by the act of 1846, clearly conferred upon the probate court the power to make the order complained of; that I believe is admitted, or, at least, is not denied, by counsel on either side. There then is plainly the existence of a special power and jurisdiction affirmatively granted by a general statute. Now, if a fair doubt existed in my mind as to the true construction of the repealing clause of the act of 1846, such doubt, in my judgment, after the lapse of 45 years, should be resolved in favor of the jurisdiction. I do not say that jurisdiction will be presumed. That is not the law; I do not so hold. What I do say is simply this: That where jurisdiction in special cases is clearly granted by an act duly passed by the legislature, and, after 45 years have intervened, the jurisdiction is challenged, on the ground that it was withdrawn by a subsequent repealing statute, if a doubt fairly exists as to the proper construction which the repealing statute should receive, such a doubt should be given in favor of sustaining rather than in defeating the jurisdiction.

There are other important and interesting questions in this case raised and discussed by counsel on both sides with great ability. Whether,

under the act of 1846, particularly the thirteenth section of that act, the probate court of Houston county had the power to approve a land claim, and order the execution of a deed by the administrator, is a question of much nicety. It is not essential to the disposition of this case for the court to pass directly upon that question. It will, however, be observed that the section last mentioned authorizes probate courts to approve claims not only for money and personal property, but also for land. Would it not seem that, having the power to approve a claim for land, the court, by necessary implication, had all necessary power to render effective and operative the power expressly granted? If that be true, then the court had the power to make the decree, and order the execution of the deed. But a decision of that question is deemed unnecessary, and is not passed upon.

My conclusion is that the probate court of Houston county had jurisdiction to pass the order in question, and that the administrator had the power to execute the deed conveying 1,000 acres of the Grigsby league and labor. If there existed any irregularities in the proceedings affecting either the order of the court or subsequent execution of the deed, under thoroughly established principles, they could not be inquired into in a collateral proceeding of this kind, and they may well be deemed healed and cured by the half century which has since elapsed. The objections of the plaintiff will be overruled, and exceptions noted.

The record being admitted in evidence, the court instructed the jury to return a verdict for the defendants. Motion for new trial presented, argued, and refused.

### UNITED STATES v. FITZSIMMONS *et al.*

(Circuit Court, N. D. Georgia. March 28, 1892.)

#### 1. UNITED STATES MARSHALS—LIABILITY ON BOND—FEES—INTEREST.

In a suit upon the official bond of a United States marshal for sums due on his fee and emolument account, interest should be allowed from the date when a balance was stated against him by the treasury officials, although the amount found to be due is less than this balance.

#### 2. SAME—ALLOWANCES TO DEPUTIES—ACCOUNTS—WAIVER.

Rev. St. U. S. § 841, providing that the allowances to any deputy marshal shall in no case exceed three fourths of the fees and emoluments received for the services rendered by him, does not make it unlawful for the marshal to allow three fourths of the gross fees, without first deducting the expenses incurred in earning the fees; and where during his whole term of office a marshal adopted this basis of settlement, both with his deputies and with the treasury department, and no objection was made thereto, he cannot, in an action on his bond, claim that the settlement should have been on the basis of three fourths of the net fees.

#### 3. SAME—FEES—EXPENSES.

A marshal is not entitled to the actual expenses incurred in earning a fee, in addition to the statutory allowance.

#### 4. SAME.

There is no law or practice entitling a deputy marshal to all the fees earned in individual cases.

#### 5. SAME—EMPLOYMENT OF AUCTIONEER.

A marshal has no authority to employ an auctioneer to sell property, and is not entitled to any allowance for the expense thereof.

6. SAME—EXPENSES.

A marshal is not entitled to an allowance for expenses incurred in sending a third person to investigate a controversy between himself and one of his deputies.

7. SAME—LIABILITY TO DEPUTY FOR FEES.

A marshal and the sureties on his bond are not liable to his deputies for fees due them, which were paid over to him; their claim is against the government; and hence, in a suit by the government on his bond, he is not entitled to a set-off for fees still owing to his deputies.

8. SAME—ACTION ON BOND—TRIAL—WAIVER.

Where accounts are investigated at length before an auditor, without any objection to the scope of the investigation, the parties cannot, after the report has been on file for seven months, for the first time object that the pleadings were not broad enough to cover certain matters reported upon.

**At Law.** Action by the United States against O. P. Fitzsimmons and the sureties on his official bond as United States marshal. Heard on exceptions to the auditor's report. Exceptions overruled.

*S. A. Darnell*, U. S. Atty.

*Broyles & Johnston, Jackson & King, J. S. Hook, W. W. Montgomery, J. M. Smith, J. M. Russell, Henry Jackson, John I. Hall, George Hillyer, and Weil & Brandt*, for defendants.

**NEWMAN**, District Judge. This suit was brought in November, 1885, by the United States, against O. P. Fitzsimmons, late United States marshal, and the sureties on his official bond, for the sum of \$14,249.09, which sum, it was alleged, had come into the hands of the said Fitzsimmons as marshal, and which he has failed to pay into the treasury of the United States, as required by law. The declaration was amended on the 8th day of June, 1886, which amendment, in connection with the original declaration, will be noticed hereafter. Demurrers, upon the grounds therein stated, were filed, both to the original and amended declaration, to which I will also allude hereafter. On the 15th day of May, 1886, this case was referred by my predecessor, Judge McCAY, to an auditor, "to hear and determine the evidence submitted by either party, to investigate the accounts between the parties, and to perform the powers and duties authorized by the laws of Georgia, and to report his findings as early as practicable to this court." On June 21, 1887, the auditor filed his report, and to that report various exceptions have been filed. In January, 1888, this report was referred back "for the purpose of allowing the auditor to separate the items of indebtedness found due by the marshal to the government, to wit, what amount due by him for fees of jurors, fees of witnesses, support of prisoners, miscellaneous expenses, and fees and expenses of marshals; also to hear argument as to the rate of interest to be paid by the marshal on the principal sum, and also to hear evidence as to a credit of three hundred and twelve dollars claimed by the marshal to have been allowed him by the department for extra services." In accordance with this order a supplemental report was filed by the auditor on January 27, 1888. To the exceptions filed originally additional exceptions were added subsequently, without objection. I will take these exceptions up in the order in which they appear.

The first exception is that the report does not cover the points involved with sufficient directness and fullness, in this: (a) That it fails to show the state of the account between the United States and said marshal touching the fees and emoluments of the marshal's office. This exception is obviated, I think, by the supplemental report of the auditor. This was one of the grounds for referring the report back to the auditor, that he might separate this finding, and show under what branch or head the default on the part of the marshal existed. It appears that the marshal received money during the greater part of his term which was to be disbursed under five separate heads, viz., fees of jurors, fees of witnesses, support of prisoners, miscellaneous expenses, and fees and expenses of marshals. It was desirable, inasmuch as he received the money to be disbursed under these several heads, that the report should show more accurately than the original report did under which of these heads balances of accounts were found against the marshal. The supplemental report shows that the entire amount found against the marshal is under the head of fees and expenses of marshals. So that, as I have stated, this exception is thereby obviated.

The next two subdivisions of this exception are (b and d) that said report fails to show the state of the account between the United States and the marshal, as to money appropriated for fees of jurors and witnesses for the fiscal year ending July 1, 1881. It is sufficient to say with reference to this that the auditor finds no default on the part of the marshal under either of these heads.

The next division of the exception is:

"(e) That said report does not find or determine whether or not the marshal unlawfully withheld and failed to account for the fees and costs from individual cases."

As to this it may be stated that the finding of the auditor is precise and full. Indeed, he seems to me to be more explicit in this than any other branch of his report. He sets out the evidence on this subject in his report in full, goes into a thorough explanation, and appends several tables showing how and what he finds upon that subject.

The next subdivision of this exception is (f) that the report does not find what was the gross earnings of the marshal's office for the years 1878, 1879, 1880, and 1881, nor for any one or more of said years, nor does said report show that the marshal has failed to account for said moneys wholly or in part. I think that the report of the auditor, accompanied, as it now is, with the supplemental report, is sufficiently definite. The auditor charges the marshal, as a disbursing officer of the government, with all the money he received in his official capacity from the United States and from individuals. As to the amount received, there is no contention whatever. He then proceeds to credit him with all disbursements lawfully made. The report seems to me full and ample. It is accompanied with tables showing the various calculations and findings of the auditor under the different heads in detail. I do not think this exception can be sustained.

The second exception is that the auditor failed to give the marshal credit for an item of \$312.20. In the supplemental report this amount is allowed the marshal by the auditor, so that it need not now be considered.

The third is a general exception that the auditor erred in finding as much as he did against the marshal. This is a general exception, and will be controlled by the findings on special exceptions, which special exceptions embrace every point made against the report.

The fourth exception filed by the original counsel in the case is that the auditor erred in the rate of interest found against the marshal. This point was embraced in the reference back to the auditor; and he has amended his report in this respect, and only finds interest from February 20, 1885, the date when a balance of the fee and emolument account was first stated by the treasury department against the marshal. The objection to the rate of interest is obviated by the supplemental report. It is further contended, however, in the argument, that no interest should be charged until the rendition of the judgment in the case, or at least until the filing of the report of the auditor, if his finding should be sustained. The cases of *U. S. v. Curtis*, 100 U. S. 119; *U. S. v. Power*, 106 U. S. 536, 1 Sup. Ct. Rep. 481; and *U. S. v. Collier*, 3 Blatchf. 327,—are cited in support of this position; the contention being that where suit is brought for breach of an official bond, where intricate accounts are involved, and where more is claimed than an investigation shows to be due, no interest should be charged against the defendant until the amount becomes a liquidated demand by a judgment finding the precise amount due. In other words, that there is no liquidated demand until judgment. I do not think the authority cited shows any rule that would make the finding of the auditor error. He finds that interest should commence to run February 20, 1885, the date when a balance on the fee and emolument account was stated against him for a larger amount than the auditor finds. I think the auditor's finding on this subject is correct.

On the 28th of January, 1888, additional exceptions to the auditor's report were filed by the counsel who have come into the case since the report was filed, which I will now proceed to consider.

The first exception is as follows:

"Because the auditor, in considering the accounts of the marshal, submitted to his investigation by the order of this honorable court, did not audit the same according to law, and failed to reduce the return of the marshal of his gross earnings, according to the rule of law prescribed in such cases, to wit, the rule which requires the reduction of the gross earnings to net earnings by deducting the cost of the gross earnings. See section 841, Rev. St. U. S. 1878. See circular of instructions based on this law, issued from treasury department, first comptroller's office, December 5, 1885, by M. J. Durham, comptroller. This law and these instructions having been disregarded, as furnishing the rule of adjustment by the auditor, the defendant by his report is found to be debtor to the government, whereas, if the rule of law had been observed by him, his report would have shown indebtedness on the part of the government to defendant.

The only ground upon which the government can recover in this case is upon the theory of a breach of marshal's bond; but, if the law applicable to the case has not yet been violated by the marshal, there is no breach. This exception is vital and important, since the auditor, in his amended and supplemental report, declares that the award he has made against the marshal is based solely on his fee and emolument account."

Argument in favor of this exception is based mainly upon the circular issued by the first comptroller's office, treasury department, at Washington, D. C., December 5, 1885. This circular, and any argument based thereupon, might be disposed of with the remark that it was not issued until 1885, and the term of the official whose accounts are under consideration ended June 30, 1881. It seems to be conceded by all parties that this circular was issued for the purpose of establishing a definite rule upon a subject as to which no precise rule had existed before. The matter would therefore, it seems, be controlled by the statutes, without reference to any ruling or instructions from the treasury department; but I will consider briefly the portion of this circular which is cited here in connection with this exception:

"Marshals, in making the semiannual return of their emoluments that is required by section 833, Rev. St., are to charge themselves with all the fees and emoluments of every name and character. They are to charge themselves with the gross amount of the fees earned, as contradistinguished from the amount which remains after the deduction of the expenses that were incurred in the earning of the fees. \* \* \* The marshal, having thus charged himself with the gross fees and emoluments of his office, is entitled to credit for the actual and necessary expenses that he has been put to, either by himself or deputies, in the earning of those fees. The expense of earning a fee is properly an expense to be paid by the marshal, and not by the deputy, since the fee itself, to which the expense is but an incident, is payable to the marshal only, and not to the deputy. According to section 841, Rev. St., a marshal, provided the attorney general consents, may pay a deputy as much as three fourths of the moneys which he receives, or which are payable to him by reason of the service of such deputy. It is proper to make this calculation on the basis of the net earnings of the deputy; that is to say, on the gross fees receivable by reason of the service of the deputy, diminished by the expense actually and necessarily incurred in the earning of them."

As I have stated, it seems that, prior to the issuance of this circular by the first comptroller of the treasury department, no general rule prevailed as to settlements between the marshal and his deputies, even if such rule prevails now, in the various marshals' offices of the United States. The plan adopted by Mr. Fitzsimmons in settlements with his deputies seems to have been to pay the deputy three fourths of the fees, and that he did not deduct from the gross earnings, and repay to the deputies, the actual expenses incurred before making the apportionment of one fourth and three fourths between himself and the deputies, respectively. It seems, also, that the marshal, in stating his accounts to the treasury department, during the whole of his term of office stated them as to settlements between his deputies and himself in this way, and that, during the whole of his term, he made no claim for settlement with him or allowance to him upon any other basis. The language of section 841, Rev. St., on this subject, is:

"The allowance to any deputy shall in no case exceed three fourths of the fees and emoluments received or payable for the services rendered by him, and may be reduced below that rate by the attorney general, whenever the returns show such rates to be unreasonable."

So it will be seen that there was nothing in the statute to prevent the marshal from adopting this basis of settlement with his deputies, and nothing to prevent the treasury department from settling his accounts on the same basis. There is nothing in the report of the auditor showing whether or not this question was made and discussed before him. The able and industrious counsel who represented the marshal before the auditor probably made every question which could, under the law and facts, have been properly made. But, if it was made before the auditor, would he have been justified in disregarding the plan and basis of settlement adopted between the marshal and deputies, and recognized by the treasury department? Besides, if no account was taken in the settlement between the marshal and deputies, as they were made from time to time, of the actual expenses which were incurred by the deputy, where would any record be found now of such actual expenses, and where would evidence be obtained, in any satisfactory way, upon which to base a readjustment of the accounts upon the plan suggested as the proper one by the defendants' counsel? I think it might be safely considered that this was a sufficient reason to justify the auditor in declining to go into this matter, even if he had been authorized and disposed so to do. The marshal is charged by the government with the gross earnings of his office. The settlement between the government and himself is necessarily on the basis of his gross earnings, and it is immaterial to the government how the money is apportioned, as between the marshal and the deputy, provided the amount paid out is not in excess of the gross earnings of the office. I state this, not to show that the present construction of this statute, as announced in the circular issued in 1885, is not a proper and just construction of the statute, but to show that the rule adopted by this marshal could not be considered a violation of the statute. It is a question, after all, between the marshal and the deputy. And in addition, if the auditor had adopted the course suggested by defendants' counsel in this adjustment, would he not have been finding that the marshal had done what, as a matter of fact, judging by the marshal's returns, the marshal had not done? Where two methods of keeping accounts and stating them would be legal, and one of the two methods is pursued during the entire term of a government official, and after the expiration of his term of office a controversy arises between the official and the government as to the *status* of his accounts, which results in a suit by the government against the official, can it be claimed that in adjusting the accounts the court should adopt the other method, and readjust the whole accounts by this plan? I do not think so. It may be proper for me to add, although the amount in issue would not affect the legal question, that I am unable to see how more than \$798.58 would be involved in this point; this being the amount of overpayments found by the auditor to have been made by the marshal to the deputies. If



there should be deducted from this \$420.20 paid to A. P. Woodward,—in the earning of which, as he was clerk in the office, there was probably no expense whatever,—it would leave only \$378.38 involved. No exception is made to the general plan of investigation by the auditor, which treats the marshal as a disbursing officer of the government, and therefore the only amount involved in this question would be such amount of actual payments in cash by the marshal as the auditor refused to allow; and this is covered by the sum I have just stated. This was the point mainly relied on and ably argued by the distinguished counsel who have recently come into the case, but I am unable, after giving it the most careful consideration of which I am capable, to coincide with their views. Something was said in the argument upon this branch of the case about the marshal being entitled to the actual expenses incurred in earning a fee in addition to the statutory allowance. This position certainly cannot be maintained. I see nothing in the statute, and nothing has been shown to me, to justify such an allowance.

The second point in the amended exceptions is this:

“Because the law in regard to individual fees, or fees in individual cases, is violated by the auditor’s report, by his charging all these fees to the marshal, when the very report of the fee and emolument account upon which his judgment is based shows that all these were earned by the deputies, and paid over to them, and recognized as properly disposed of by the department at Washington city; making a large charge in this way, illegally, against the marshal, of \$2,298.92.”

This exception appears to me to be founded upon an entire misapprehension of the report. I am unable to see any ground for the exception. It seems to me that the auditor dealt with the marshal, in the matter of individual fees, with great liberality. The only difficulty as to individual fees seems to have been in the southern district. If I understand this exception, the meaning of it is that the deputy should have all the fees earned in individual cases. There is no law or practice, so far as I am able to ascertain, to sustain this position.

The fourth amended exception is the alleged failure of the auditor to report the evidence adduced before him in full. As I understand the statement of counsel, this exception is not insisted upon, because the questions they make can be fully considered without it. In what I have already stated, and what I shall hereafter state, I shall endeavor to give each exception fair consideration, and I presume this exception is not insisted upon; and if it should be, the failure to report the evidence was, I think, by consent of counsel. Certainly, no exception was made on this point either at the time the report was filed, in June, 1887, nor subsequently, until January, 1888, and in the mean time the case had several times been set for argument.

The fifth amended exception is:

“Because the auditor exceeded his jurisdiction in undertaking to disallow charges hereinbefore and hereinafter more especially set forth, which had been allowed at Washington, especially as no issue is raised in the declaration upon the correctness of these charges.”

The argument before me on this exception was that the scope of the declaration was not sufficient to justify certain branches of the investigation. The original declaration was filed in the case in November, 1885. To this declaration a demurrer was filed. Afterwards, in June, 1886, an amendment was filed to the declaration, and to this amendment there seems also to have been a demurrer. At least, I find two demurrers among the papers,—one to the original and one to the amended declaration, and also a plea. None of them, however, appear to have been filed in office; but I will treat them as of file, for the purpose of considering this question. It is sufficient for me to say upon this point that I think the declaration, as amended, sufficiently broad to justify the scope given to the matter by the auditor; and in addition to this the entire investigation seems to have been gone into by the auditor with defendants represented during the whole of it, and without any objection during its entire progress, so far as appears, to any branch of the investigation. And, further, this report was filed in office more than seven months before any objection was made whatever to the manner of investigation by the auditor or the report upon the ground that he had gone outside of the pleadings.

The sixth amended exception is:

"Because the auditor erred in charging the marshal with \$1,025.67 entered in the fee and emolument return for the six months ending June 30, 1879, as 'not received' from the United States, and, again, in charging him with \$2,125.58 entered in the fee and emolument return for the six months ending December 31, 1879, making the sum of \$3,151.25, erroneously charged against the marshal, all of which appears in Exhibit N of the report."

I believe, in discussion before me, counsel for defendant were all satisfied with the explanation of the district attorney as to the meaning of these words, "not received," and I do not understand that they insist upon this exception; but, if they do, their exception is clearly founded upon a misconception of Exhibit N, (pages 1, 2,) which is called by the auditor an "abstract of emolument returns." The auditor does not charge the marshal with these items as cash received, as counsel seem to think. He charges him generally in his report, as I have stated before, with the cash received from the government, and the fees earned in individual cases, and credits him with the amounts actually disbursed, where they are legal. The part of Exhibit N referred to is, if I understand it, merely a basis of computation, and not a charge against the marshal.

The seventh amended exception is because the auditor erred in not allowing the charge of the marshal for attendance on the United States courts in Savannah during their terms of 1879-80 and spring term of 1881, amounting to \$357.50. This is a claim that the marshal should have been allowed, in addition to the *per diem* and mileage allowances paid him by the government, his actual expenses in attending the courts in the southern district. No law was cited, sustaining this allowance, and I am not aware of any. Besides this, it appears that this item was never presented to the department at Washington, and had never

been claimed by the marshal until he claimed it before the auditor. Counsel for defendant, when they were informed that no claim had ever been made on the department for this amount, I believe, abandoned this position.

Certain other exceptions are appended to these amended exceptions, which are called "exceptions of fact." The first of these states that—

"The evidence clearly shows that the cost of the earnings was (taking a fair average of the evidence on this point) say 33½ per cent. of the gross earnings. The auditor failed to take this view, disregarding this evidence, and brought the defendant in debt, as reported by him, whereas the evidence should have made a finding against the government of five thousand dollars."

While this is called an "exception of fact," it is wholly an exception of law; and I have already discussed the question involved under the other exceptions, namely, as to whether the auditor should have gone into the question of deducting the actual expenses from the fees before making an apportionment between the marshal and deputy. I hold, therefore, that this exception is controlled by the ruling of the court upon the first of these amended exceptions.

The second of these exceptions of fact is that—

"Assuming, for the sake of argument, that the auditor was right in charging the defendant with individual fees, to-wit, \$1,107.19, in the northern district, and \$1,191.74 in the southern district, he nevertheless erred in failing to credit him with these three fourths of the amount earned in the northern district, to wit, \$830.40."

The exception is based upon a misconception of the auditor's report. This charge to him of \$1,107.19 in the northern district is a charge made as of cash that went into his hands, because, as I have stated, the auditor charges him with the cash actually received from the government, and the fees in individual cases; and this amount of \$1,107.19 is the net amount after deducting from the fees allowed for services in individual cases the actual expenses incurred in earning them. All this will be seen in Exhibit E of the auditor's report. Of course the credits allowed for disbursing this amount will be found in the amounts allowed various deputies in the northern district. If the auditor had given the marshal credit for three fourths of this amount, and then credited him with the amount paid to the deputies for earning it, the marshal would have received a double credit on this account. The auditor, in individual cases, allowed the marshal a deduction of actual expenses before charging him the amount of individual fees that came into his hands; and this for the reason that he treats the marshal, as I have stated, as a disbursing officer, and therefore charges him, in individual cases, only with cash actually received, while in criminal cases he adopts the plan of disbursing money received from the government, used by the marshal himself.

The third exception of fact is because the auditor erred in refusing to allow the marshal credit for the two items on page 9 of the report,—one for \$10, and the other for \$43.25; the first being for fees paid an auctioneer for sale of property, and the other for expenses incurred by A.

P. Woodward in attending to business of the marshal's office; the said charges not having been allowed by the department at Washington. I am not aware of any law authorizing a marshal to employ an auctioneer to sell property. The other amount was for expenses incurred by the marshal in sending Mr. Woodward to investigate a matter in controversy between himself and one of his deputies. I do not think that this could have been allowed as a charge against the government.

The fourth exception of fact is:

"Because the auditor erred in charging the marshal with \$420.28 as overpaid A. P. Woodward; the fact being that no overpayment was made to him."

If I understand the matter correctly, there is really no issue of fact as to this item. The amount earned by A. P. Woodward, the deputy named, and the amount really paid him, I think, are not disputed; and the question as to whether there was an overpayment to him is, I presume, controlled by the general question as to method of settlements by the marshal with the deputies, which I have discussed. If it is not so controlled, and there is an issue of fact on this point, defendants will be permitted to produce evidence before the jury on it.

The fifth exception, as to a disallowance of \$159.51 paid to J. B. Gaston, makes a question of fact, on which the jury should pass.

All of these exceptions have been argued before me and submitted; and, in compliance with what I understand to be the desire of counsel on both sides, I announce these views. The case may now be set for hearing before a jury, that it may finally be determined.

#### ON MOTION FOR NEW TRIAL.

NEWMAN, District Judge. In an opinion filed March 12, 1888, in the above-stated case in passing on exceptions to the auditor's report, I discussed and disposed of every question then raised by defendants. The question presented in argument on the motion for new trial, and the one which is mainly relied upon, was before the court on an amended plea, and motion to strike the same, which was argued and disposed of June 5, 1889. Plea filed by the defendants at that time was as follows:

"By leave of the court, defendants amend their plea, and for further plea say there is still due from plaintiff to defendant Fitzsimmons, for the use of certain of his deputies, for services rendered by them as such deputies during the term said Fitzsimmons held the office of United States marshal for the northern district of Georgia, the sum of eleven thousand nine hundred and eighty-six and 17-100 dollars. The amount due each of such deputies will further appear by reference to the bill of particulars hereto annexed. Said sum defendants plead in defense of plaintiff's claim so far as it is necessary to meet it, and show nothing due plaintiff, and residue defendants plead as set-off in favor of defendant Fitzsimmons for use of the said deputies to whom same is due and owing, and pray judgment for the same."

It will be perceived that the question there raised is as to the right of defendants to set off against the amount found by the auditor in favor of the government the amount which, in an *addendum* to his report, the auditor finds is due by the government to various persons who

were deputies under Marshal Fitzsimmons. The finding of the auditor on this subject is in these words:

"In the examination of this case it became necessary to go into the account of the deputies against the United States, and to ascertain the amount of their earnings, disallowances, realallowances, etc., and thus to ascertain the balance due them; and while, in accordance with the view I have taken of the case, the statement of these balances is not necessary to a proper understanding of the issues involved, yet I have thought proper to append a table, set forth in Exhibit L, covering two pages, showing the balance due the deputies there named from the United States."

He then appends a table of the amounts due the various deputies. This was not a matter referred to the auditor; and, as will be seen by the language he uses, he did not so consider it. The verdict in this case, which defendant desires now to have set aside, is in a suit between the United States, as plaintiff, and O. P. Fitzsimmons and the sureties on his official bond, as defendants. The deputy marshals were not parties to the case, and I understand that the finding of the auditor as to amounts due them was simply a voluntary statement of that which might be at some time beneficial to persons at interest. As a knowledge of the amount due by the government to these various deputies came to him in the course of his investigation, in auditing the account between the government and Fitzsimmons, he attached it to his report, not as a finding on matter referred to him, but because he probably thought it might be desirable for future reference. In a suit before my predecessor, Hon. H. K. McCAY, in the circuit court for this district, between some of these very deputies and O. P. Fitzsimmons and his sureties, a ruling was made by the court which may be of interest just here. The entire report of that case, which I find in 1 Ga. Law Rep. 116, is given, for the reason that that periodical seems to have been very short-lived, and probably but a few numbers of it are in existence. The case stated therein is as follows:

*"J. B. Gaston, L. G. Pirkle, and A. P. Woodward vs. O. P. Fitzsimmons et al.*

*"(U. S. Circuit Court, Northern District of Georgia. November 14th, 1885.)*

**"BOND OF U. S. MARSHAL—SUIT ON BY DEPUTY MARSHALS FOR FEES—LIABLE WHEN—DEMURRER.**

"A suit cannot be maintained against a U. S. marshal, and the sureties on his bond, for fees of U. S. deputy marshals paid over to him. Such claim is against the U. S.

"Gaston and two other deputy U. S. marshals brought suit against O. P. Fitzsimmons, U. S. marshal, and the sureties on his bond, in the United States circuit court, for the northern district of Georgia, claiming that various sums of money were due them for fees earned as such deputies; that said sum of money had been collected by said Fitzsimmons from the United States, and that he had failed to pay the same over to them. Defendants demurred to the declaration in said cause upon the following grounds: (1) That the court had no jurisdiction. (2) That, if a liability existed, it was an individual and not an official one. (3) That the deputies were co-obligors with the marshal. All of these cases were tried together on said demurrer.

*"J. C. Reed and Haight & Osborn, attorneys for plaintiffs.*

*"Broyles & Johnson, Jackson & King, Hopkins & Glen, R. B. Trippe, and Albert S. Johnson, attorneys for defendants.*

"Counsel for plaintiff insisted that their cause of action arose under section 784, Rev. St. U. S., and under the following clause thereof: 'In case of the breach of the condition of a marshal's bond, any person thereby injured may institute in his own name, and for his sole use, suit on said bond,' etc.

"McCAY, J., held that plaintiffs were not injured by the failure of the marshal to pay the money due over to them; that the United States still owed them; that their claim for fees was against the United States, and not discharged by a payment to the marshal; that the government should pay the deputies, then sue and recover on the marshal's bond any sum that might be due the government by reason of the marshal's failure to pay over fees due said deputies.

"The court passed the following order in each of the three cases: 'That the demurrer be sustained on the ground that the plaintiffs have no right of action against the United States marshal and the sureties on his bond; their claim being against the United States. Wherefore, it is ordered that this case be dismissed,' etc."

It will be seen that the above decision was rendered by Judge McCAY on November 14, 1885. The original declaration in the suit by the United States against Fitzsimmons and others, in which this motion for new trial is made, was filed on November 18th, so that it seems likely that the decision in the suit of the deputies against the marshal gave color to this case, and the management of it before the auditor. At all events, it seems never to have been suggested, even before the auditor, that there was any right in Fitzsimmons to set off the amount due the deputies against any amount that might be found against him in favor of the United States. The auditor states in his report that, in making his investigation, he treated Fitzsimmons as a disbursing officer of the government, charging him with all the money which went into his hands, and giving him credit for all disbursements to which he found him to be entitled. Except as to a few items, which were eliminated from the case on trial before the jury, I do not believe that any serious objection has ever been made by the marshal to the statement of account, calculation, and finding of the auditor, if it was proper to treat him as a disbursing officer of the government in making his investigation. Certain legal questions, it is true, were raised, as to whether the auditor pursued the correct course in his method of stating the account between the marshal and his deputies, all of which were disposed of by the court in the opinion heretofore filed in the case. There has been no argument as to that question on this motion, and I presume that it is considered as disposed of by the former decision of the court. I have carefully examined this case, and reflected upon it; and I am unable to see any error in the conclusions that were reached in passing upon the exceptions to the auditor's report, or in deciding the motion to strike the plea of set-off, which is copied above, or in the direction given to the case when it was for trial before the court and a jury. It may be proper, however, to allude to each of the grounds of motion for new trial. The first three are based upon the statutory grounds in Georgia,—that the verdict is contrary to law, contrary to evidence, and against the weight

of the evidence, and without evidence to support it, and that it did not cover the true issue in the case, and which is unnecessary to discuss; and I shall allude to each special ground relied on. The fourth ground of the motion for new trial, with additional grounds, as contained in an amendment filed to the motion, raised two questions, as I understand it: *First*, that the court erred in treating the auditor's report as *prima facie* correct. There would seem to be no question whatever about the correctness of this action of the court. This case was referred to an auditor under the statute of Georgia, (Code, § 4202;) and the law under which it was referred provides that the report of the auditor shall be *prima facie* correct as to its finding of fact, (Code Ga. § 3097.) The *second* question raised in this fourth ground of the motion is as to the proper way to state the account between the marshal and his deputies, which question was disposed of by the court in determining the exceptions to the auditor's report; and to the conclusion there reached the court adheres. The fifth ground is that the court refused to charge the jury on a rule laid down in a circular issued by the first comptroller's office of the treasury department, December 5, 1885. This question was also disposed of in the former opinion filed in this case, and I see no reason to change the conclusion there reached. The sixth ground is:

"Because the evidence submitted before the auditor was not sent up with the report, and, though this exception was duly made and filed, the court overruled it, and proceeded with the case."

As to the question made in this ground of the motion the court's views were first expressed in the decision on the exceptions. The court expressed the opinion then, from the facts and statements of counsel made on that hearing, that there had been a waiver by the parties as to the auditor filing a stenographic report of the evidence as taken by him; but subsequently, upon examination of the record, the court held that, if it was the duty of the auditor to send up the evidence, he had done so in the brief of evidence submitted by him in connection with his report, and passed an order to that effect June 5, 1889. The seventh ground of the motion raised the question as to the right of the marshal to have credit for the amount due by the government to his deputies, which has been discussed and disposed of. The eighth ground makes substantially the same question as contained in the seventh ground.

The conclusion is that the motion for new trial must be overruled, and it is so ordered.

## YOUNG v. MCKAY.

(Circuit Court, N. D. California. April 18, 1893.)

## NATIONAL BANKS—STOCKHOLDER'S LIABILITY—TRANSFER OF CERTIFICATES.

In an action by the receiver of a national bank to enforce an assessment under Rev. St. § 5151, against one credited on the transfer books as a stockholder, it appeared that nearly a year before the failure he had sold his stock to a broker for an undisclosed principal, that he indorsed the same, and requested the broker to inform the cashier of the transaction, and to have the stock transferred: that the broker accordingly handed the stock to the cashier, gave him the necessary information, and requested him to make the transfer. This the cashier promised to do, but in fact the transfer was never made. The certificate recited that it was transferable on the books of the company "by indorsement hereon and surrender of this certificate." *Held*, that in requesting the cashier to make the transfer the broker acted as the seller's agent, and that the latter did all that was required of him as a prudent business man, and could not be held liable as a stockholder. *Whitney v. Butler*, 7 Sup. Ct. Rep. 61, 118 U. S. 655, followed. *Richmond v. Irons*, 7 Sup. Ct. Rep. 788, 121 U. S. 27, distinguished.

At Law. Action by S. P. Young, as receiver of the California National Bank of San Francisco, against McKay, as a stockholder, to recover an assessment on certain stock. Judgment for defendant.

*A. R. Cotton*, for plaintiff.

*Edward R. Taylor* and *John R. Jarboe*, for defendant.

HAWLEY, District Judge, (*orally*.) This is an action brought by the receiver of the California National Bank of San Francisco to recover the amount of an assessment levied by the comptroller of the currency at Washington upon 50 shares of stock alleged to be owned by the defendant. On the 20th day of October, 1886, the defendant subscribed for 100 shares of stock. On the 4th day of November he paid the first installment of \$2,500 on 50 shares. The other 50 shares were then transferred by him upon the books of the bank to R. P. Thomas, the president of the bank. On January 6, 1887, he paid the second installment on 50 shares, and on April 18th he paid the final installment of \$500, making in all the sum of \$5,000, the par value of the stock. He held and owned the certificate for this 50 shares of stock until the 1st of January, 1888, when he sold it to S. R. Noyes for \$6,000. At the time of the sale the bank was solvent, doing a good business, and its stock was above par, selling in the open market at a premium of \$20 per share. The defendant, in detailing the facts concerning this sale of his stock, said that Mr. Noyes, a broker, came to his office and asked him if he had any shares of stock for sale; that he replied that he had, and asked \$120 per share for it; that Mr. Noyes bought the 50 shares of him, and paid him \$6,000 therefor; that he then indorsed the certificate, and handed it to Noyes, and said that he would go with him to the bank, and have the certificate transferred; that Noyes said that it was unnecessary to take that trouble; that he would attend to it himself, and have it transferred; that defendant then requested Noyes to inform the cashier of the bank that he had no longer any interest in the stock, and to be sure and have the certificate transferred. Mr. Noyes' testi-



mony as to what occurred at the time of the sale is the same as given by the defendant. He further testified that he took the certificate to the bank, and informed the cashier that it was McKay's stock; that McKay requested that the certificate be transferred; that the cashier took the certificate, and said that he would attend to it,—that it was all right. In purchasing the stock, Mr. Noyes acted as broker for an undisclosed principal. His connection with the transaction can be briefly stated. Mr. Ramsden, who was the cashier of the bank, met him on the street, and requested him to get the stock from McKay, and assured him that, if the stock was procured, he could make a brokerage on it. Ramsden gave him the money to purchase the stock, and requested him to bring the certificate to the bank, which he did. Ramsden also confidentially told him that the stock was for R. P. Thomas, the president of the bank. On December 17, 1888, 11 months after the transaction, the bank suspended. The certificate for the 50 shares of stock was canceled on the 5th of January, 1889, 19 days after the failure of the bank. On the 14th of January, 1889, S. P. Young was appointed receiver of the bank by J. D. Abrams, deputy and acting comptroller of the currency. On the 18th of January, the comptroller of the currency levied an assessment of \$37.50 upon each share of the capital stock, and directed the receiver to enforce to that extent the individual liability of the shareholders.

Upon the facts above stated, is defendant, McKay, liable as a shareholder for the assessment upon said 50 shares of stock? The United States statute provides that the capital stock of each banking association shall be deemed personal property, and shall be transferable on the books of the association in such manner as may be prescribed by the by-laws of the association, and that every person becoming a shareholder by such transfer shall, in proportion to his shares, succeed to all the rights and liabilities of the prior holder of such shares. Rev. St. § 5139. It is also provided that the shareholders shall be held individually responsible, equally and ratably, for all contracts, debts, and engagements of the association, to the extent of the amount of their stock therein. Section 5151. The by-laws of the California National Bank declare that—

“Certificates of stock shall be signed by the president and cashier, and shall state upon their face that the stock is transferable only upon the books of the bank. When transferred, the certificates thereof shall be returned to the bank, and canceled, and new certificates issued. Every issue and transfer of stock shall be entered upon a book to be kept for the purpose, which shall show the date of issue, whether an original issue or one by transfer, and, if the latter, in place of what stock issued, the name of the present owner, and such matters as may be necessary to give a complete history of the ownership of the stock.”

As a general rule, deducible from all the authorities bearing directly upon the question under consideration, it may be safely stated that, in all cases between the creditors of a bank and the person standing on the books of the bank as a shareholder, the person who allows his name to remain on the books of the bank as a shareholder is estopped from denying that he is a shareholder, and that his individual liability to the

creditors continues after he has made a *bona fide* sale of his stock until the transfer of the stock is entered on the books of the bank, and that such transfer cannot be made, as against creditors, after the bank is known to be insolvent.

In *Richmond v. Irons*, 7 Sup. Ct. Rep. 788, 121 U. S. 27, the supreme court of the United States said:

"As to the 50 shares of stock sold by Comstock to Holmes, September 23, 1873, we think the conclusion cannot be resisted that the transaction was made in contemplation of the insolvency of the bank, and, although both parties may have believed that the bank would ultimately be able to pay all of its debts notwithstanding this transaction, we think that, as against creditors, it was fraudulent in law, and to that extent Comstock is chargeable as a shareholder. The sale of 50 shares in February, 1873, and of the other 50 shares in June, 1873, there is no reason to suppose were not made in entire good faith, and without any expectation on the part of the parties of the insolvency of the bank. Notwithstanding that, Comstock continued to be, upon the books of the bank, the owner of these shares until September 23d and September 24th, when they were respectively transferred. By section 5139 of the Revised Statutes, those persons only have the rights and liabilities of stockholders who appear to be such as are registered on the books of the association, the stock being transferable only in that way. No person becomes a shareholder, subject to such liabilities and succeeding to such rights, except by such transfer. Until such transfer, the prior holder is the stockholder for all purposes of the law. It follows, therefore, that Charles Comstock, in respect to the shares sold by him in February and June, 1873, was the statutory owner on the 23d day of September, 1873. His liability as such stockholder is the same as if he had that day sold and transferred the stock to Ira Holmes, but such a sale and transfer could only have been made that day by Comstock, who was himself a director, in contemplation and actual knowledge of the suspension of the bank. It would operate as a fraud on the creditors,—an effect which the law will not permit. The case is not within the rule laid down in *Whitney v. Butler*, 118 U. S. 655, 7 Sup. Ct. Rep. 61. Here there is no proof, as there was in that case, of the delivery of the certificates to the bank, and the power of attorney authorizing its transfer, with a request to do so made at the time of the transaction. The delivery was to Holmes, not as president, but as vendee. We are therefore constrained to hold that the decree below, in charging Comstock with liability as the owner of 150 shares, was not erroneous."

In *Whitney v. Butler* the court, after stating the general rule, said:

"But it will be found, upon careful examination, that in no one of the cases upon which these general principles have been announced, as between creditors and shareholders, does it appear that the precaution was taken, after the sale of the stock, to surrender the certificates therefor to the bank itself, accompanied (where such surrender was not made by the shareholder in person) by a power of attorney, which would enable its officers to make the transfer on the register. The position of the seller, in such a case, is analogous to that of a grantor of a deed deposited in the proper office to be recorded. The general rule is that the deed is considered as recorded from the time of such deposit. 2 Washb. Real Prop. bk. 3, c. 4, par. 52. Where the seller delivers the stock certificate and power of attorney to the buyer, relying upon the promise of the latter to have the necessary transfer made, or where the certificate and power of attorney are delivered to the bank without communicating to its officers the name of the buyer, the seller may well be held liable as a shareholder until, at least, he shall have done all that he reasonably can



do to effect a transfer on the stock register. In the case before us the personal presence of the defendants at the bank was not required, in order to secure their release from liability as shareholders. Besides, the certificate of stock authorized them to act by attorney. Through their agents, the brokers who sold the stock, and through whom they received the money paid for it, they surrendered the certificates and power of attorney to the president of the bank; he receiving them with knowledge not only that defendants had parted with all title to the stock, and had been paid for it, but also that it had been purchased at public auction by Eger. He knew equally well that the surrender of the certificates and the delivery of the power of attorney and the certificate from the probate court could only have been for the purpose of having it appear, by means of a transfer on the books of the bank, that Whitney's executors were no longer shareholders. The right to have the transfer made, and thereby secure exemption from further responsibility, was secured to the defendants, both by the statute and by the by-laws of the bank. They did all that was required by either as preliminary to such transfer. Nothing remained to be done except for some officer of the bank to make the necessary formal entries on its books. If, when the agents of defendants delivered the certificates and power of attorney to the president of the bank, the latter had given an intimation of a purpose not to make the transfer promptly, or had avowed an intention to postpone action until a sufficient amount of stock was obtained to fill Coburn's order, it may be that the failure of the defendants to take legal steps to compel a transfer would, in favor of the creditors of the bank, have been deemed a waiver of the right to an immediate transfer on the stock register. But no such intimation was given; no such avowal was made. No objection was made to the power of attorney, or to the discharge of the defendants from liability. So far as the record shows, nothing was said or done by the bank's officers to raise a doubt in the minds of the defendant's agents that the transfer would not be made at once. It was suggested in argument that the defendants should have seen that the transfer was made. But we are not told precisely what ought to have been done to this end that was not done by them and their agents. Had anything occurred that would have justified the defendants in believing, or even in suspecting, that the transfer had not been promptly made on the books of the bank, they would, perhaps, have been wanting in due diligence had they not, by inspection of the bank's stock register, ascertained whether the proper transfer had in fact been made. But there was nothing to justify such a belief or to excite such a suspicion. Their conduct was, under all the circumstances, that of careful, prudent business men, and it would be a harsh interpretation of their acts to hold (in the language in some of the cases, when considering the general question under a different state of facts) that they allowed or permitted the name of Whitney to remain on the stock register as a shareholder. We are of opinion that, within a reasonable construction of the statute, and for all the objects intended to be accomplished by the provision imposing liability upon shareholders for the debts of national banks, the responsibility of the defendants must be held to have ceased upon the surrender of the certificates to the bank, and the delivery to its president of a power of attorney sufficient to effect, and intended to effect, as that officer knew, a transfer of the stock on the books of the association to the purchaser." 118 U. S. 661, 7 Sup. Ct. Rep. 63-65.

If it be true, as is held in *Whitney v. Butler*, that the seller of the stock should not be held liable as a shareholder when it affirmatively appears that he has done all that a careful, prudent business man could reasonably do to effect a transfer on the stock register, and that it is a sufficient compliance of this rule if the seller of the stock has taken the precaution,

after the sale of the stock, to surrender the certificate to the bank, properly indorsed, with the request that the transfer be made on the books of the bank, then it must necessarily follow that, upon the facts presented in this case, the defendant cannot be held liable as a stockholder. But it is argued by plaintiff's counsel that the defendant does not come within the rule laid down in *Whitney v. Butler*, because the surrender of the stock was not made by him in person, nor was it accompanied by a power of attorney, which would enable the officers of the bank to make the transfer on the register. The transfer journal kept by the bank contains a heading in the following words:

"We, the undersigned, hereby sell, transfer, and assign so many shares of the stock of the California National Bank of San Francisco to the person whose name is set opposite our respective names, as per certificate surrendered and canceled."

It is contended that no person but the seller of the stock, or some one by him duly authorized by power of attorney, can lawfully write his name in this book. It is true that, in *Whitney v. Butler*, there was a regular power of attorney executed by the sellers of the stock. But the certificate in that case—evidently prepared so as to conform to the by-laws of the bank—contained the following words: "Transferable only on the books of said bank in person or by attorney, on surrender of this certificate." The certificate in this case is radically different. It contains the following words: "Transferable on the books of the company by indorsement hereon and surrender of this certificate." An inspection of the transfer journal shows, as was testified to upon the trial, that some of the transfers were made in the handwriting of the bookkeeper of the bank. The certificate was properly indorsed, and it was delivered to an officer of the bank, with the verbal request of the seller that it be transferred on the books of the bank. The broker Noyes, in making this request, must, under the facts established in this case, be considered as the agent of the defendant for that purpose. It therefore affirmatively appears that the defendant did all that the statutes, or the by-laws of the bank, or the certificate, required him to do to have the transfer made. "Nothing remained to be done except for some officer of the bank to make the necessary formal entries in the books." This the officer agreed to do, and the certificate was left with him with the understanding that the transfer should be made to the purchaser, whom the officer knew was R. P. Thomas, the president of the bank. There is not, in my opinion, any conflict in the legal principles announced in *Whitney v. Butler* and *Richmond v. Irons*. The cases are simply distinguishable in their facts. Upon a careful consideration of all the facts established by the evidence in this case, and of the principles of law applicable thereto, as announced by the supreme court of the United States, I am of opinion that this case comes within the rule laid down in *Whitney v. Butler*, and that the defendant is not liable for the assessment levied upon the 50 shares of stock. Judgment will therefore be entered in favor of defendant for his costs.

## SMITH v. SUN PUB. Co.

(Circuit Court, S. D. New York. March 8, 1892.)

## 1. LIBEL—AMBIGUOUS ARTICLE—OPINION EVIDENCE.

Where a libelous article is ambiguous, a witness may not state as to whom, in his opinion, it refers, but after simply replying in the affirmative to the question, "Did you know to whom it applied?" he may subsequently give the facts and circumstances which show who was pointed to by the publication. *Van Vechten v. Hopkins*, 5 Johns. 211, distinguished.

## 2. SAME—EVIDENCE—ESTOPPEL.

Where, in an action for libel, evidence offered by the plaintiff has been excluded on the motion of defendant's counsel, on the strength of their statement that they made no attack upon the character or standing of the plaintiff, they are estopped from introducing testimony to show that she had been, or proposed to be, a singer upon the stage.

## 3. SAME—EXCESSIVE DAMAGES.

In an action for libel, the amount of damages is almost entirely within the discretion of the jury, and the court will not set aside the verdict as excessive, unless it is satisfied that it is the result of gross error, prejudice, perverseness, or corruption. *Gibson v. Cincinnati Enquirer*, 2 Flap. 121, followed.

At Law. Action by Juliette C. Smith against the Sun Publishing Company for libel. Verdict for plaintiff. Defendant moves for a new trial. Denied.

*Harriman & Fessenden*, for plaintiff.

*Franklin Bartlett*, for defendant.

SHIPMAN, District Judge. This is a motion by the defendant for a new trial of an action at law for libel, wherein the jury rendered a verdict for the plaintiff to recover \$7,500. The motion is principally based upon exceptions to the admission of evidence and upon the amount of damages, which are alleged to be excessive. The plaintiff is a married woman, and neither her full name nor the full name of her husband was stated in the libel, but circumstances were given from which the person who was intended to be designated could easily be identified. As a part of the testimony in regard to identity, the plaintiff's counsel asked one witness, "Did you know to whom the article related, when you read it? Answer. Yes. Question. State the reasons why you knew." Each of these questions were objected to and admitted. Another witness was asked, "Did you know to whom it [the article] alluded? Answer. I did. Question. State how you knew." The first question only was objected to. The decisions in the state of New York are that when a libel is ambiguous, a witness cannot be permitted to testify that from reading the libel he applied it to, or understood it to mean, the plaintiff. These decisions are based upon *Van Vechten v. Hopkins*, 5 Johns. 211, which is commented upon and enforced by Chancellor WALWORTH in *Maynard v. Beardsley*, 7 Wend. 561. They relate to the bare question, "To whom did the witness apply the article or publication?" and not to questions which call out the circumstances, the facts, and the reasons which would enable the jury to draw their own conclusions. It is true that the decisions are not uniform, but the reason for the exclusion of the question, which merely compels the witness to say that he applied

the libel to the plaintiff, is a sound one, because the admission of such a question and an answer substitutes the opinion or conclusion of the witness for a statement of the facts, from which the jury should make their own finding. As it was said by Chancellor WALWORTH, in 7 Wend. 560: "The witness must state the facts on which the opinion might be founded, and leave it to the court and jury to draw the conclusions." But the exclusion of such a general question does not exclude a statement of the facts and circumstances in detail, from which the jury can see the meaning or intention of the publication and of the facts which caused the witness to know to whom the article applied. The admissibility of such questions is recognized in the *Maynard Case*, *supra*, and by the text writers. Odg. Sland. & L. 94, note, and 540, where the authorities are also collected. Indeed, Mr. Greenleaf goes further, and says:

"It [the meaning of the defendant] may be proved by the testimony of any person conversant with the parties and circumstances; and, from the nature of the case, they must be permitted to some extent to state their opinions, conclusions, and belief, leaving the grounds of it to be inquired into upon cross-examination." 2 Greenl. Ev. § 417.

The witnesses in this case to whose testimony exception was taken were not asked to whom, in their opinion, or within their knowledge, the article applied. They were asked if they knew to whom the article applied, to which they replied, "Yes," and were then asked to give the reason why they knew; in other words, to state the facts and circumstances which showed who was pointed at by the publication. The testimony was not objectionable under the rule which excludes the opinions or conclusions of a witness. But, if this particular testimony had been inadmissible, that fact would create no ground for a new trial. The testimony that the plaintiff was the person named in the libelous matter was overwhelming. The defendant made no substantial attempt to deny it. As was said in the charge, "the only question in real and actual dispute is the question of damages." The improper admission of a single item of testimony upon the question of identity would have been an unimportant matter upon a motion for a new trial.

The second subject of exception was the refusal of the court to permit the defendant to show that after the plaintiff left school, and before her marriage, some time between five years and nine years before the date of the libel, she studied singing in New York, for the purpose of becoming a singer upon the stage, and it was also said that the defendant proposed to prove that she had sung upon the stage. This evidence was excluded, because in a previous part of the trial evidence offered by the plaintiff had been excluded upon the defendant's motion, upon the strength of the statement of its counsel that he "made no attack upon the character, social standing, or position of the lady." The only object of the offered evidence was to mitigate damages by attempting to diminish her position or standing or character, as the result, in some way, of the circumstance that she had been, or proposed to be, a singer upon the stage. In my opinion, the defendant was estopped from that

line of testimony. The principal point in the case is in respect to the damages, which are said to be excessive, and so large that the existence of prejudice or malice in the jury is clearly shown. The libel charged a married woman, in a sensational and somewhat jeering manner, with having eloped with a man, her previous intimacy with whom, it was further said, had been freely spoken of in the city of her residence. It was a pronounced statement of her disgrace as a married woman, and was displayed in the columns of the paper in a manner intended to attract attention, and to give publicity to the story. It was known and commented upon by a large number of people in the city where she lived, and was calculated to cause great injury to her reputation. No evidence was presented that it caused actual change in her social relations or social *status*. The officers of the defendant company had no personal hostility or spite against the plaintiff, and no damages were asked for on that account. Punitive damages were asked for on the ground that the article was published wantonly or recklessly; that is, without adequate inquiry as to its truth, and with reckless lack of knowledge whether it was true or false. It was said by the defendant that it received the article in the usual course of business, from a news agency upon which it was in the habit of relying for accuracy, which it paid by the week, and not by the quantity, and that it published the article relying upon the source from which it came; and for these reasons, although it did not take other precautions before publication to verify the accuracy of the story, it claimed to be freed from the charge of wantonness or recklessness. The jury were instructed that these were circumstances which were fairly to be taken in mitigation of the act of the defendant, and, if they thought that these facts were sufficient to excuse the defendant from the duty of investigation, of inquiry, of delay for the sake of accuracy, then they should not give punitive damages; but if they thought that the defendant was guilty of reprehensible negligence in the publication of the article, without further attempts to verify its truth, they were justified in giving such a reasonable sum in damages as should be an example to deter against similar future negligence. The jury evidently found that it was a case for punitive damages. In actions for libel the amount of damages is very peculiarly a matter for the jury. It is almost entirely within their discretion, because there can be no fixed or mathematical rule upon the subject. Much depends upon the circumstances of mitigation or aggravation, the notoriety which was given in the newspaper to the defamatory charge, the care or lack of care, the malice or the recklessness which characterized the publication, and the necessity of giving to the public any information in regard to the existence of the charge; so that it is established that courts will not interfere with verdicts in libel suits upon the ground of excessive damages, unless they are satisfied that the verdicts were the result of gross error, prejudice, perverseness, or corruption. *Gibson v. Cincinnati Enquirer*, 2 Flip. 121; Townsh. Sland. & L. § 293. "A new trial will only be granted when the verdict is so large as to satisfy the court that it was perversely in excess, or the result of some gross error on a matter

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of principle; it must be shown that the jury either misconceived the case, or acted under the influence of undue motives." Ogd. Sland. & L. 291.

The claim of the defendant is that the sum is so large that the jury must have been influenced by prejudice, or have been improperly inflamed against the defendant. The jury evidently thought that so much of the mitigation as rested upon the fact that the article was published as received from a news agency in the usual course of business did not tend to mitigate the damages. The amount of punishment which they chose to inflict does not indicate to me that they acted from prejudice against or hostility to the defendant, but that they thought that the general principle or system upon which the testimony showed that its evening paper was conducted was a wrong and perilous system, and that any defendant who, in the course of his business upon that system, and as the result of it, published an article which would naturally cause great injury to a plaintiff, exposed himself to heavy damages.

The motion is denied.

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### Appeal of BATTLE & Co.

(Circuit Court, E. D. Missouri, E. D. May 4, 1892.)

#### CUSTOMS DUTIES—CLASSIFICATION—"CHLORAL HYDRATE."

Under the tariff of October 1, 1890, chloral hydrate is dutiable at 25 per cent. *ad valorem*, under Schedule A, par. 76, as a "chemical compound \* \* \* not specially provided for," and not at 50 cents per pound, under paragraph 74, as a "medicinal preparation, \* \* \* of which alcohol is a component part, or in the preparation of which alcohol is used."

Application by Battle & Co., chemists, a corporation, for a review of the board of general appraisers' decision with respect to the classification of certain imports.

*Dickson & Smith*, for petitioners.

*Geo. D. Reynolds*, U. S. Atty.

THAYER, District Judge, (*orally*.) This is a case that arises under the customs law. The question in the case is whether chloral hydrate is dutiable at 50 cents per pound, under paragraph 74 of Schedule A of the tariff act of October 1, 1890, as "a medicinal preparation \* \* \* of which alcohol is a component part, or in the preparation of which alcohol is used," or whether it is dutiable at the rate of 25 per cent. *ad valorem*, under paragraph 76 of the same schedule, as "a chemical compound \* \* \* not specially provided for." The court is compelled to adopt the latter view, for the following reasons: Chloral hydrate is not mentioned by name in the tariff act, and in that sense it is not "specially provided for." Furthermore, all the experts agree that it is "a chemical compound." It answers, therefore, all of the requirements



of paragraph 76 of Schedule A. On the other hand, there are some grave objections to classifying it under paragraph 74 of Schedule A. In the first place, it may be said that alcohol is clearly not a component part of "chloral hydrate," because in the process of manufacturing the latter drug (when the alcohol process is employed) the alcohol is broken up into its constituent elements, and does not reappear in the drug, and cannot be extracted therefrom, as it may be when used merely as a solvent or to treat oils or other fatty substances. The case for the government rests on the fact that alcohol is used in one of the most common processes employed for manufacturing chloral hydrate; hence it is claimed that it is "a medicinal preparation \* \* \* in the preparation of which alcohol is used."

A very substantial objection to this view is that chloral hydrate may be, and sometimes is, manufactured by two processes from substances containing considerable starch, without the use of any alcohol. Chloral hydrate thus produced would certainly not be dutiable under paragraph 74, and the result of holding the present importation dutiable under that clause would be to impose a different rate of duty on the same drug, depending upon the process of manufacture. Another view of the case is also entitled to much weight. Considering the whole of paragraph 74, which reads as follows: "All medicinal preparations, including medicinal proprietary preparations, of which alcohol is a component part, or in the preparation of which alcohol is used, not specially provided for in this act, fifty cents per pound,"—it would seem as though congress in this clause only had in mind a class of medicinal preparations in which alcohol is used as an ingredient without being broken up, either as a solvent, or to extract and hold in solution the medicinal properties of certain vegetable substances or drugs. The use of alcohol in the manufacture of chloral hydrate bears no analogy to the uses last mentioned. The drug is manufactured in the alcohol process by passing dry chlorine gas through alcohol. By so doing, the alcohol is broken up chemically; a part of its hydrogen is liberated, and is replaced by atoms of chlorine. The process results in the formation of a solid substance of a crystalline structure, which is then treated with water to form chloral hydrate.

As before stated, other substances containing starch may be used in lieu of alcohol, to supply the elements necessary to form chloral hydrate. In view of the manner in which alcohol is treated in the process above described, the court considers it extremely improbable that chloral hydrate was one of the medicinal preparations which congress intended to make dutiable under paragraph 74 of Schedule A. Under the testimony, it is also doubtful whether chloral hydrate is, in a strictly legal or dictionary sense, "a medicinal preparation." In the form in which the present importation was made, it is clear that the article in question is not a complete medicinal preparation, for the reason that it cannot be administered in the form in which it was imported, but must be further prepared by the druggist or apothecary. While the case is not entirely free from doubt, I think, for the reasons above stated, that the article in

question should be assessed under paragraph 76 as "a chemical compound not specially provided for," and at the rate of 25 per cent. *ad valorem*. Judgment accordingly.

UNITED STATES *v.* McGRATH *et al.*

(District Court, E. D. Louisiana. May 11, 1892.)

No. 12,873.

CUSTOMS DUTIES—ENTRY UNDER BOND—WITHDRAWAL—ADDITIONAL DUTY.

Under Act Cong. Oct. 1, 1890, (26 St. at Large, p. 624,) § 50, goods deposited in bond prior to the date thereof, for which no permit of delivery has issued, and withdrawn before February 1, 1891, but after the above law went into effect, are not subject to the additional duty of 10 per cent. provided by Rev. St. U. S. § 2970.

At Law. Action by the United States against James McGrath & Son to recover the additional duty of 10 per cent. prescribed by Rev. St. U. S. § 2970, upon goods withdrawn from bond. Verdict directed for defendants.

*Wm. Grant*, for complainant.

*Gurley & Mellen* and *W. O. Hart*, for defendants.

BILLINGS, District Judge. The decisions by the treasury department as to the question involved in this case have not been uniform. It is a pure question of law, and arises from the following facts, which are undisputed: Merchandise was imported and entered in bond prior to the passage of the act of October 1, 1890, to wit, in November and December, 1889, and was withdrawn after the 6th day of October, 1890, and after one year, but within three years of the time when it was entered and deposited in a bonded warehouse, and before February 1, 1891. It had not been in the warehouse a year at the time the present law went into effect. The duties upon this merchandise were the same in the former and the present act, and were liquidated and paid without the addition of the 10 per cent. additional duty, which is provided for by section 2970 of the Revised Statutes. This suit is brought to recover that additional duty of 10 per cent. It may be stated also, as a fact, that no permit of delivery had been issued to the importer or his agent prior to October 6, 1890. If the statute of October 1, 1890, had not contained section 50, when we consider the public reasons against implied repeals of provisions imposing customs duties, there would have been presented a difficult question as to the effect of the general repealing clause contained in section 55, when taken in connection with the proviso contained in that section. But section 50 (26 St. p. 624) has made specific provision for the case of merchandise which had been entered in bond prior to the 6th of October, 1890, and subjects the duties upon all such merchandise to the effect of the general repealing clause. With this specific provision as to the duties upon goods already imported and in bonded warehouse, making them subject to no duties other than those

imposed upon goods subsequently imported, there was no "accruing or accrued right" of the government, and no "liability" of the importer for the additional 10 per cent., and the general words of the repealing section operated upon this provision of the previous statute for this duty here sought to be recovered. Section 50 provides:

"That, on and after the day when this act shall go into effect, all goods, wares, and merchandise previously imported, for which no entry has been made, and all goods, wares, and merchandise previously entered, without payment of duty and under bond for warehousing, transportation, or any other purpose, for which no permit of delivery to the importer or his agent has been issued, shall be subjected to no other duty, upon the entry or the withdrawal thereof, than if the same were imported, respectively, after that day: provided, that any imported merchandise deposited in bond in any public or private bonded warehouse, having been so deposited prior to the first day of October, eighteen hundred and ninety, may be withdrawn for consumption at any time prior to February first, eighteen hundred and ninety-one, upon the payment of duties at the rates in force prior to the passage of this act: provided, further, that, when duties are based upon the weight of merchandise deposited in any public or private bonded warehouse, said duties shall be levied and collected upon the weight of such merchandise at the time of its withdrawal."

This was "merchandise entered without payment of duty and under bond for warehousing," and "no permit of delivery had been issued." Therefore it can be subjected to no other duty upon the withdrawal thereof than if the same had been imported after the new law was in force. It is placed by the new statute in the same situation, as to duties additional or chief, as if it had been imported after October 6, 1890. The question presented here is not, as was that in *Fabbri v. Murphy*, 95 U. S. 194, one as to an implied repeal, for the new statute has expressly provided for the case of goods already in bond. It is conclusive that congress was dealing with the whole subject of duties, for, in the following clause or proviso, they give the importer whose goods are in the bonded warehouse the option to pay the duties at the rates in force prior to the passage of this act. Section 54 provided for the extended period during which all goods, both those previously and subsequently imported, might remain in bond. Section 50 placed the goods already in bond on an equality with those afterwards imported in respect to duties. I shall therefore instruct the jury to find a verdict for the defendants.

UNITED STATES *v.* RIDER *et al.*, County Commissioners.

(District Court, S. D. Ohio, E. D. May 14, 1893.)

No. 211.

## 1. NAVIGABLE WATERS—BRIDGES—SUFFICIENCY OF NOTICE TO PROVIDE "DRAW."

County commissioners of M. county, Ohio, were notified by the secretary of war, February 25, 1891, to provide a state bridge over the M. river, with a "draw" for the passage of boats, on or before September 30, 1891. The commissioners had no funds with which to provide the "draw," could make no levy for that purpose until March or June, 1891, which levy would not be collectible in full before December 20th of the year following. The commissioners had applied to the legislature for the necessary funds without success, and had no opportunity to submit the question of the necessary expenditure, which exceeded \$10,000, to a popular vote, as required in case of such excess. *Held*, that the notice did not give a reasonable time in which to provide the "draw."

## 2. SAME—POWERS OF SECRETARY OF WAR—CONSTITUTIONALITY OF ACT.

Act Cong. Aug. 11, 1888, (25 U. S. St. at Large, p. 424, §§ 9, 10,) providing that, when the secretary of war shall have reason to believe that any bridge is an obstruction to free navigation, he shall give notice requiring the bridge to be so altered as to render navigation through or under it easy and unobstructed, and imposing a penalty on the controllers of the bridge for failing to make such provision, is unconstitutional, in that it delegates to the secretary of war powers exclusively vested in congress. *U. S. v. Keokuk & H. Bridge Co.*, 45 Fed. Rep. 178, followed.

**At Law.** Information against Frank M. Rider, John F. Burgess, and others, county commissioners of Muskingum county, Ohio, for failing to provide a bridge with a "draw" for the passage of boats. There was a verdict and judgment for plaintiff, and defendants move for a new trial. Motion sustained, and final judgment entered for defendants.

*John W. Herron*, for the United States.

*F. H. Southard and S. M. Winn*, for defendants.

**SAGE**, District Judge. The defendants are prosecuted under an information founded upon the fourth and fifth sections of the river and harbor act, approved September 19, 1890. The charges are, in short, that on the 15th of October, 1891, the defendants were the county commissioners of Muskingum county, Ohio, and as such empowered by the law of Ohio to construct, alter, and keep in repair all necessary bridges over streams and public canals on all state and county roads, and then and there had control of the bridge across the Muskingum river between Taylorsville and Duncan's Falls; and the secretary of war of the United States having good reason to believe that said bridge was an unreasonable obstruction to the navigation of said river, a navigable stream over which the United States has jurisdiction, gave written notice to the defendants on the 19th of December, 1890, that said bridge was considered an obstruction to navigation by reason of the fact that it had no draw for the passage of boats by way of the new lock just above the south end of the new bridge at Taylorsville, Ohio, and, in order to afford defendants a reasonable opportunity to be heard and give evidence in regard to said complaint, the 6th of January, 1891, was named and a place fixed for that purpose; that the time was extended to the 3d of February, 1891, and that on the 25th of February, 1891, the secretary gave written notice to the defendants that said bridge was an unreasonable obstruction to

the free navigation of said river, for the reason above stated, and required the construction of a draw span therein in accordance with plans shown in a map attached to said notice, and served upon the defendants; said notice prescribed that said draw span should be made and completed within a reasonable time, to wit, on or before the 30th of September, 1891; that personal service of said notice was made on the 3d of March, 1891; that afterwards the defendants, on, to wit, the 15th day of October, 1891, after receiving said notice, did unlawfully fail and refuse to comply with the order of the secretary, and to make the alterations aforesaid, contrary to the form of sections 4 and 5 of the act above referred to. Those sections are as follows:

"Sec. 4. That section nine of the river and harbor act of August eleventh, eighteen hundred and eighty-eight, be amended and re-enacted so as to read as follows: That whenever the secretary of war shall have good reason to believe that any railroad or other bridge now constructed, or which may hereafter be constructed, over any of the navigable water ways of the United States, is an unreasonable obstruction to the free navigation of such waters, on account of insufficient height, width of span, or otherwise, or where there is difficulty in passing the draw opening or the draw span of such bridge by rafts, steamboats, or other water craft, it shall be the duty of the said secretary, first giving the parties reasonable opportunity to be heard, to give notice to the persons or corporations owning or controlling such bridge so to alter the same as to render navigation through or under it reasonably free, easy, and unobstructed; and in giving such notice he shall specify the changes required to be made, and shall prescribe in each case a reasonable time in which to make them. If at the end of such time the alteration has not been made, the secretary of war shall forthwith notify the United States district attorney for the district in which such bridge is situated, to the end that the criminal proceedings mentioned in the succeeding section may be taken.

"Sec. 5. That section ten of the river and harbor act of August eleventh, eighteen hundred and eighty-eight, be amended and re-enacted so as to read as follows: That if the persons, corporations, or associations owning or controlling any railroad or other bridge shall, after receiving notice to that effect as hereinbefore required from the secretary of war, and within the time prescribed by him, willfully fail or refuse to remove the same, or to comply with the lawful order of the secretary of war in the premises, such persons, corporation, or association shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by a fine not exceeding five thousand dollars; and every month such persons, corporation, or association shall remain in default in respect to the removal or alteration of such bridge shall be deemed a new offense, and subject the persons, corporation, or association so offending to the penalties above prescribed."

Upon the trial, the evidence being in, a *pro forma* verdict of guilty was taken by consent, with the understanding that the questions of law involved should be presented and considered on motion for new trial. They are as follows:

1. Was the notice to the defendants reasonable? The charges of the information in regard to the notice were established by the evidence, and are not disputed. It has been held that where the facts are clear, what is reasonable notice or reasonable time is always a question exclusively for the court. *Toland v. Sprague*, 12 Pet. 336; *Wiggins v. Burkham*, 10 Wall. 132. It appears from the evidence that, at the time of the

service of said notice, the defendants had no funds with which to make the required change; and that under the statute of Ohio they, as commissioners, could only make levies for bridge purposes at their March or June session in each year, one half of which would be collectible not before the 20th of December of the year following. It also appears from the evidence that the defendants applied for legislation authorizing them to raise the funds with which to make the change required, and that their application failed, and the defendants introduced evidence tending to prove that the cost of the required change will exceed the sum of \$10,000, which, however, is denied by witnesses for the government. The defendants, under the statutes of Ohio, cannot expend, in constructing, altering, or repairing any bridge, a sum in excess of \$10,000 without special authority from the legislature, or without submitting the same to a vote of the people of the county at some general election; and there was no general election after the service of notice, excepting the spring election, on the first Monday of April, and the state election, on the first Tuesday after the first Monday of November. The first of these dates was too early after the notice, and the last was after the limit prescribed by the notice. The defendants had no authority in the matter excepting as county commissioners. They had no bridge fund to draw upon, and no authority of law to incur any obligation excepting upon their individual responsibility. It would be manifestly unreasonable to expect them to proceed without the authority of local law, and without money, upon their own responsibility, to incur the expense involved in making the required changes, whether the cost would have been less or more than \$10,000. The notice was not reasonable, and therefore, if upon no other ground, the verdict must be set aside.

2. The main question, and that which goes to the root of the matter, is whether congress has the power to confer upon the secretary of war the authority attempted to be conferred by the act. In accordance with its terms, whenever he has good reason to believe that a bridge is an unreasonable obstruction to navigation, he is to give notice to the parties owning or controlling the same—after first giving them reasonable opportunity to be heard—to make such alterations as he may specify, and, upon their failure or refusal to make the same within a reasonable time, they are to be deemed guilty of a misdemeanor, and the secretary may direct the institution of criminal proceedings. The power of the secretary depends upon his having adjudged that the bridge is an obstruction, and his adjudication is made final and conclusive. This is a judicial power. The question is one of fact, or a mixed question of law and fact, and it cannot be determined by a court without a jury unless the defendant consent. It was held in *Grant v. Raymond*, 6 Pet. 242, Chief Justice MARSHALL announcing the decision, that the secretary of state of the United States is not an officer in whom, under the constitution, judicial power can be vested. In that case the secretary had gone through with the form of reissuing a patent for an invention. It is true that there was not then any statute authorizing a reissue. The original patent had been granted by the president, signed by him, and counter-

signed by the secretary. It was returned to the patent office, and canceled, owing to the defective specification on which it was issued, and another patent issued with a corrected specification. The argument in favor of the reissue was that the department of state had clearly the right to correct an inadvertent or innocent mistake. But the court said that the question of inadvertence or mistake was a judicial question, which could not be decided by the secretary of state. It is also true that within a few months after the decision of that case congress enacted a statute making it lawful for the secretary of state, upon the surrender of a patent invalid or inoperative by reason of inadvertence, accident, or mistake, as specified in the act, to cause a new patent for the same invention, and for the residue of the term of the original patent, to be issued, the reissued patent to be liable to the same defenses as the original; and that subsequently the authority was vested in the commissioner of patents, with whom it remains to this day. But there is this radical difference between the case of a reissued patent and the case now before the court: The patent, original or reissued, is only *prima facie* evidence of an exclusive right in the patentee, and it is open to all defenses, including, in the case of a reissued patent, those involving an investigation into the question whether there was in fact any such inadvertence, accident, or mistake as was requisite to authorize the reissue; while here the secretary of war finds and decides conclusively and finally whether the bridge is an obstruction, what changes shall be made, and within what time; and the only questions left open to be tried in the criminal prosecution for misdemeanor, which he is authorized to set on foot, are whether he has made the findings and decision, ordered the changes, given the proper notices, and whether the defendants have complied with his orders.

In this case the bridge was built about 1874 by the board of commissioners of Muskingum county by virtue of a grant from the state of Ohio under the act of the legislature of March 25, 1870. The Muskingum river is entirely within the state of Ohio. Since 1838, and until the date hereinafter mentioned, it has been under the control of the state, through its board of public works, which maintained a system of slack-water navigation until the cession of the river and its improvements by the state of Ohio to the federal government, March 21, 1887. Since that time the general government has caused to be constructed in a dam at the head of rapids above said bridge, on its west side and under the bridge, an artificial channel. It has also raised the locks and dam on the river below, thus raising the level of the water above, some four feet. These improvements and changes furnished the occasion alleged for requiring the proposed changes in the bridge. The right of the state of Ohio to erect or authorize bridges over the river which should not interfere with its navigation is conceded, and that such bridges were lawful structures. But it is urged for the government that they were built subject to the power of congress at any time to act upon the subject of the navigation of the river, and to define what structures should be regarded as interfering with that navigation; citing *Gilman v.*

*Philadelphia*, 3 Wall. 731. There is a long series of cases decided by the supreme court, and cited in *U. S. v. Keokuk & H. Bridge Co.*, 45 Fed. Rep., at page 180, sustaining the general proposition as above stated. But the question to be here decided is whether congress could delegate, as it has undertaken to do, its authority in the premises to the secretary of war. My conclusion is that it could not. The reasons for this conclusion are so well and so fully set forth by Judge SHIRAS in *U. S. v. Keokuk & H. Bridge Co.*, cited above, that it is sufficient to refer to that case, and to express, as I do, my concurrence in the reasoning and conclusions of the opinion therein.

The verdict against the defendants will be set aside, and the judgment of the court will be that sections 4 and 5 of the river and harbor act of September 19, 1890, upon which the information is based, are unconstitutional, and that the defendants go hence without day.

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### UNITED STATES *v.* GAYLORD.

(*District Court, S. D. Illinois. January, 1883.*)

#### 1. **MAILS—OBSCENE MATTER—SEALED ENVELOPE.**

Since Rev. St. § 3893, relating to mailing nonmailable matter, was amended by the insertion of the word "writing," all writings, whether inclosed under a sealed envelope or not, signed or unsigned, that are of an obscene, lewd, or lascivious character, are nonmailable matter, and covered by the statute.

#### 2. **SAME—PUBLICATION OF WRITING.**

Inclosing an obscene, lewd, or lascivious writing in a sealed envelope, and mailing it to another, constitutes a publication of the writing, within the meaning of the statute.

#### At Law.

This was an indictment under section 3893, Rev. St. U. S., for mailing obscene writings. There were three counts, each charging defendant with "depositing in the mail of the United States, for mailing and delivery, a certain obscene, lewd, and lascivious writing, purporting to be a letter," etc., "which said writing is so lewd, lascivious, and obscene that the same would be offensive to the court here, and improper to be placed upon the records thereof, which said writing then and there was inclosed in a letter envelope, said letter being then and there addressed," etc. A motion was made to quash the indictment on the ground that the obscene, lewd, and lascivious expressions were not set forth in the indictment, which motion was overruled by the court. Defendant thereupon entered a plea of "Guilty," and moved for arrest of judgment—*First*, on the ground that the statute did not include private communications which were sent under cover of a seal, such as letters, etc., but was intended to embrace only such matter as was classed under the head of publications, such as circulars, etc., which were sent subject to the scrutiny of postmasters, and to be detained by them in case of their being determined to be nonmailable matter; and, *second*,



that the sending of such letters did not constitute a publication of the writings therein inclosed.

*James A. Connolly*, U. S. Dist. Atty., and *Edward Roe*, Asst. U. S. Atty., for the United States.

*John M. Palmer* and *James C. Robinson*, for defendant.

TREAT, District Judge, (*orally*.) Since this statute has been amended by the insertion of the word "writing," I am of opinion that all writings, whether inclosed under a sealed envelope or not, signed or unsigned, that are of an obscene, lewd, or lascivious character, are non-mailable matter, and covered by the statute. As to the question raised regarding what constitutes a publication, I shall hold that to inclose an obscene, lewd, or lascivious writing in a sealed envelope and mail it to another is a publication of that writing, and would place it within the power of the party receiving the letter to institute a prosecution for the offense.

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*Ex parte* GEISLER.

(Circuit Court, N. D. Texas. June, 1882.)

COUNTERFEITING—JURISDICTION OF STATE COURTS.

The judiciary act of 1789, § 11, provides for the exclusive cognizance by the United States courts of all offenses against the laws of the United States, unless such laws otherwise direct. Act Cong. 1825, § 20, (Rev. St. U. S. § 5457,) and section 26, (Rev. St. U. S. § 5328,) providing for the punishment of the counterfeiting of coin, declare that "nothing in this act shall be construed to deprive the courts of the individual states of jurisdiction of the laws of the several states over offenses made punishable by this act." *Held*, that the state courts have power to punish counterfeiting under the state statutes.

Petition by Adam J. Geisler for Writ of *Habeas Corpus*.

Article 463, Pen. Code Tex., declares:

"If any person, with intent to defraud, shall pass, or offer to pass, as true, or bring into this state, or have in his possession, with intent to pass as true, any counterfeit coin, knowing the same to be counterfeit, he shall be punished by imprisonment in the penitentiary not less than two nor more than five years."

The petitioner was indicted in the district court of Grayson county, Tex., for a violation of this article of the state law, was tried and convicted, and sentenced by the court, in pursuance of the verdict of the jury, to imprisonment in the state penitentiary for the term of two years. He now seeks discharge from imprisonment, on the ground that the court by which he was tried and sentenced had no jurisdiction of the offense with which he was charged, and of which he was convicted.

*S. W. Miner*, for petitioner.

WOODS, Circuit Justice. The ground upon which the jurisdiction of the state court is denied is that the offense charged was an offense cog-

nizable under the authority of the United States, and that the courts of the United States have exclusive jurisdiction thereof. The judiciary act of 1789, § 11, (1 St. p. 78,) provides that the circuit courts shall have exclusive cognizance of all crimes and offenses cognizable under the authority of the United States, except when this act otherwise provides or the laws of the United States shall otherwise direct. The petition for *habeas corpus* is based on this section. After the passage of the act of 1789, to-wit, on March 3, 1825, an act was passed entitled "An act more effectually to provide for the punishment of certain crimes against the United States, and for other purposes." 4 St. p. 115. The twentieth section of this act declared it to be an offense to pass, utter, publish, or sell, or attempt to pass, utter, publish, or sell, as true, any false, forged, or counterfeited coin, in the resemblance or similitude of the gold or silver coin which had been or might hereafter be coined at the mint of the United States. This section, with a slight amendment incorporated therein by the acts of February 12, 1873, (17 St. p. 434,) and the act of January 16, 1877, (19 St. p. 223,) is still in force, and constitutes section 5457 of the United States Revised Statutes. The twenty-sixth and last section of the act of 1825 declared:

"Nothing in this act contained shall be construed to deprive the courts of the individual states of jurisdiction of the laws of the several states over offenses made punishable by this act."

This section is still in force, and appears, in substance, as section 5328 of the United States Revised Statutes. Conceding what is unquestionably well settled, that congress may exclude the jurisdiction of the courts of the states from offenses within the power of congress to punish,—*Houston v. Moore*, 5 Wheat. 1; *The Moses Taylor*, 4 Wall. 411; *Martin v. Hunter*, 1 Wheat. 304; *Com. v. Fuller*, 8 Metc. (Mass.) 313,—it appears, in respect to the offense of which the petitioner stands convicted, not only that congress has not excluded, but on the contrary has expressly reserved and recognized, the jurisdiction of the state courts. The district court of Grayson county had therefore jurisdiction to try and sentence the petitioner for the offense with which he was charged, and whereof he was convicted, and his imprisonment under such sentence is lawful. The petition for the writ of *habeas corpus* must therefore be denied.

## UNITED STATES v. MULHOLLAND.

(District Court, D. Kentucky. April 21, 1892.)

**1. POST OFFICES—LARCENY FROM MAILS—EVIDENCE—HEARSAY.**

Evidence of an admission of the theft of a registered letter, made by a person since deceased, is not admissible upon the trial of a postmaster for the embezzlement of such letter, as it is not such a declaration against interest as admits of the introduction of hearsay evidence.

**2. SAME—EVIDENCE—REMOTENESS.**

Evidence is not admissible in such a case that the declarant was caught in the act of stealing money from the post office nearly six months after the letter had been stolen, especially as it was not shown that he could have had access to such letter in the course of his official duties or otherwise.

**3. NEW TRIAL—NEWLY-DISCOVERED EVIDENCE—EX PARTE AFFIDAVITS.**

*Ex parte* affidavits, upon motion for a new trial, made by witnesses for the state, containing statements more favorable to the defendant than the testimony given at the trial, will not sustain a motion for such new trial.

**At Law.**

At the November term, 1891, in the district court of the United States for the district of Kentucky, the grand jury returned an indictment against defendant, as follows:

*"United States of America, District of Kentucky—act.:* In the district court of the United States for the sixth judicial circuit and district of Kentucky, held at Paducah, November term, in the year of our Lord eighteen hundred and ninety-one. *First Count.* The grand jurors of the United States of America, impaneled and sworn, and charged to inquire in and for the district of Kentucky, on their oath present that Hugh Mulholland, late of the district aforesaid, on the seventeenth day of July, in the year of our Lord eighteen hundred and ninety-one, in the district aforesaid, being then and there employed in a department of the postal service of the United States, to wit, as postmaster at Paducah, Kentucky, feloniously did secrete and embezzle a certain letter, which had then and there come into the possession of the said Hugh Mulholland, and which said letter was intended to be conveyed by mail of the United States, and was then and there addressed to M. A. Sills & Son, Model, Tennessee, and which said letter then and there contained articles of value, to wit, two hundred and eighty-seven and twenty-nine hundredths dollars, consisting of United States treasury notes and national bank notes, and of the value of \$287.29, and a further description of which said letter and its contents is to the jurors aforesaid unknown; against the peace and dignity of the United States, and contrary to the form of the statute in such case made and provided. Section 5467, Rev. St. par. 1. *Second Count.* And the grand jurors aforesaid, upon their oath aforesaid, do further present that the said Hugh Mulholland on the seventeenth day of July, in the year of our Lord eighteen hundred and ninety-one, in the district aforesaid, being then and there employed in a department of the postal service of the United States, to wit, as postmaster at Paducah, Kentucky, feloniously did steal and take certain articles of value, to wit, treasury notes of the United States and national bank notes, amounting in the aggregate to, and of the value of, two hundred and eighty-seven dollars, out of a certain letter then and there addressed to M. A. Sills & Son, Model, Tennessee, which said letter had then and there come into his possession in the regular course of his official duties, and which said letter was then and there intended to be conveyed by mail of the United States, and which said letter was not delivered to the party to whom it was directed, and a further description of which

said letter and its contents is to the jurors aforesaid unknown; against the peace and dignity of the United States, and contrary to the form of the statute in such case made and provided. Section 5467, Rev. St. par. 2. *Third Count.* And the grand jurors aforesaid, upon their oath aforesaid, do further present that the said Hugh Mulholland, on the seventeenth day of July, in the year of our Lord eighteen hundred and ninety-one, in the district aforesaid, feloniously did steal and take from and out of the mail of the United States, to wit, out of the post office at Paducah, Kentucky, a certain letter, which said letter was then and there directed to M. A. Sills & Son, Model, Tennessee, and a further description of which said letter is to the jurors aforesaid unknown; against the peace and dignity of the United States, and contrary to the form of the statute in such case made and provided. Section 5469, Rev. St. par. 1. *Fourth Count.* And the grand jurors aforesaid, upon their oath aforesaid, do further present that the said Hugh Mulholland, on the seventeenth day of July, in the year of our Lord eighteen hundred and ninety-one, in the district aforesaid, feloniously did take from the mail of the United States, to wit, out of the post office at Paducah, Kentucky, a certain letter then and there addressed to M. A. Sills & Son, Model, Tennessee, and did then and there open and embezzle said letter, which said letter then and there contained articles of value, to wit, United States treasury notes and national bank notes of the value of two hundred and eighty-seven dollars, and a further description of which said letter and its contents is to the jurors aforesaid unknown; against the peace and dignity of the United States, and contrary to the form of the statute in such case made and provided.

"GEO. W. JOLLY, United States Attorney."

On the 5th and 6th days of April, 1892, the defendant was tried, and the jury returned a verdict as follows:

"We, the jury, find the defendant guilty as charged in the within indictment."

After the verdict was rendered the defendant moved the court to set aside the verdict, and grant a new trial, on the following grounds, to wit:

"The defendant, Hugh Mulholland, Jr., moves the court to set aside the verdict of the jury, and grant a new trial herein, for the following reasons, to wit: (1) The verdict of the jury is contrary to the law, as given by the court in his charge, and against the evidence. (2) Because of errors committed by the court, in this: That the defendant offered to prove on the trial by the witness Samuel Williams that in a conversation between the said witness and one Edward King, in December, 1891, in the town of Paris, Tennessee, said King stated that he had to leave this country; that he was guilty of taking the registered letters that said Mulholland was charged with taking. To the introduction of said testimony the government objected, and the court sustained said objection, and would not permit the said testimony to be introduced; to which ruling of the court the defendant objected and excepted at the time, and still objects and excepts. (3) Because of the errors committed by the court, in this: That the defendant offered to prove on the trial by the witness Miss Lena Henneberger that the said King in December, 1891, in the city of Paducah, Kentucky, the post office in the said city, was caught in the act of stealing a twenty-dollar gold piece from the money drawer in the said post office; that said King returned the money, and confessed to her that he had taken the said money, and that said King on July 16 and 17, 1891, was in the employ of the postal service, and was in Paducah daily during said month; that the government objected to the introduction of the said testimony, and the court sustained the said objection, and refused to permit said

introduction of said testimony; to which ruling of the court the defendant objected and excepted at the time, and still does object and except. (4) Because since the trial of this case new evidence in behalf of the defendant has been discovered in this, to wit: That the government's witness James Withrow, before the trial of this case, told H. E. Thompson, of the city of Paducah, that he (Withrow) remembered to have seen the letter directed to the postmaster at Model, Tennessee, inclosed in a registered envelope at the time Miss Henneberger says she saw the said letter, and which is the same letter mentioned in the indictment; and that this testimony was not known to the defendant until since the verdict of the jury. Wherefore the defendant prays for a new trial."

*George W. Jolly, U. S. Atty.*

*Wm. Lindsay, St. John Boyle, J. C. Wickliffe, Burnett & Dallam, and Frank Hagan, for defendant.*

BARR, District Judge. The defendant has filed grounds for a new trial, and as they present an interesting question, and the motion is of much importance to the defendant, I have considered the motion with care.

The second and third grounds are the most important, and will be considered first. They are that the court erred in not allowing the defendant to prove by Miss Henneberger that one King was, in December, 1891, caught in the act of stealing a \$20 gold piece from the money drawer of the post office at Paducah; and that he then confessed he had taken the money, and returned it; and that he was on the 15th and 17th of July, 1891, in the railway postal service, and was in Paducah daily during the month of July, 1891. And that the court erred in not allowing the defendant to prove by Samuel Williamson that said King in the month of December, 1891, in the town of Paris, Tenn., told him (Williamson) that he (King) had to leave the country, and that he was guilty of taking the registered letters the defendant was charged with taking. The defendant proposed to prove by this witness that this conversation was a day before King killed himself, and after the stealing of the gold piece from the money drawer of the post office. The defendant was permitted to prove any fact or circumstance which would show, or tend to show, that other persons than himself had access to the registered letter apartment, or had possession of the registered letter after it was received by the defendant, or the opportunity to get into the registered letter apartment, or to handle the registered letter, or to have access to it in any way whatsoever. We thought the fact that a postal clerk was caught stealing in the same post office, nearly six months after the registered letter and contents were charged to have been taken, was too remote, and only calculated to mislead the jury. We still think the theft of King committed in December did not throw the slightest light upon who committed a theft the previous July, especially as it was not shown that King was ever in, or had access to, the registered letter apartment, or that he had access, or could have had access, to this registered letter in the course of his official duties or otherwise. The fact that King was caught stealing in December might tend to prove that he was capable of

stealing in the previous July, and thus increase the probability of the truth of his admission of guilt of having stolen the registered letter in July, but as independent evidence it is not admissible. If admissible at all, it must be in connection with King's statement which he is said to have made to Williamson. The counsel for defendant has not pressed this ground for a new trial, and I therefore proceed to consider whether the statement said to have been made by King to Williamson is competent evidence.

This statement of King was not made under the solemnity of an oath, or the fear of the penalties denounced by the law for false swearing, nor was the statement made subject to a cross-examination. Williamson's statement as to what was said by King would have been under oath, and subject to cross-examination; yet it is clearly hearsay, or, as Mr. Roscoe calls it, "second-hand" evidence. This is admitted by the learned counsel, but he insists that King's statement was made against his own interest, being the acknowledgment of a crime that destroyed his character, and rendered him liable to punishment for an infamous crime, and that it is, and should be, an exception to the general rule which excludes hearsay as evidence. It is insisted that this is a clearly recognized exception to the general rule as to hearsay evidence when the party making the statement is dead, in civil cases; and, as the rules of evidence are the same in criminal cases as in civil ones, this statement of King is competent evidence for defendant under the exception. Mr. Greenleaf states this exception most broadly, thus:

"This class embraces not only entries in books, but all other declarations or statements of facts, whether verbal or in writing, and whether they were made at the time of the fact declared, or at a subsequent day. But, to render them admissible, it must appear that the declarant is deceased, that he possessed competent knowledge of the facts, or that it was his duty to know them, and that the declarations were at variance with his interest." 1 Greenl. Ev. § 147.

This, we think, is too broad a statement of the exception, and not sustained by the authorities, at least as to recent events; but, assuming that such is the law in civil cases, the inquiry is, does it extend to criminal ones? We have not been referred to or seen an authority, English or American, where this kind of evidence has been admitted in a criminal case. The English cases declare that the adverse interest which the deceased must have had to make his statement competent must be of a pecuniary nature, and that the apprehension of possible danger of a prosecution is not sufficient to admit such statements. *Higham v. Ridgway*, 10 East, 109; *Sussex Peerage Case*, 11 Clark & F. 108. The latter case was in the house of lords in 1844, and the question was as to the legality of a marriage upon which depended the right of the claimant to a peerage and a large estate. It was attempted to prove the statements of Mr. Gunn, who was said to have been the officiating clergyman who married the mother and father of the claimant, to his son, in regard to said marriage, in 1798. It was insisted that this statement was within the exception as to hearsay evidence, because Mr. Gunn had violated

the statute in regard to marriage, and subjected himself to a penalty; hence his statement to his son in regard to the marriage was against his interest. The judges (12, I believe) unanimously agreed that this statement was not competent. The reason given was that the fear of or the liability to be prosecuted under the marriage act was not sufficient to bring the statement within the exception as to hearsay evidence. This was a civil action, and the decision has not been overruled or modified in England. Nor is there any American case to the contrary known to us, except the case of *Coleman v. Frazier*, 4 Rich. Law, 146. This was a civil action against the postmaster to recover the value of a letter containing money, because of the negligence of the postmaster. It appears that Meigs, who had been allowed by the postmaster access to the letters in the office, informed the defendant that he had stolen the money from the letter. This was allowed to be proven, and the superior court of South Carolina sustained the ruling of the lower court. The court says:

"I placed its admission on two grounds: (1) That the defendant was present, heard it, and received it as true; and (2) that it was the admission of an act committed by the party making it, against his interest, and subjecting him to infamy and heavy penal consequences, and who was dead at the trial. In either or both these points of view, I think the evidence was admissible, but more especially when both are combined."

This case was decided in 1850, but does not notice the *Sussex Peerage Case*, decided in 1844; but the reasoning of the court in *Coleman v. Frazier* was the opposite of that taken in that case. If known to the court, it was evidently not intended to be followed. That case, as well as the *Sussex Case*, was a civil action, and is not an authority for admitting such statements in a criminal case. Indeed, no case has been found by me, or been cited, which sustains the admission of such evidence in a criminal case.

There are many cases in America where the statements or admissions of other parties than the accused have been attempted to be proven, for the purpose of endeavoring to show the innocence of the accused; but there are none known to me where such admissions or statements have been allowed as evidence, as being under the exception now under consideration. This fact is a strong argument against the contention that this exception as to hearsay evidence is applicable to criminal cases as well as civil ones. It is true, in all the cases which I have examined, the persons who made, or are alleged to have made, the admissions or confessions, were seemingly alive; at least, the cases do not show they were dead. But if this exception as to hearsay be applicable to criminal as well as civil cases, it is strange the effort has not been made to introduce such statements or admissions, even though the person making them was alive and within the jurisdiction of the court, since the living person who may have made the admission or confession of a crime for which another was being tried could not be compelled to testify against himself upon the stand. If, therefore, the admission of a person to another, not under oath, that he has committed a crime for which another

is indicted, is not within the rule as to hearsay, and competent evidence if the party thereafter dies, why should it not be competent if the party is still living, as he cannot be compelled to testify, and thus criminate himself? The admission or confession is as likely to be true in the one instance as the other.

It is unnecessary to review the American cases, but a few will be mentioned. In *Snow v. State*, 58 Ala. 375, Daniel Smith, Frank Snow, and Elbert Smith were jointly indicted for stealing cotton, and Frank Snow and Elbert Smith were being tried. Daniel Smith not being on trial, the accused (Snow and Elbert Smith) offered to prove by two witnesses that Daniel Smith had told them that he (Smith) had broken into the lint room, and that Frank Snow and Elbert Smith were innocent; that, after he broke open the lint room and took out the cotton, he hired Frank Snow and Elbert Smith to haul the cotton away for him. This was excluded in the lower court, and the ruling was sustained by the supreme court of the state. See, also, *Snow v. State*, 54 Ala. 138. In *Daniel v. State*, 65 Ga. 200, the offense charged was stealing cattle. The accused on his trial offered to prove by two witnesses that they had heard Henry Dixon say "that he had stolen the steers for which the defendant (accused) was indicted, and that he was sharp enough to get out of it." This evidence was rejected. In *Greenfield v. People*, 85 N. Y. 75, the accused offered to prove statements made by third parties the same night of the murder, and not far from the place of murder. This was refused by the court. In *Crookham v. State*, 5 W. Va. 510, the accused was not allowed to prove that another person had made threats to kill Thurman (the person killed) just before the killing charged to have been done by the accused, and that immediately after the offense such other person left the country, and had not been heard of since. In *Bowen v. State*, 3 Tex. App. 623, the defendant offered to prove that one John W. Hardin had stated that he (Hardin) had killed the deceased, Haldeman, for whose killing defendant was being tried, and had acknowledged to defendant that he had done him a great wrong by accusing him (defendant) of killing Haldeman. This statement was not allowed to be proven. In *Peck v. State*, 86 Tenn. 267, 6 S. W. Rep. 389, the defense offered to prove that one Robert Woods had, after the killing of the person for whom the accused was being tried, admitted to witnesses that he (Woods) had done the shooting. This was rejected. See, also, to the same effect, *Rhea v. State*, 10 Yerg. 258; *Smith v. State*, 9 Ala. 990; *Com. v. Chabcock*, 1 Mass. 144; *State v. White*, 68 N. C. 158.

In some of these cases the persons who were alleged to have made the statements or admissions were shown to be alive, and within reach of process, and in none of them were these persons shown to be dead, although in some they were beyond the jurisdiction of the court; but, as the persons could not have been compelled to testify in regard to said admissions, and thus compelled to criminate themselves, we do not see that it was material that they were still alive. Their right of absolute silence would deprive the accused party of their testimony on the witness stand as effectually as if dead.



If we are to consider the question, not upon decisions, but by analogy to other rules of evidence in criminal cases, we think this statement of King must be rejected. The declarations which bear the closest resemblance to these statements of King are those known as "dying declarations." These declarations are hearsay, and are admitted with the utmost caution. They are only competent in the trial for the killing of the person making them, and only then when made by him in a dying condition, and after the hope of recovery is gone. If courts are thus cautious in allowing this kind of hearsay, surely this court should not allow, in the absence of an adjudicated case, such hearsay as the statement of Williamson, stating what King told him in December in regard to the stealing of these registered letters, because King now is dead.

The supreme court, by Chief Justice MARSHALL, in discussing "hearsay," and its exclusion as evidence, said:

"That this species of testimony supposes some better testimony which might be adduced in the particular case is not the sole ground of its exclusion. Its intrinsic weakness, its incompetency to satisfy the mind of the existence of the fact, and the frauds which might be practiced under its cover, combine to support the rule that hearsay evidence is totally inadmissible."

The court, after stating the exceptions to the general rule excluding hearsay evidence, says:

"But if other cases standing on similar principles should arise, it may be doubted whether justice and the general policy of the law would warrant the creation of new exceptions. The danger of admitting hearsay evidence is sufficient to admonish courts of justice against lightly yielding to the introduction of fresh exceptions to an old and well-established rule, the value of which is felt and acknowledged by all." *Queen v. Hepburn*, 7 Cranch, 296.

The jury that tried the defendant was not taken from the city of Paducah, but from the surrounding counties, and seemed to be an exceedingly intelligent one, having neither prejudice nor bias against the defendant, or partiality or sympathy for him. The question of the guilt or innocence of the defendant was one depending upon how the jury determined upon the evidence; and although the court might, if one of the jury, come to a different conclusion, this is no reason for granting a new trial.

The other ground for a new trial is the discovery of evidence since the trial, which was not and could not have been discovered by reasonable diligence before. This is a statement of H. E. Thompson of what young Withrow told him as to the fact that he had seen this registered letter at the time Miss Henneberger said she saw it. This evidence would be only competent to contradict Withrow, had the proper foundation been laid; and is not sufficient ground for a new trial. Whart. Pl. & Pr. § 869; *State v. Williams*, 14 W. Va. 864; *Friedberg v. People*, 102 Ill. 165; *Partee v. State*, 67 Ga. 570; *Polser v. State*, 6 Tex. App. 512.

The affidavits of Miss Henneberger and Withrow, in which they make statements more favorable to the defendant upon a material point, requires the court should consider whether these *ex parte* statements enti-

tle the defendant to a new trial. In view of what Withrow stated and omitted to state on the trial, his present statement is quite a surprising one, and much more favorable to the defendant than given at the trial. Miss Henneberger's *ex parte* statement is also more favorable to the defendant than that given before the jury. This is, however, chiefly in the distinctness of the statement in the affidavit as compared with that made before the jury. I have a distinct recollection of what occurred in the trial when these witnesses were examined. Young Withrow seemed to be calm and collected, and answered questions coolly, promptly, intelligently, and I think was not cross-examined at all by the defendant's counsel. Miss Henneberger became much embarrassed and agitated during the examination, but seemed to answer questions intelligently, though with some degree of indistinctness as to the time of her backing the registered letter to Model. She was excused, and in the course of a half hour or more was recalled, at the instance of the defendant, and then asked about some matter about which she had not been examined before. She was calmer than when she left the witness stand. The court asked her a number of questions for the purpose of having her state to the jury more definitely her recollection about the registered letter which she had addressed to Model, Tenn. She was asked the time, and all the circumstances connected with the matter. She made a clearer and more distinct statement than she had previously given, but still not so distinct or in detail as given in the affidavit filed. But granting this, and that Mr. Withrow's affidavit is more favorable to the defendant than his testimony before the jury on the trial, and that, too, upon a most material fact, still I do not think this new evidence is a good ground for a new trial. If parties in criminal cases are allowed to get *ex parte* statements from witnesses who have testified upon their trial what they would then state if again put upon the witness stand in another trial, and thus obtain a new trial if such evidence be material, a precedent would be established which would open wide the door to fraud and perjury. I am compelled, therefore, to overrule the motion for a new trial.

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DOUGLAS *et al.* v. ABRAHAM.

(Circuit Court, S. D. Ohio, W. D. May 14, 1892.)

No. 4,829.

1. PATENTS FOR INVENTIONS—INFRINGEMENT—FLUSHING TANKS—VALVES.

Letters patent No. 369,843, issued September 18, 1887, to J. & G. Douglas, were for an improvement in flushing tanks for water-closets, which consisted of a spherical rubber valve, resting in a cup-shaped seat and closing the discharge pipe, and which, when drawn from its seat, floats until the tank is nearly empty, when the downward current draws and wedges it into the seat, which is of slightly less diameter than the valve, and deep enough to embrace it, when in position, for more than half its size, thereby forcing it into complete contact with the surface of the seat. *Held*, that this is not infringed by a device whose operation is precisely similar, but in which the valve is of metal and has a rubber seat, and is, moreover, somewhat of an acorn shape, so that less than half its size is embraced by the seat, which has a flaring mouth.

**2. SAME—EXTENT OF CLAIM—WAIVER.**

The original claim of the Douglas patent was for "a valve seat so arranged as that the valve will be sucked or drawn and wedged therein in the act of closing." The claim was rejected as being met by another patent. The patentees acquiesced in rejection, and it was canceled; and they then claimed "a seat slightly smaller in diameter than the valve, and cupped to receive the valve for more than half its size." *Held*, that they must be restricted to this, as their acquiescence was a waiver of the broader claim.

In Equity. Suit for infringement of letters patent No. 369,843, issued to J. & G. Douglas, September 13, 1887, for improvement in flushing tanks for water-closets. Bill dismissed.

*Arthur Stem*, for complainants.

*Geo. J. Murray*, for defendant.

SAGE, District Judge. The structure set forth in complainants' patent is a flushing tank with a discharge pipe opening into it at or near the bottom, and provided with an elastic valve composed of a hollow rubber ball, which floats when raised from its seat. The seat is in the form of a cup, so that the valve is guided into proper position, and slightly wedged in by the pressure of the water above it, thus making a firm closure. The overflow pipe is distinct from the valve and its opening, and communicates with the discharge pipe below the valve. The top of the overflow pipe is closed by a cap held down by a weight, which will float and raise the cap when the water rises above a certain height. The rubber ball valve is connected by a chain to a lever at the top of the tank; the lever being so weighted as to be normally in position to permit the valve to close. By pulling a cord so attached to the lever as to raise it, the ball valve is lifted from its seat, and the water passes into the discharge pipe. When the cord is released the lever returns to its normal position; but the ball, being hollow, floats on the water, and the discharge continues until the tank is nearly empty. Then, to quote from the specification, "the downward current caused by the pressure of the atmosphere from above, and the created vacuum beneath, will exert such an influence as will draw the valve into its seat, and deposit it thereon; and, the seat being smaller in diameter than the valve, the latter will be drawn or wedged into it so snugly as to stop the passageway, and prevent any more of the liquid reaching the discharge pipe until the valve is forced up again by the pull." The patentees state in the specification that the valve cup or seat "is made deep enough so that it will permit the valve to enter and be embraced for more than half its size, as shown. The diameter of the seat, also, is less than the diameter of the valve itself, so that, when the latter is in position, it will be wedged and prevented from becoming disengaged except when pulled out." The drawing shows the valve cup or seat as described in the specification; that is, deep enough to permit the valve to enter, and to be embraced for more than half its size.

The first claim of the patent, which is the only one sued upon, is as follows:

"The pull, B, connected to the fulcrumed and weighted arm, C, and chain, D, holding elastic valve, V, in combination with the valve seat, F, over the

discharge aperture; the seat being slightly smaller in diameter than the valve, and cupped to receive the valve for more than half its size, substantially as shown and described."

The discharge pipe of the defendant's tank opens into it near the bottom. A metal ball and a rubber seat are provided to close the discharge. At the top of the tank a weighted lever, whose normal position is such as to leave the ball valve closed, is connected to the ball by two pieces of wire, which constitute, in effect, a chain, and permit the lever to assume its normal position without forcing the ball down, but pull the ball up when the weighted end of the lever is raised. There is a cup over the discharge aperture, which acts to enlarge the valve seat so as to guide the ball to its proper position, and wedge it slightly in place. The only differences between the two structures to which it will be necessary to refer are that the defendant substitutes a metal valve for the rubber valve of the complainants' tank, and a rubber seat for the metal seat of the complainants' tank. This metal ball valve is hollow and light, and will float in the water when lifted from its seat; and, while it is nearly spherical, it is somewhat acorn shape, so that its greatest lateral diameter is above the center of its perpendicular diameter when in position. The other point of difference claimed on behalf of the defendant is that whereas the ball valve of the complainants' tank, when seated, is embraced by the valve cup for more than half its size, the defendant's valve, when seated, is less than half its perpendicular diameter within the cup or valve seat.

It is contended for complainants that the language of this claim, construed in the light of the specification, referring particularly to the description of the device, and its operation, "means that the valve seat is cupped so as to conform with the shape of the valve, and of a size to receive the valve a sufficient distance to secure the wedging of the valve in the seat." The first objection to this construction is that the claim would then be substantially the original second claim as it appears in the file wrapper and contents, which are in evidence. That claim was for "a spherical elastic valve, operated by a pull, and designed to open or close the discharge orifice of a flushing tank; the valve seat being so arranged as that the valve will be sucked or drawn and wedged therein in the act of closing, substantially as shown and described." But that claim was rejected, as functional and indefinite, and substantially met by English patent of 1848, No. 12,098 to Hosmer, and the rejection was acquiesced in, and the claim canceled. The second objection is that the field of invention to which the device described in the complainants' patent belongs was so occupied when the complainants made their application that there was no room for more than the precise construction and claim set forth in their patent. They could not move from these in any direction without encountering an anticipation. They must, therefore, be confined strictly to such a construction. Moreover, the drawing shows a valve seat deep enough to permit the valve to enter and to be embraced for more than half its size, and the specification is explicitly and unmistakably in exact accord with the language of the claim, literally con-

strued. The complainants' acquiescence in the rejection of original claim 2, and its cancellation, amounted to a waiver of the broad claim therein made; and for that reason, also, the construction claimed, which would now, in effect, revive that claim, is altogether inadmissible.

The question, then, is, does the defendant infringe the claim, as above construed? The substitution of the metal valve for the rubber valve, and of the rubber seat for the metal seat, is a mere transposition, which any mechanic could make, without invention, and it would not avoid infringement. But the defendant's valve has no more tendency to wedge itself into its seat than has any of the well-known wash-basin or bath-tub valves; and it has, if not less, certainly not more, contact surface than most of the old forms of plug valves. When the complainants' valve is sunk to its place in the valve seat the upper edge of the seat is a little above the greatest lateral diameter of the valve. The result is that the valve is so wedged in as to be held tightly in position by the contracted mouth of the seat, and by its elasticity it expands and fits the inside surface of the seat below its mouth, thereby precluding its withdrawal until it is partially collapsed by the upward force exerted in pulling it out. On the other hand, the greatest lateral diameter of the defendant's valve, when sunk to its place in the valve seat, is more than a quarter of an inch above the top of the seat, and the peculiar gripping or holding effect of the seat upon the valve in the complainants' device is wanting. The valve seat is not cupped so as to receive the valve for more than half its size. More than half its perpendicular diameter is above the mouth of of the seat, and the mouth is flaring, not contracted. The defendant's construction is more nearly like the Dalton and Ingersoll valves, as shown by an exhibit put in evidence by complainants, made in accordance with prior patents issued to Scott, and admitted to have been in public and common use prior to complainants' invention. The defendant does not infringe the complainants' patent.

The bill will be dismissed at complainants' cost.

### VERMONT FARM MACH. CO. v. GIBSON, (two cases.)

(Circuit Court, D. Vermont. May 3, 1892.)

#### 1. PATENTS FOR INVENTIONS—INFRINGEMENT—JURISDICTION—WAIVER.

The circuit courts of the United States have jurisdiction of suits for the infringement of patents, without regard to the citizenship or residence of the parties; and a bill which fails to allege that defendant is an inhabitant of the district where suit is brought is not demurrable. The exemption from suit in any district other than that of defendant's residence is waived, if not pleaded.

#### 2. SAME—PATENTABLE NOVELTY—CREAMERIES.

Letters patent No. 187,576, granted February 20, 1877, to William Cooley, for "the process of treating milk for raising cream by sealing with water and air the cover, applied directly to the vessel containing the milk," is valid, as embodying patentable novelty. *Boyd v. Cherry*, 50 Fed. Rep. 279, 4 McCrary, 70, followed.

#### 3. SAME—LICENSE—WHAT AMOUNTS TO.

The sale of a creamery containing cans which embody this invention does not operate as a license to use new cans procured from other parties, which infringe the claims of this patent. *Machine Co. v. Gibson*, 46 Fed. Rep. 488, followed.

**In Equity.** Bill by the Vermont Farm Machine Company against Hugh G. Gibson for infringement of patents. Decree for complainant.

*William Edgar Simonds*, for orator.

*G. G. Frelinghuysen*, for defendant.

WHEELER, District Judge. One of these cases is brought upon patent 187,516, dated February 20, 1877, and granted to William Cooley, for, among other claims, "The process of treating milk for raising cream by sealing with water and air the cover, applied directly to the vessel containing the milk, substantially as set forth." The other is brought upon patent 321,340, dated June 30, 1885, and granted to Francis G. Butler, for a can for raising cream by water sealing, in substantially the same way, but with internal supports raising the cover from the rim of the can for circulation of air between the water and the milk. Both bills have, with other defenses, been demurred to for want of jurisdiction, because the defendant is not, in either, alleged to be an inhabitant of this district. If the court did not have jurisdiction of any such cases but those in which the defendants should be inhabitants of the district, this objection would probably be fatal, as such an objection is when courts only have jurisdiction of suits between citizens of different states, and the requisite citizenship is not alleged. But the circuit courts have jurisdiction of suits for infringement of patents, without regard to citizenship or inhabitancy, by the general law of the subject. The requirement elsewhere that they be brought in particular districts is a personal exemption, which may be waived. *Ex parte Schollenberger*, 96 U. S. 369. On principle, this exemption must be pleaded, or it is waived.

The other defenses are want of patentable novelty, and a license from the orator, arising from a sale to the defendant of a creamery having a tank for water, and cans made according to the patent to Butler, operating according to the patent to Cooley. These claims of the patent to Cooley were held to be valid against the defense of want of novelty in *Boyd v. Cherry*, 4 McCrary, 70, 50 Fed. Rep. 279. The same, and that the sale of the creamery did not license new cans got from others, was held by this court on a motion for a preliminary injunction in these cases. *Machine Co. v. Gibson*, 46 Fed. Rep. 488. Further consideration, after the full argument now had, leads to the same conclusion, for substantially the same reasons, which need not be repeated. Neither of the patents put in evidence, nor the proof of knowledge and use, seems to show the invention of this part of the patent to Butler. These claims of both patents appear to be valid, and the orator appears to be entitled to a decree in each case. Let decrees be entered, continuing the injunctions, and for an account, with costs.



## AMERICAN Box Co. v. WILSON.

(Olcott Court, N. D. Illinois. January 13, 1892.)

## 1. PATENTS FOR INVENTIONS—Box MACHINE—NOVELTY.

Letters patent No. 244,919, granted July 26, 1881, to Gordon Munro, for a machine for covering pasteboard boxes with paper, consisting of a frame upon which is mounted a spindle for carrying a roll of paper, a paste box, through which the ribbon of paper passes as it is unwound from the roll, and a guide roll for guiding the paper as it is delivered from the paste box to the box to be covered, are not void for want of novelty. *Box Co. v. Day*, 32 Fed. Rep. 585, followed.

## 2. SAME—INFRINGEMENT.

Said patent is infringed by a device which differs from the patented machine only in using bent rods over which the paper passes, in place of the guide rolls described in the specifications.

In Equity.

*Wetmore & Jenner and W. E. Furness*, for complainant.

*Curtis & Rodman*, for defendant.

BLODGETT, District Judge. In this case defendant is charged with the infringement of letters patent No. 244,919, granted July 26, 1881, to Gordon Munro for a "box machine." The scope of the invention covered by the patent is stated by the patentee in his specifications as follows:

"My invention relates to improvements in machines for covering pasteboard boxes with paper, in which the paper is taken from a roll or coil, and passed over a roller resting in a paste box, and over or under other rollers, to a box resting upon a form adapted to revolve; and the objects of my improvements are to produce an inexpensive machine, in which the amount of paste received on the paper can be regulated, the paste or glue retained in a warm or hot state, and the delivery of the paper from the coil is adjustably accomplished."

Dispensing with the letters of reference, the machine described in and covered by the patent consists of a frame upon which is mounted a spindle for carrying a roll of paper, a paste box, through which the ribbon of paper, as it is unwound from the roll, passes, and a guide roll for guiding the paper as it is delivered from the paste box to the box which is to be covered. The patent contains two claims, as follows:

"(1) The combination of the table top, A, paper roll supporting frame, paste box, F, and heating pipe F', with guide rolls, L, M, N, and block, e, adapted to revolve, substantially as and for the purpose described. (2) The combination of the table top, A, paper roll supporting frame, paste box, F, and adjustable scraper, K, with guide rolls and block, e, adapted to revolve, substantially as and for the purpose described."

The defenses interposed are (1) want of novelty; (2) that the defendant does not infringe.

The defense of want of novelty is based upon a large number of prior patents, introduced in evidence, but the principal reliance seems to be upon the Orr & Wright device, patented October 2, 1866. The case of *Box Machine Co. v. Day*, heard before the United States circuit court for the eastern district of Pennsylvania, (32 Fed. Rep. 585,) was upon a double

strip machine by the same inventor, being patent No. 298,879, in which the want of novelty in the patent was urged as a defense, and the court briefly disposed of that question in the following paragraph:

"To discuss and contrast the several exhibits relied upon by the defendants, and the conflicting testimony of witnesses, would serve no useful purpose. It is sufficient to say that the evidence does not show such a prior state of the art as would justify a finding against the patent. The combination seems to be new, highly useful, and, we think, shows invention."

If the defense of want of novelty as to a double strip machine was so summarily disposed of by that court, the inference is certainly very strong that it would have fared no better in regard to a single strip machine.

The Orr & Wright patent relied upon here was a complicated machine, in which provision was made for delivering the ribbon of paper to the box to be covered by the turning of a crank by an assistant to the operator who manipulated the box, and the paper ribbon for the purposes of covering being dependent entirely for the supply of paper upon the person who turned the crank. In the complainant's machine the rolls are so loosely adjusted as that the operator draws the paper towards him as is needed for the purpose of covering the box, the tension being just sufficient to make the paper lie smoothly upon the box as it is drawn on, and dispenses entirely with the attendant who turns the crank. The machine is very simple, and the proof shows has gone into extensive use, and is the first and only successful machine of the kind which has been devised. Its simplicity, I think, is the key to its success; and now that this patentee has taught the public the requisites for such a machine, it is very easy to organize one from the old machines which were inoperative and useless before. I do not find in the numerous citations which have been made in this case any machines which fairly anticipate the device covered by the patent, and, aside from the rule of comity, which should govern in a case like this, I must say that the new proof, even if there is any in this case, does not sustain the defense of want of novelty.

As to the question of infringement, I find in the defendant's machine all the elements of the plaintiff's second claim. The defendant does not use the guide rolls, L, M, N, which are in the combination of the first claim, but in place of those substitutes some bent rods, over which the paper passes before it reaches the box upon which it is to be placed. There seems from the proof to be a necessity in the manipulation of the paper, in order to have it properly adhere to the box, that it should pass some distance through the air after it leaves the paste box, so that the paper may become to some extent softened and limbered by the dampening which it receives from the paste. At all events, the defendant's machine is so organized as to carry the paper fully as far from the paste box before it reaches the box to be covered as does the complainant's machine; and, while the paper in the defendant's machine does not pass over or under other rollers, it passes over and under rods which are doubtless the equivalent, to a certain extent, of the rollers, as it keeps



the paper from dragging upon the table, and thereby becoming to some extent wrinkled, or some part of the surface injured. While, therefore, it is not so clear that the defendant infringes the first claim of the complainant's patent, I am fully satisfied from the proof that an infringement of the second claim is clearly established; and, did I deem it necessary to find so, I think I should also adjudge an infringement of both claims by the defendant's machine. A decree finding that the patent is valid, and that the defendant infringes, will be entered, and a reference made to a master to assess damages.

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**GILKA *et al.* v. MIHALOVITCH *et al.***

(Circuit Court, S. D. Ohio, W. D. May 14, 1892.)

No. 4,479.

**INFRINGEMENT OF TRADE-MARKS—ACCOUNT OF PROFITS—NOTICE—LACHES.**

In a suit to restrain the infringement of plaintiffs' mixture trade-mark, "Gilka-Kummel," and for an account of profits, defendants filed a plea alleging that they and their predecessors had used the trade-mark for 20 years without knowledge of plaintiffs' right, and without intent to injure them, and that immediately on learning of such right they had desisted from such use. The only circumstance relied on to show notice to plaintiffs of the illegal use, and consequent laches in demanding an account, was the fact that they had an agency for the sale of the mixture in New York city, 800 miles distant from defendants' place of business. *Held*, that the plea presented no sufficient defense.

**In Equity.** Bill by Hermann Gilka and others against Morris Mihalo-  
vitch and others. Plea of defendants overruled. •

*Mathews & Cleveland* and *Smith & Harlan*, for complainants.  
*Goss & Cohen* and *Alfred Mack*, for defendants.

SAGE, District Judge. The bill is to restrain the infringement of the complainants' trade-mark, under which a mixture or cordial, long known as "Gilka-Kummel," is and has been for many years advertised and sold by the complainants and by their predecessor in business. There is a prayer for an account of the profits made by the defendants by the manufacture and sale of an imitation cordial, under the name of "Gilka-Kummel," and with the use of the complainants' trade-mark. The defendants filed a plea setting up that they have continuously engaged in the business of manufacturing, bottling, and selling cordials and other liquors for the past 15 years; and that two of them, who were the predecessors of the present defendant firm, were engaged in such business for upwards of 5 years continuously, prior to such time; and that during the entire 20 years there were manufactured and sold, in the open market and in the business and trade of the defendants, and of the complainants, bottles, labels, packages, and other signs and devices similar to those set forth and described in the bill. Admitting that, in common with others in their trade and business, they have in the past, and up to the date hereinafter mentioned, manufactured and sold, upon the order of customers,

cordials put up in such bottles, and with such labels, which they purchased in the open market, they say that such use was without knowledge of any special or exclusive right to such labels and bottles as is now claimed by the complainants, and without any intention or design of infringing upon or injuring any special or exclusive right complainants have to the use of the same. They further plead that upon learning, in July, 1891, that complainants claimed the exclusive right aforesaid, they at once desisted from using in any way in their business either the bottles or labels described in the bill, and have not since then manufactured or sold, or offered for sale, any Kummel in any such bottles or with any such labels; that they have none such in their possession, custody, or control; and that they have no desire or intention of manufacturing, selling, or offering for sale any cordial in such bottles, with such labels or other devices.

The complainants have set down the plea for argument, and ask the judgment of the court on its sufficiency.

The plea must be overruled. While it is a well-settled rule that courts of equity should decline to assist one who has slept upon his rights, and shows no excuse for his laches in asserting them, there is nothing in the plea to make the rule applicable here. The complainants' right and title to the trade-mark is not denied, and it is not alleged that they had any knowledge of the infringement by the defendants. It is true that it appears from the bill that the complainants have been represented by A. Stepeani & Co., of the city of New York, their sole and exclusive agents for the United States, with the exception of the state of California. But the inference sought to be drawn from the fact that the complainants had the means of knowledge of what the defendants were doing, and therefore were chargeable as if they had had actual knowledge, does not follow. The complainant cannot lie by for a long time before filing his bill, not only for an injunction, but for profits, without being guilty of laches, as was held in *Beard v. Turner*, 13 Law T. R. (N. S.) 747. There the plaintiff, having actual knowledge, waited two years before filing his bill, and the vice chancellor said he apprehended that the court would make the objection that he should have come into court at once, for the reason that he asks for an account of the profits, and because a complainant might conclude that it would answer his purpose to let the defendant go on selling four or five years, and at the end of that time call him to an account of profits as if he were the complainant's salesman. It was held in the same case that it would be a fraud to allow complainant to avail himself of delay to obtain benefit for himself, and therefore the court could not give a person an opportunity of lying by, and then asking for an account of the profits made by an injury committed. The cases in which the rule is applied are cases in which the complainant was guilty of laches similar to that stated in *Beard v. Turner*. But here the only circumstance relied upon to charge the plaintiffs with constructive notice is that they were represented by agents located at the city of New York, nearly 800 miles distant from the defendants' place of business. The defendants have been confessedly conducting all these

years a spurious business, manufacturing and selling imitation goods, and using labels that they must have known were calculated to deceive and defraud. They are hardly in position to come into court and assert equities growing out of that business against the manufacturers of the genuine article, whose trade-mark they have been infringing. It is not a case of innocent use with complainants' knowledge and acquiescence, nor is it a case where it is shown that the complainant had sufficient knowledge to lead him to the fact, and therefore should be deemed conversant. Regarded in any and every point of view, the plea is insufficient.

The defendants will be allowed 20 days within which to present an answer and apply for leave to file the same.

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SPOKANE MILL CO. v. Post *et al.*

(Circuit Court, D. Idaho. April 9, 1892.)

1. NAVIGABLE WATERS—OBSTRUCTION—NUISANCE.

Rivers and streams, when of such size and channel that they may be used for the purpose of floating logs or in the transportation of any article of commerce, are public highways. While any obstructions placed in the same which will prevent such use are a public nuisance, they may be abated upon the action of a private individual who suffers some special damage, not common to the entire community.

2. SAME—PLEADING.

The party asking such abatement must allege and show that the commerce for which he would utilize the stream is lawful.

(*Syllabus by the Court.*)

In Equity. Bill by the Spokane Mill Company against Frederick Post *et al.* to enjoin the obstruction of a stream, and abate a nuisance. Heard on motion for a temporary injunction and on demurrer to the bill. Injunction refused, and demurrer sustained.

Edgar Wilson, for plaintiff.

Albert Hagan and John R. McBride, for defendants.

BEATTY, District Judge. The complainant alleges that, by obstructions placed in the Spokane River by defendants, it is prevented from floating down the stream a lot of logs it now has just above such obstructions, as well as from so using the river in the future as it has used it in the past, and asks the abatement of the obstructions. Responding to the order to show cause why a temporary mandatory injunction should not issue, the defendants deny the general allegations of the bill and the affidavits of complainant, and also demur to the bill as insufficient to justify the relief sought. The complainant is not asking the relief of a merely temporary restraining order to prevent waste and preserve the property as it now is pending litigation, but the extraordinary writ by

which the *status* shall be changed, the property of defendants destroyed, and an alleged nuisance abated. To justify this proceeding, such an extraordinary state of facts must appear as would demonstrate clearly the existence of most lawless aggression by the defendants, and strong probability of such great and irreparable loss and injury to complainant as could not otherwise be protected. The facts are not fully before me, but, in so far as they are, I am not impressed with the belief that the situation is such as to justify complainant's request. So far as can be observed, it cannot be necessary at any time to remove from said river all the weirs, dams, and obstructions asked by the complainant, but it seems to me some change in the construction of the boom may be made, which will permit the use of the stream by all. It is quite probable such change will not leave the river as free as it was by nature, and may work some inconvenience to all using it; but the water, as well as the light and the air and the rest of Nature's bequests, are not for the sole benefit and use of any single individual, corporation, or interest, but for all, as far as they can be usefully appropriated. I am not prepared, from the facts now before me, to say what change should be made it such boom, even if I were convinced complainant is likely to suffer the injury above referred to; but the facts do not show it will be without a remedy for any immediate loss suffered. Any order, therefore, to now remove the obstructions complained of, or any of them, must be and is refused.

But there is another reason why this order will not now be made. It is not shown that complainant is lawfully removing the logs from Idaho. It may be said that it does not appear from the allegations that complainant is engaged in a contraband trade, and that the court is justified until the contrary is shown in regarding the business as lawful. It does, however, appear from the evidence that the United States marshal, an officer of this court, in his efforts to protect the government and prevent the unlawful exportation of its timber from this state, has been somewhat instrumental in the maintenance of the boom and obstructions complained of; and the court cannot avoid the knowledge that gross depredations have recently been made upon the public timber lands in the portion of the state referred to in the pleadings. There is sufficient, at least, to put the court on its guard, and for it to require, before acting, such positive information of the facts that it will not inadvertently protect an unlawful business. This is not indulging in any presumption that the complainant is guilty of any violation of law, but, as the granting of the unusual relief asked is a matter somewhat within the discretion of the court, it should be exercised adversely to the complainant until it shall clearly appear that the law is not being violated. Moreover, any one asking this extraordinary relief should first establish beyond question that he is entitled to it, that no fault lies with him, that his hands are clean; and this, too, by direct, and not by inferential, averments. It is very certain that if, in this case, it positively appeared the logs in question were unlawfully cut from the public lands of the gov-

ernment, the complainant's request would, without hesitation, be refused. The contrary, I think, should be manifest by allegations and proof. In this respect the bill is subject to the objection taken.

As the temporary injunction is refused, and the bill should be amended, at least in the particular referred to, I might stop here; but other questions having been raised, a brief notice of them may be taken.

The defendants ask the dismissal of the bill, also, because the complainant may have relief at law. The statute upon this subject is section 723, taken from the act of 1789, by which it is provided that a suit cannot be sustained in equity "in any case where a plain, adequate, and complete remedy may be had at law." The supreme court has said, speaking through Mr. Justice FIELD, in *Whitehead v. Shattuck*, 138 U. S. 151, 11 Sup. Ct. Rep. 276, "it would be difficult, and perhaps impossible, to state any general rule which would determine in all cases what would be deemed a suit in equity, as distinguished from an action at law;" to which may be added that this difficulty is not lessened by the various decisions upon this vexing question. The statute is that the remedy by law must be, not only plain and adequate, but it must be complete; otherwise, equity may be invoked. Could the complainant obtain at law all it asks in this action? If so, to that forum must it be remitted. If the only relief sought were for the damage resulting from the detention of a certain lot of logs referred to, law would afford what would be held a complete remedy; but the complainant asks further relief. It alleges it has long been accustomed to use this river as a highway for the transportation of logs to its mill, and that it desires and intends to continue such use in the future, and that defendants are now resisting and obstructing the claim of complainant, and intend and threaten to so continue. If the complainant has the right to so use the river, then it is a continuing right. The interference therewith may be of daily occurrence, and would, in law, lead to a multiplicity of suits,—to constant annoyance. As said in the *Wheeling Bridge Case*, 13 How. 562:

"This injury is of a character for which an action at law could afford no adequate redress. It is of daily occurrence, and would require numerous, if not daily, prosecutions for the wrong done; and from the nature of that wrong the compensation could not be measured or ascertained with any degree of precision."

While complainant may at law obtain relief, at least in part, for the damage it suffers by defendants' acts, it cannot obtain all it asks and is entitled to, if it has the right claimed to the use of that stream. It can by law, in theory at least, obtain damage for its present actual loss, but cannot be awarded future protection. Its remedy, therefore, in that forum is not complete, and only in this can it be.

It is further urged that complainant should at least first have its asserted right to such use of the river determined at law. This rule is not imperative upon application for an interlocutory injunction. Moreover, it is a familiar principle that, when a court of equity is entitled to and assumes the jurisdiction of a cause, it determines it fully in all re-

spects. This familiar doctrine is reaffirmed in *Holland v. Challen*, 110 U. S. 15, 3 Sup. Ct. Rep. 495. It was urged in that case, against the jurisdiction of the court, that the title of the property had not been judicially determined, to which the court said:

"It is not an objection to the jurisdiction of equity that legal questions are presented for consideration which might arise in a court of law. If the controversy be one in which a court of equity only can afford the relief prayed for, its jurisdiction is unaffected by the character of the questions involved."

A different principle is not asserted in 138 U. S., 11 Sup. Ct. Rep., *supra*. While by that action the complainant asked the removal of a cloud from his title, it appeared the defendant was in the actual possession of the property in controversy, and that what complainant sought was possession of his property, and the affirmance of his title thereto. The court held that as, by ejectment, he could both recover the possession and determine the title, he had a complete remedy at law. Had there been some equitable relief asked, and justified by the facts stated, doubtless the cause would have been retained in the equity forum. The ancient English rule that one must thrice maintain his title by ejectment before entire justice will be awarded him is, fortunately, not the law here. It would appear that if, in any case, all a party asks, and to which, under the allegations, he would be entitled, cannot be granted him by law, it does not afford him a complete remedy, and equity then may. This certainly is the rule when the equitable relief is prayed in good faith, and is not a mere incidental, but an important, issue in the cause.

It is also claimed by defendants that their acts, as complained of, constitute a public nuisance, and cannot be abated by this action through a private person or corporation. The law upon this subject is clearly settled. When the nuisance is a public one, and applies alike to all the individual members of the public, only the public, through its proper agents, can maintain an action for its abatement. An individual may maintain the action when he suffers some special damage. The difficulty more often is to determine when the damage suffered by the individual is special, and such as is not shared in common by all the individuals of the community. In this case, complainant has alleged a special damage in the detention of a certain lot of logs. This was a special damage suffered in this particular instance, in which other members of the community did not share. It is true others would have suffered in the same way, perhaps to a different degree, had they attempted to run logs down the river; but, if what others might suffer under the same circumstances were made the rule, then in no case could it be said individuals ever suffer special damages from a public nuisance. In the *Whedding Bridge Case*, *supra*, it was held that the bridge was a public nuisance, and that the state, as an individual, for the protection of its individual interests, and not as a state for the protection of the community, could maintain the action to abate it. There are many cases, and some quite similar to the case at bar, in which an individual has been allowed to bring his action to abate a public nuisance because of some special damage he suffered. I think the facts in this case bring it within that rule.

Whether the Spokane river is either a navigable stream, or such as the law denominates a "public highway," is a controlling factor in this cause. It is unnecessary to discuss the old English rule and definition of a navigable stream. However applicable it may have been to their physical condition, it never has been to ours, nor have we adopted it as law. Most sections of our timbered country are traversed by streams of such size that they may be utilized for the economical and convenient transportation of the timber products. In fact, without them, in a mountainous, undeveloped country, the timber would be practically unavailable and useless. From the earliest settlement of the country, all the streams, where convenient, have been thus used. It is safe to assert that generally, throughout the United States, all streams of sufficient size to be used for trade in the transportation of merchandise or products of any kind are public highways, and free to the equal use of all, and the title of riparian owners to the bed of the stream is subject to such public use. That the stream is not meandered by the government survey is immaterial, for the purchase of its bed does not include its waters or their control.

It is urged that because defendant Post has so long resided upon and improved the stream in question, and now owns the land upon both banks, including the intervening islands, he now has the right to use and control it, practically, as he will, including a right to place such obstructions in the current for his own purposes as will deprive others of any use thereof as a public highway. While great consideration is due the adventurous and enterprising pioneer, such a claim as this should not be conceded to any. The adoption of such a principle would enslave any country to the iron rule of its few discoverers.

The defendants assert that the complainant, a large milling company, is by this action inequitably asking the destruction of their property and business. But grant the defendants what they claim, and the public generally, desiring to use the river, would be subject to their exactions. Every man floating timber down this stream would sell to them at such prices as they might arbitrarily fix, or pay them tribute for the right to pass on to other markets. If such were the law the courts would, with lagging step, so enforce it, but the contrary is too well established to now leave a court in doubt of its way. In so far as the facts are developed, they indicate that Spokane river is of sufficient size and of such a channel as to be held a public highway. If this indication is confirmed by a full production of the facts, its waters must so far flow unfettered that they may be utilized by the public for transportation purposes. I do not, however, imagine this will result in any great damage to any of defendants' works, and at most only to some inconvenience. The weir spoken of, probably, need not be disturbed, but by a change or proper construction of the boom the desired end can be reached. The motion for temporary injunction is refused, the demurrer is sustained, and complainant is permitted to amend its bill, and costs against complainant are allowed.

v.50F.no.5—28

## THE NETHER HOLME.

HINE *et al.* v. PERKINS *et al.*

(District Court, S. D. New York. April 26, 1892.)

**1. DEMURRAGE—CHARTER—BERTH—WHEN TO BE PROVIDED—ABSENCE OF STIPULATION.**

In the absence of any charter stipulation as to the time within which a berth shall be provided for a ship after arrival, it must be provided within a reasonable time, or within such time as usage provides, which time, by the ordinary usage of the port of New York, is 24 hours after notice of arrival.

**2. SAME—CHARTER—STIPULATIONS—DISCHARGE—"AS FAST AS SHIP CAN DELIVER"—DUTY OF CHARTERER—FOUR HATCHES.**

Where the charter of a vessel having four hatches provides that the ship shall discharge "as fast as she can deliver," the charter saying nothing about the number of hatches to be used, and the wharves at which four hatches can be simultaneously worked in the port being the exception, and being no evidence that vessels of such size are accustomed to discharge from all four hatches at once, the charterer is not bound to provide a berth where all four can be used at once, but fulfills his duty by sending the ship to such a reasonably fit berth as is customary for her size and class, and by seeing to it, at such berth, that there are no hindrances on the dock, so that the vessel may discharge as fast as she can deliver, with the usual appliances therefor.

**SAME—NONATTENDANCE OF CUSTOMHOUSE INSPECTOR.**

After a ship is berthed, and permit to discharge obtained, the charterer is liable for delay caused by the nonattendance of a customhouse inspector.

In Admiralty. Libel for demurrage.

*Convers & Kirkin*, for libelants.

*G. K. Souther*, for respondents.

Brown, District Judge. The charter of the *Nether Holme* provided that she "should discharge at one safe berth in New York harbor, as ordered by charterers; any subsequent removal to be at charterers' expense." Another stipulation was that she should "be discharged as fast as she can deliver in ordinary working hours."

The latter stipulation relates to the *rate* of discharge after she commences; it has nothing to do with the *time* within which a berth should be provided after arrival. In the absence of any charter stipulation on that point, or as to when the laydays begin, the berth must be provided within a reasonable time, or such time as usage prescribes. By the ordinary usage of this port, 24 hours after notice of arrival is allowed for procuring a berth. Within the usual time a berth at Eighteenth street, to which the vessel was directed, was ready for her; but through the vessel's faulty conduct in coming prior to the time notified and then going away at once, instead of lying alongside and waiting a few hours, as she might have done, for the time appointed, she did not get into her berth until the evening of the 11th; and the discharge was begun on the following day. It being high water from 8 to 9 o'clock A. M., she could have taken her berth as well at half past 10 or 11 A. M. on the 11th, as at 6 P. M. No demurrage, or towage, is, therefore, allowed for the 11th.



Cunningham, the stevedore, was employed by the ship's agents. He testifies explicitly that he never worked more than two gangs, nor from more than two hatches. The ship was, therefore, not prepared at that dock, to deliver from more than two hatches. The provision of the charter that the consignees should take as "fast as the ship can deliver," did not bind them to take more than the ship was prepared to deliver, under such arrangements with the ship's stevedore for discharging as the ship herself had made; since the ship was bound to put the cargo over the ship's side. The respondents are answerable, however, for the half day's delay through the nonattendance of the customhouse officer during the forenoon of the 12th, after the ship had obtained a permit. *Carsanego v. Wheeler*, 16 Fed. Rep. 248. The master says that was the stevedore's fault, which would be the ship's fault. But I find that he is mistaken on that point. Through the incumbrance on the dock I find, also, that during the remaining half day of the 12th the consignees were not prepared to receive above half what the ship was prepared to deliver through the two hatches and by the two gangs of stevedores that she had provided. The libelants are, therefore, entitled to count three quarters of a day's delay for December 12th, at Eighteenth street.

The respondents are also chargeable for one half of December 13th at Forty-Second street, which was lost through delay in furnishing the transfer permit. The 14th was Sunday. The 17th was unfit to work through the rain. The ship finished discharging on Saturday the 20th at 1:30 P. M. The testimony shows that there was no hindrance or lack of diligence in the discharge at Forty-Second street after it was begun, from such hatches as were in fact used, namely, two hatches, prior to the 17th, and three hatches afterwards; and no complaint was made on that score. At this season "ordinary working hours" closed at sunset.

The libelants contend, however, that the stipulation of the charter that the ship should discharge "as fast as she can deliver in ordinary working hours," imposed on the consignee the obligation to receive from all four hatches at once; and to send the ship, moreover, to a berth where all four hatches should be worked at once. This construction, I think, is more rigid than the ship is entitled to. The charter is in one of the ship's own forms. It bears the stamp of her own agents. She is not entitled to read into it, therefore, by construction, more than its language imports. The charter says nothing about the number of hatches that are to be used, nor the kind of berth to which the charterer is to assign the ship. The wharves at which four hatches can be worked at once are the exception and not the rule. There is no evidence of any usage to discharge any vessels from all her hatches at once. The evidence, so far as it shows anything on the subject, and from the libelants' own witnesses, is that only two hatches were customarily used at once, though this related probably to smaller vessels. Reported cases show that this stipulation in charters has been in use for at least 20 years. *Dahl v. Nelson*, 6 App. Cas. 38, 42. In no case does it appear that such a construction of this clause has ever been given to it. In the recent case of *The Glenfinlas*, 42 Fed. Rep. 232, affirmed 1 U. S. App.

22, 48 Fed. Rep. 758, where the charter contained a similar provision, the ship was held entitled to discharge from two hatches, because the proofs showed that it was customary for vessels of her size, having four hatches, to discharge from at least two of them at once. It was also held in that case that under such a stipulation, the custom applicable to small vessels was not applicable to a much larger one; and that she was entitled to a berth reasonably adapted to her size, and to discharge from as many hatches as was customary with other vessels of her size and class, if procurable. Such, I have no doubt, is the reasonable construction of this clause, and what was intended by these parties. Had it been designed that she would be sent to a berth where four hatches should be used at once, and that all four must be used simultaneously, it should and would have been so stated in the charter, as was done in the case of *Grant v. Coverdale*, 9 App. Cas. 471. I think it certain that no shipping men reading this charter, would understand from it any such agreement or obligation.

Aside from the language of the charter, there is no evidence to show that vessels of this size or class are accustomed to discharge from four hatches at once. The libelants on this subject gave but a single word of testimony, to the effect that a wharf might have been procured where four hatches could be used. Where such a wharf was to be found was not stated, nor whether it was in the part of the port where the consignee under the discretion given him had a right to direct the ship for the economical transaction of his business. The evidence is insufficient, therefore, to show any breach or neglect of duty by the consignee in the selection of the wharf. The object of the charter in giving such a discretion to the consignee is that the cargo may be received at such place as may comport with necessary economy in the receipt, sale, or disposal of such cargoes. It is sufficient if the charterer sends the ship to a reasonably fit berth, considering her size and class, such as the wharf at Forty-Second street was. And the intention of the clause in question is, in my judgment, fully met, if at such a berth the charterer sees that there are no hindrances upon the dock in the receipt and carrying away of the cargo, so that the vessel may discharge as fast as she can deliver with the usual appliances therefor.

If the respondents are held chargeable with the duty of discharging at three hatches, from the fact that upon the ship's demand for more rapid discharge they rigged up means for discharging from an additional hatch on the afternoon of the 16th, still I find that upon computation the consignees did not occupy, on the whole, a longer time than a discharge from three hatches all the time would allow them. The charterers were not required to unload at night, but only "in ordinary working hours." But the charter provided that the vessel should "work at night when required by charterers, any extra expense thereby incurred to be paid by charterers." After the third hatch was prepared the respondents worked the ship for three nights, which presumably equals a saving of three days' time. Charging against the respondents the loss of three fourths of a day on the 12th, one half a day on the 13th, and the

loss of one day more for the use of only two hatches, instead of three, from the 13th up to the afternoon of the 16th, there would be but 2½ days lost time chargeable against them, which is less than the amount saved by night work. As there is no proof that the ship was not allowed to discharge as fast as she could from the hatches used, the charterers did not exceed, therefore, the time at their disposal under the charter.

The extra expense caused by working the ship at night amounted to \$139.70. Such extra expense, by the terms of the charter, was to be charged to the charterer. The latter, however, contends that it was chargeable to him only in case night work was "required by him;" and that such night work was not done upon the requirement of the charterer, but because the ship demanded it, and was assented to on condition that the ship should pay the extra expense. Language to that effect appears in a letter of the respondents in answer to the ship's claim for a quicker discharge, and in reply thereto. The discharge at night, however, was as much for the benefit of the charterer as for the ship. In the demurrage account the charterers are given the benefit of the night work, which has saved them about \$434, which they would otherwise have been liable to pay the ship for demurrage. This night work was "required" by them in order to avoid the amount of demurrage. Under such circumstances it is the plain intent of the charter that the charterer should pay the extra expense of night work. It is like a substituted expense. *Wheelwright v. Walsh*, 44 Fed. Rep. 880. The libelants are, therefore, entitled to a decree for that amount, together with one towage to Eighteenth street, and one to Forty-Second street, amounting to \$35; in all \$174.70, with interest. The libelants not being successful on the principal item of the claim, namely, \$1,358, for demurrage, no costs are allowed.

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### THE PILOT.

#### UNITED STATES v. THE STEAM TUG PILOT.

(*Circuit Court of Appeals, Ninth Circuit. April 19, 1892.*)

#### FOREIGN WATERS—TOWAGE BY FOREIGN TUGBOATS.

The treaty between the United States and Great Britain of June 15, 1846, fixes the boundary between the two countries in the straits of San Juan de Fuca by a line following the middle of the strait, but also secures to each nation a right of free navigation over all the waters of the strait. *Held*, that all the waters north of the boundary line are "foreign waters," within the meaning of Rev. St. § 4370, which exempts from the penalty therein imposed against foreign tugboats towing vessels of the United States, cases where the towing is, in whole or in part, within or upon foreign waters. 48 Fed. Rep. 819, reversed.

(*Syllabus by the Court.*)

Appeal from the District Court of the United States for the District of Washington, Northern Division.

Libel by the United States against the British tug Pilot for violation of section 4370, Rev. St. Decree for libelant for \$643 and costs. 48 Fed. Rep. 319. The owner appeals. Reversed.

*Burke, Shepard & Woods, (Thos. R. Shepard, of counsel,) for appellant.*  
*P. H. Winston, for appellee.*

Before GILBERT, Circuit Judge, and DEADY and HAWLEY, District Judges.

GILBERT, Circuit Judge. On the 2d day of May, 1891, the British tug Pilot spoke the American bark Valley Forge in the straits of San Juan de Fuca at a point about ten miles from the entrance of the straits, and three miles off Port Vancouver, in the province of British Columbia. The bark was an enrolled vessel, engaged in coastwise trade, and was proceeding on her voyage from San Francisco to Port Angeles. A contract was made between the captains of the two vessels, by which it was agreed that the tug should tow the bark to Port Angeles, where the bark would exchange her certificate of enrollment for a register to entitle her to clear for a foreign port, and then should tow her to Departure bay, a British port, thence back, through the straits, to the sea. After picking up the bark, the tug towed her along the Vancouver shore, a distance of 38 or 40 miles, and thence across the straits to Port Angeles. The greater part of the towing was upon waters north of the middle line of the channel which separates the state of Washington from Vancouver's island. The bark lay at Port Angeles until the 6th day of May, when the tug was libeled by the United States for violation of section 4370 of the Revised Statutes. That section contains the act of July 18, 1866, entitled "An act to prevent smuggling and for other purposes," and the amendment to the same by the act of February 25, 1867. It reads as follows:

"Sec. 4370. All steam tugboats not of the United States, found employed in towing documented vessels of the United States plying from one port or place in the same to another, shall be liable to a penalty of fifty cents per ton on the measurement of every such vessel so towed by them, respectively, which sum may be recovered by way of libel or suit. This section shall not apply to any case where the towing, in whole or in part, is within or upon foreign waters."

The question is presented whether the waters of the straits of San Juan de Fuca, lying north of the dividing line between the United States and British Columbia, are "foreign waters," within the meaning of the statute. By the treaty between the United States and Great Britain of June 15, 1846, the boundary line between the possessions of the two nations is made to run through the middle of the straits. By the same treaty, however, it is stipulated that the entire straits shall be open and free to both countries for the purposes of navigation, so that the vessels of each may sail anywhere upon either side of the line; and under this provision it is contended that the waters north of the line cannot be considered foreign waters, but that all the waters of the straits are common to both nations. We do not so construe the effect of the treaty. Notwithstanding the license of free navigation over the whole of the straits, which is

reserved to each of the contracting parties, a definite line of division is adopted, which determines the limit of jurisdiction of each nation. All waters north of the line are British waters, subject to the control and dominion of Great Britain. All waters south of the line are American waters, and are under the jurisdiction of the United States. The privilege of free navigation exercised by each nation of the waters of the other is in the nature of an easement, which in no way affects the question of the jurisdiction. The decree of the district court which is appealed from is itself a declaration of the doctrine of the exclusive jurisdiction of each nation over its own half of the waters of the straits; otherwise it is not perceived that a British tug could, for an act committed upon the American side of the line, be made subject to a penalty imposed by the laws of the United States. The word "foreign" means belonging to another nation or country; belonging to or subject to another jurisdiction. The waters of the straits north of the boundary line belong to and are subject to the jurisdiction of Great Britain, and hence are foreign waters. The United States, although having a right of free navigation, has no jurisdiction over them, except so far as regards its own citizens. The case of *The Apollon*, 9 Wheat. 362, is relied upon by the appellee as supporting the doctrine that no part of the waters of the straits can be considered foreign to either British or American vessels. The question which arose in that case was whether a French vessel, which had entered and anchored in the St. Mary's river, and then proceeded out to sea and to a Spanish port, had entered American waters, so as to be required to make entry at the customhouse of that district, under section 29 of the collections act of 1799. The St. Mary's river being the boundary between the United States and the Spanish possessions, upon the general principles of the law of nations its waters were common to both nations for the purposes of navigation. The court, without deciding whether any of the waters of the river were American waters, held that the true exposition of the twenty-ninth section was that it meant to compel an entry at the customhouse of all vessels coming into our waters, being bound to our ports, and that the *Appollon* had not entered American waters, within the meaning of that statute. It is proper to note that the evident object of the amendment contained in section 4370 of the statute is in harmony with the construction which we have adopted. The law, as originally enacted, did not embody the exception in regard to towage, in whole or in part, upon foreign waters. Upon the petition of "owners of tugs and vessels on the lakes and rivers of the northern frontier," the amendment of February 25, 1867, was made. Its purpose was to avoid the difficulty and inconvenience which attended the application of the statute upon the lakes of the northern frontier, where, as in the straits of San Juan de Fuca, the boundary line is a fixed line, but in practical navigation its position upon the waters would always be difficult to locate with certainty. The decree is reversed, and the case is remanded, with instructions to dismiss the libel, and to enter a decree for claimant.

**DUNSMUIR v. BRADSHAW, Collector of Customs.***(Circuit Court of Appeals, Ninth Circuit. April 19, 1892.)***SHIPPING—PUBLIC REGULATIONS—TOWAGE BY FOREIGN TUGS.**

Under Rev. St. U. S. § 4370, imposing a penalty against foreign tugs towing American vessels from one American port to another, except where the towing is partly in foreign waters, a British tug is not liable where the towing is done partly on the British side of the straits of San Juan de Fuca, even though it might have been done entirely on the American side, in the absence of any allegation that the British waters were entered collusively or for the purpose of evading the statute.

Appeal from the District Court of the United States for the District of Washington, Northern Division.

The Lorne, a British tug, was seized by the collector of the district of Puget sound, under the provisions of section 4370, Rev. St. U. S., for an alleged illegal towing of the ship *Oriental*, a documented vessel of the United States, from the high seas through the straits of San Juan de Fuca and the waters of Puget sound to Tacoma, in the state of Washington. The owner of the tug paid under protest a fine of \$884, and brought this libel to recover the same as having been illegally exacted. The respondent answered, alleging that, although a portion of the towing was upon the British side of the boundary line between the United States and the British possessions, it was not necessarily so, and that it might all have been done upon the American waters. A demurrer to this defense was overruled, and a decree entered dismissing the libel, upon the ground that none of the waters are "foreign waters," within the meaning of the statute.

*Burke, Shepard & Woods*, (*Thomas R. Shepard*, of counsel,) for appellant.

*Patrick H. Winston*, U. S. Dist. Atty., for appellee.

Before GILBERT, Circuit Judge, and DEADY and HAWLEY, District Judges.

GILBERT, Circuit Judge. The principles decided by this court in the case of *The Pilot*, 50 Fed. Rep. 437, govern the decision of this case. The additional defense that the towing might all have been done upon the American side of the boundary line, and without entering foreign waters, can make no difference with the result. It is not alleged that the foreign waters were entered collusively, or for the purpose, on the part of the tug, of evading the statute. The decree is reversed, with instructions to sustain the demurrer to the answer and for further proceedings.

## THE COLUMBIA.

## UNITED STATES v. THE COLUMBIA.

(Circuit Court of Appeals, Second Circuit. February 16, 1892.)

**PENALTIES—FORFEITURES—PASSENGER ACT—OVERLOADING—SECTION 4465, REV. ST.**

On the evidence the court found that the steamboat Columbia, libeled by the government for carrying passengers in excess of the number stated in her certificate of inspection, and held in fault by the district court, did not, on the trip in question, carry more passengers than her certificate allowed, and that the decree of the district court should therefore be reversed, and the libel dismissed. 39 Fed. Rep. 617, reversed.

In Admiralty. Libel by the United States against the steamboat Columbia for violation of section 4465, Rev. St. The Columbia was allowed to carry 3,000 passengers, and no more. The libel alleged that on one trip she had carried 677 in excess of the number stated in her certificate of inspection. The district court decreed for the libellant, (39 Fed. Rep. 617;) and the claimant appealed to the circuit court for the eastern district of New York, which affirmed *pro forma* the decree of the district court, and claimant appealed to this court. Reversed.

*Blair & Rudd*, (Benjamin F. Blair, of counsel,) for appellant.

*Jesse Johnson*, U. S. Dist. Atty.

Before WALLACE and LACOMBE, Circuit Judges.

LACOMBE, Circuit Judge. The circumstances under which the count was made by the two passengers at Far Rockaway were such as to make absolute accuracy impossible. It did not need the testimony of the government inspectors, whom the claimant called as experts, to show that a count of a crowd moving rapidly in a mass over a wide gang plank, and moving away from the observer, could be but an approximation only. Besides errors likely to result from displacement of positions as some one turns back to return, there is the highly probable error that some will pass whom the observer does not count, and the error resulting from a consciousness of that fact on the part of the observer, and his effort, perhaps unconsciously, to correct it. Manifestly, it cannot be as accurate as a count of articles that can be handled and sorted, when that count is conducted under circumstances which admit of its being done deliberately. It appears from the evidence that the company running the Columbia had issued complimentary season tickets to the number of nearly 300. Holders of such might have been on the Columbia that day, and left no tangible evidence of their presence. But such tickets were issued almost entirely to persons in a similar line of business,—railroad men and others more or less closely affiliated in business with the company. Very few of such tickets would be shown on any one trip. It also appeared that the president or general agent of the company, the master, or purser might pass a friend on board without a ticket, and sometimes did so; but there would be very few such instan-

ces on any one trip, and the evidence does not show that there were more than four on this particular trip. It must be presumed that the passengers who presented money instead of tickets when they came aboard would subsequently get their tickets from the purser, as he testifies they did; for otherwise they would be without the coupons entitling them to a return trip. Except, then, for the very few who held season tickets or were passed as personal friends of the four officers above named, every passenger the Columbia carried that day left aboard her a tangible evidence of his presence. A count of these tickets, if deliberately and honestly made, would be plainly entitled to greater credit than the tally made by the two passengers at Far Rockaway. The count of tickets before Jewell's wharf was reached was evidently made in haste, so that the number on board might be known before the boat made her landing. Three men—the purser, assistant purser, and superintendent—bunched the tickets; and they each testify that they put 100 in each bunch, (save one, containing 14.) The superintendent and others counted the bunches, and, assuming each to contain 100, made out the number of tickets to be 2,214. Of course, this did not account for such passengers as had paid cash, but had not yet obtained their tickets from the purser. The counters at Jewell's wharf, whose enumeration was made under more favorable circumstances than the one at Far Rockaway, and which seems to have commended itself to the district judge, showed 650 to 680. This would make the total number 2,864 to 2,894. There was, however, another count made of the tickets. The purser is required to make a return to the company of each round trip, showing, not only how many passengers were carried, but what they paid and where they came from. This is not begun till after the boat has made her last landing, and all passengers are aboard. To do it the tickets must be all sorted, and counted separately, under their separate classes. The return of this round trip is in evidence, and testified to by the purser and assistant purser, who made it up. The district judge discredited this return because he found it "impossible to conclude from the purser's testimony that there is any certainty that the tickets counted by him when making his return were all the tickets that had been taken in on that day." We think he must have overlooked the evidence given by the assistant purser. It abundantly appears from the testimony that only the purser and the assistant purser took tickets from incoming passengers, and both testify positively that they turned in all the tickets they took, which were first deposited in a heap on the desk in the purser's office, and subsequently bunched. It is no doubt true, as the district judge suggests, that the officers of the boat were biased in favor of the boat, just as the complaining witnesses were biased against it by reason of the discomfort which induced their counting, and the knowledge they had when they made their complaint that they would be entitled to share in any recovery. But where the testimony of witnesses is reasonable in itself, and is given without any indication of untruthfulness, mere bias does not seem to us sufficient for concluding, as the district attorney suggests in his brief, that they deliberately retained 600 tickets,



or abstracted them from the purser's room, and then perjured themselves to hide their fraud. It is a suggestive fact that these witnesses were not cross-examined on this point. Apparently, there was nothing in the manner in which they gave their evidence to excite suspicion. A trial judge has the opportunity, which an appellate court has not, of hearing and seeing the witnesses; but in this case, for all that appears, the purser's return was discredited by the district judge because the purser's testimony, standing by itself, did not establish the fact that such return included all the tickets. As he does not refer to the very positive testimony of the assistant purser, which, when taken in connection with the purser's, does establish that fact, we must conclude that he overlooked it.

It being established that the purser and assistant had before them tickets representing all passengers on board, except the very few holding season tickets or "passed" as friends of the officers, it is only necessary to see what they did with them. The bunched tickets taken in at the different landings were kept in different places on the purser's desk. They were first counted to determine how many were taken aboard at each landing, and the result minuted on the back of the return, which is the usual custom. It was conceded on the trial that by an error 92 elevated railroad tickets were put under the heading of Jewell's wharf, instead of pier 6. Correcting this error, the back of that paper shows the number of passengers as follows:

Taken at West Twenty-Second street	-	-	-	-	-	-	834
Taken at West Tenth street	-	-	-	-	-	-	559
Taken at pier 6	-	-	-	-	-	-	791
Taken at Jewell's wharf	-	-	-	-	-	-	671
							<hr/>
							2,855

All the tickets were also assorted and recounted under different classes, viz., those sold by the boat, the various connecting railroads, etc., with this result:

Passengers paying cash	-	-	-	-	-	-	93
Passengers having ordinary round-trip tickets	-	-	-	-	-	-	2,529
Passengers having single tickets up	-	-	-	-	-	-	50
Passengers having tickets from railroads	-	-	-	-	-	-	826
							<hr/>
							2,998

This corresponds exactly with the figures on the back of the return made before the reassortment, because the back does not contain 50 "single up" tickets which were sold by the agent at Rockaway for the return trip, nor 93 purser's tickets, representing cash. Adding these items (143) to the aggregate by landings, the result is 2,998. The evidence indicates that the passengers down, who did not return by boat, were more in number than those who boarded her at Far Rockaway for the first time to make the up trip only; and as we see no reason to assume that those who held season tickets or came aboard on "pass" exceeded 50 (the return shows there were 4 only) the return indicates that

she did not carry in excess of 3,000 passengers on the day in question. Of the two enumerations, presented respectively by the libellant and the steamboat, we are of opinion that the clear preponderance of proof is in favor of the latter. The decree is reversed, and case remanded to the circuit court with instructions to dismiss the libel.

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THE WILLIAM CRANE.

MERRYMAN *et al.* v. THE WILLIAM CRANE.

(District Court, D. Maryland. November 13, 1899.)

SHIPPING—DAMAGE TO FREIGHT—STOWAGE OF CARGO.

Cotton stowed on the main deck of a large coasting steamship for a voyage from Savannah to Baltimore, under the upper deck, in a space between the main deck and the upper deck, inclosed by the iron bulwarks and by strong shutters and bulkheads, *held* to be properly stowed, although not under the hatches of the main deck. *Held* that, the stowage being in a protected place, and customary and proper, the cotton could not be said to be carried "on deck," and the steamship was not liable for damages from sea water, caused by an unusual storm, which flooded the decks, and broke down the bulkhead, and tore away the protections.

(Syllabus by the Court.)

In Admiralty. Libel by Merryman & Co. against the steamer William Crane for damage to cargo.

*Fisher, Bruce & Fisher*, for libellants.

*Wm. P. Whyte*, for respondent.

MORRIS, District Judge. This is a libel to recover for damage by sea water to 80 bales of cotton shipped on the steamer William Crane, to be carried from Savannah to Baltimore. The decision of this case depends upon whether the cotton was stowed in a place on the steamer where, under the bill of lading, it might rightly be placed. The William Crane is a large, iron steam propeller, intended for the coastwise trade, and above her main deck has an upper deck, on the top of which are structures containing pilot house, officers' quarters, and staterooms for passengers. Along the sides of the ship this upper deck is not altogether permanently inclosed, but may be inclosed when required for carrying cargo. The space between the main and upper decks is seven feet in height. Four feet of this height is permanently defended by the iron bulwarks and rail of the ship, and the remaining three feet between the rail and the upper deck has wooden shutters, which can be tightly fitted in, and made fast between the permanent uprights which support the upper deck, thus inclosing the entire space. The middle of the ship between the main and the upper deck is occupied by permanent structures containing the engine room and quarters for the engineers and others, leaving an alleyway on each side. The forward end of each alleyway is closed by a heavy bulkhead with doors. It was in these alleyways that the cotton involved

in this controversy was stowed. It was raised somewhat from the deck by dunnage, and was kept in place by uprights, which left a narrow gangway alongside the engine room house. On the voyage from Savannah to Baltimore the steamer encountered a severe storm, and shipped a heavy sea on the starboard side near the bow, and just forward of the bulkhead inclosing the starboard alleyway. The wave boarded the vessel with such force that it flooded the forward main deck, broke down the bulkhead on the starboard side, wrenched off seven feet of the wooden shutter next to it, and, crossing the ship, burst open the iron cargo ports in the bulwarks on the port side, and carried away a portion of the port rail. The water flooded the starboard alleyway, and saturated the cotton so that it suffered damage to the extent of \$10 a bale. There was also a portion of the same shipment, containing 13 bales, which was placed upon the open deck, forward of the bulkheads, in the space between them and the forecastle, which were damaged by the same sea. As to these 13 bales the owners of the steamship admit her liability, and have tendered payment of the damage. The owners of the steamship deny their liability for the damage to the 80 bales of cotton stowed between the upper and main decks, contending that it was properly stowed, and that the damage was caused by a peril of the sea, within the exception in the bill of lading.

The libelants rely upon the established rule that a clean bill of lading such as was given upon the shipment of this cotton imports that the goods are to be carried under deck, and not on deck. *The Delaware*, 14 Wall. 579. They contend that, as the cotton was not under hatches below the main deck, its stowage does not gratify the contract. Unquestionably, on sailing vessels, "under deck" is held to mean beneath the hatches, in the place devoted to the under-deck cargo. On a sailing vessel no other place is protected from the spray and water, and in no other place can cargo be placed so as to leave the decks free and unobstructed for the handling of the sails and the navigation of the ship. But on steamers navigating our inland and coastwise waters on short voyages this is not the rule, because the reason for it ceases. The size and stability of such steamers enables them to carry extensive upper works, built high above the main deck, and they have no need to keep the main deck clear for handling sails, or for any of the requirements of navigation. Goods placed upon the main deck in such steamers are as safe as those placed below, if the space thus used is sufficiently protected, and provided the goods are not of such weight as to disturb the proper trim of the ship. This has frequently been declared to be the rule. It was so held in *The Neptune*, 6 Blatchf. 194; *Harris v. Moody*, 30 N. Y. 266; *Gillett v. Ellis*, 11 Ill. 579. It is matter of common observation that cargo is constantly so carried on such steamers.

The question in this case, to my mind, is therefore not whether the cotton was carried under the hatches of the main deck, but whether it was carried in a protected place, under cover, and where experience had demonstrated it would be safe. The alleyways under the upper deck, inclosed with the wooden shutters already described, were designed in

the planning of the ship as a place for carrying cargo. The cubical contents of these spaces was included in ascertaining the tonnage of the vessel by the custom-house authorities. It is not suggested that carrying cargo there, if it be of the proper weight, in any manner makes the ship less seaworthy. Cotton in bales is not damaged by a slight wetting, and its light weight in proportion to its bulk makes it proper to be carried on the upper part of a vessel. It seems to me, then, that the only question is whether or not the construction of the shutters on the sides and the bulkheads in front of these alleyways was such as to be reasonably safe as a protection from the waves which the ship might be expected to encounter. Considering the location was in the midship section of a large steamer, and considering the elevation above the surface of the sea, I am of opinion that the shutters and bulkheads were sufficient in strength for the purpose for which the builders of the steamer designed them. It is objected that the space was not sufficiently inclosed because the after ends of the alleyways were not protected by bulkheads, and that a sea coming aboard from astern would reach the cotton, but the fact is that nearly the whole width of the stern was filled up by the passenger saloon, which nearly closed the after ends of the alleyways, and it could hardly be that any but a small amount of spray could reach the cotton from that direction. In this case the proof shows that the water which caused the damage came with great violence from near the starboard bow, and not from the stern. It is true that on this voyage the bulkhead was bursted in, and a portion of one shutter torn away, but the violence of the wave must have been extraordinary, and the occurrence an exceptional one, such as will occasionally do great damage to the strongest vessel. The testimony of the master, who has been navigating this steamer for four years, carrying cotton in the same manner, is that he never had such cotton damaged, either before or since this voyage, and the testimony of a number of other witnesses who are familiar with the business of similar steamers carrying cotton from Savannah to northern ports is that their experience justifies them in considering such a location on the vessel as safe for cotton as below the hatches of the main deck. I do not think the libelants are entitled to recover for the damage to the 80 bales sued for in their libel.

## THE JOHN SWAN.

MURRAY *et al.* v. THE JOHN SWAN.SCHUYLER *et al.* v. SAME.

(District Court, S. D. New York. April 26, 1892.)

## SALVAGE—FIRE ON BULKHEAD—APPREHENSION OF DANGER—EXCESSIVE SECURITY—COSTS.

Fire broke out in a building near a bulkhead, within 40 or 50 feet of which lay the barkentine John Swan. Two tugs, coming up, were requested by the only person on the ship to tow her into the stream, which was done; one of the tugs remaining by her, as her anchor dragged somewhat. Before the tugs had hauled the vessel out, the city fire boat arrived. Events proved that the fire traveled away from the ship, and that there was no absolute necessity for hauling her into the stream. *Held*, that at the time the service was begun there was such reasonable apprehension of danger as made it proper to remove the ship; that the service, therefore, was a salvage service, though of small merit; and \$125 was awarded to one tug, and \$75 to the other, costs being refused to one tug because she had exacted security in the sum of \$5,000.

In Admiralty. Libel for salvage.

*Goodrich, Deady & Goodrich*, for the Henry A. Peck.

*Owen, Gray & Sturges*, for the Quaker City.

*Wing, Shoudy & Putnam*, for the John Swan.

BROWN, District Judge. On June 1, 1891, the barkentine John Swan, loaded and ready for sea, lay on the north side of the wharf at the foot of North Sixth street, Williamsburgh. Between 11 and 12 p. m. a fire broke out in the street and in a building stretching across from North Sixth to North Seventh streets a short distance from the bulkhead at the head of the slip. The stern of the ship was some 40 or 50 feet distant from this bulkhead. The tugs Henry A. Peck and the Quaker City in the East river, observing the fire, made their way thither. The Peck arrived first. One of her hands was sent to the Swan to ascertain if help was desired. No one was on board of her except a watchman, who was asleep; being roused, he asked that the ship be towed out. The Quaker City had by that time arrived; both tugs got out hawsers to the ship and towed her out in the stream, where she was anchored. The Peck, finding that the anchor dragged some, remained by her; the Quaker City left for other employment.

The claimants contend that the vessel was in no danger, and that the service was of no value. The witnesses for the Peck affirm that smoke and sparks were flying about the vessel. The claimants contend that this is a gross misrepresentation; their testimony is, that at least from half an hour after the tugs arrived, when their witnesses were on the scene, the wind was setting up river and on shore, so as to carry any fire sparks away from the ship. The fire extended two blocks to the northward; and not at all to the southward; it was hotter and fiercer at North Seventh street than at North Sixth. Some bagging and bar-

rels on the bulkhead between caught fire, and were more or less consumed. A line of loaded cars, which was on the North Sixth street wharf running parallel with the ship at a distance of about 35 feet from her, was not removed during the fire, and the cars were not damaged. About the time the tugs were hauling the ship out of her berth, the city fire boat Seth Low came up river, and waiting below until the ship was hauled out, then went into the slip alongside the North Sixth street pier as far up as the bulkhead, remained there several hours, and played upon the fire until it was subdued, her stern occupying a part of the berth in which the ship had been before.

Whether a service is a salvage one or not, is not to be determined by what is ascertained or judged after the event. It is enough that at the time the service is rendered, the vessel is in a "situation of actual apprehension though not of actual danger." *The Raikes*, 1 Hagg. Adm. 246. See *The Alaska*, 23 Fed. Rep. 597, 607, 608, and cases there cited. At the time this service was begun, I have no doubt that the removal of this ship was a proper and necessary act; not in the sense that there was a certainty of danger or loss, but such a reasonable apprehension of danger as made it prudent to remove her. That was requested by the watchman, the only person in charge. It could not then be known how fiercely the fire might rage, or how much it might spread along the bulkhead or the wharf. The fire boat, it is true, appeared on the spot before the ship got out into the stream; and it is now seen that it would have been quite sufficient had the ship been merely hauled out to the end of the wharf and made fast there. The presence of the fire boat inside of the slip, and between the bulkhead and the ship, would have been a complete protection from danger, as the captain of the Quaker City stated. While these circumstances do not deprive the service of a salvage character, they make it one of small merit. It involved no difficulty or danger to the tugs; the service was short, except that the Peck lay by, as was proper, when the anchor was dragging. The damage to the Swan and the loss of ropes and some other articles in the course of the service, as testified to, amount to \$84. Taking all these circumstances into account, I think \$125 to the Peck, and \$75 to the Quaker City, will be a sufficient award for the services rendered. But as the claimants were required by the Peck to give security in the grossly excessive amount of \$5,000, I do not award her costs.

## LOUISVILLE &amp; N. R. Co. v. MERCHANTS' COMPRESS &amp; STORAGE Co.

(Circuit Court, W. D. Tennessee. March 25, 1892.)

**COSTS—DOCKET FEE IN EQUITY—DISMISSAL AFTER REFUSAL OF PRELIMINARY INJUNCTION.**

If, after a decree refusing a preliminary injunction, the plaintiff dismiss the bill, the docket fee of \$20 upon final hearing is taxable for the solicitor of the prevailing party.

**In Equity.**

Statement by HAMMOND, District Judge:

The bill in this case, with some 20 exhibits thereto, was filed December 3, 1891. It was simply an injunction bill to enjoin the defendant company from violating the provisions of a certain contract claimed to exist between the parties for the compressing, storage, and insurance of cotton; the prayer of the bill being stated in various forms to meet the different stipulations of the contract. The usual process of subpoena was issued the same day, requiring the defendant to appear, etc., on the first Monday in January, 1892. On the day the bill was filed the plaintiff moved for a restraining order until motion for preliminary injunction could be heard, which was denied. It then moved for the preliminary injunction, and a decree was entered setting down the motion for hearing and argument on December 5, 1891, before the court, "when and where the defendant is required to be present, and show cause, if any it have or know, why such preliminary injunction should not be granted." Notice of this motion and decree was issued, which, with the subpoena to answer, was served on defendant the following day. The defendant entered its appearance by its solicitors on the day fixed, when the motion for a preliminary injunction was fully and elaborately argued by counsel here and from a distant city, and the matter taken under advisement for further consideration by the court. On December 11, 1891, the record shows that the parties again came before the court "by their respective solicitors, when the cause came on for determination upon a motion of complainant for a preliminary injunction heretofore made herein, and argued at a previous day of the term; and the said motion, upon full consideration, is by the court hereby overruled, and the preliminary injunction denied." Afterwards, on January 19, 1892, after the day for defendant to answer, complainant moved the court for leave to dismiss the cause, "which motion is, for satisfactory reasons to the court appearing, hereby granted, and this cause dismissed." Defendant did not demur to nor answer the bill, nor was a *pro confesso* entered at the January rule day. In taxing the costs against complainant the clerk has included an item of \$20 docket fee to defendant's solicitors, and plaintiff moves to retax by striking out this item. The other items of the taxation are conceded to be correct. Section 983 of the United States Revised Statutes prescribes what shall be deemed "costs" in the federal courts as between the parties to a suit. It is as follows:

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"The bill of fees of the clerk, marshal, and attorney, and the amount paid printers and witnesses, and lawful fees for exemplifications and copies of papers necessarily obtained for use on trials, in cases where by law costs are recoverable in favor of the prevailing party, shall be taxed by a judge or clerk of the court, and be included and form a portion of a judgment or decree against the losing party."

Sections 823-857, Id., prescribe the "fees" taxable in favor of attorneys, court officers, jurors, witnesses, printers, etc., how they may be taxed and recovered, by whom and how paid, and the various regulations pertaining to the same in suits in which the United States is a party. The portion of section 824, Id., prescribing the "fees of attorneys, solicitors, and proctors," under which the taxation was here made, is as follows:

"On a trial before a jury in civil or criminal causes, or before referees, or on a final hearing in equity or admiralty, a docket fee of twenty dollars. \* \* \* In cases at law, where judgment is rendered without a jury, ten dollars. In cases at law, where the cause is discontinued, five dollars."

*J. P. Houston*, for the motion.

*Metcalf & Walker*, opposed.

HAMMOND, District Judge, (*after stating the facts as above.*) The question involved in this motion was first considered by me in 1883, in *Goodyear v. Sawyer*, 17 Fed. Rep. 2, where in six causes in equity the solicitor's docket fee was objected to. Answers were filed in all the cases, and replications in two of them. In one only had there been a decree upon the merits, and an account ordered, but this cause was afterwards dismissed by the plaintiff. In another of the cases the dismissal by the plaintiff was "without prejudice;" in the third case the dismissal was by complainant at his costs, and in the other three cases there was no order or decree disposing of them, though plaintiff paid, or assumed to pay, the costs, and claimed that they had been dismissed in the clerk's office. Upon a full review of all the cases, and on examination of the law of costs in chancery suits in England, as well as in the federal courts of this country before the act of February 26, 1853, chapter 80, (10 St. at Large, pp. 161, 162,) from which the above-cited sections of the Revision were compiled, the taxation of the docket fees in all these cases was sustained, both upon principle and authority, although the reported decisions on the subject were found to be conflicting. Again, in 1886, the same question arose here in *Partee v. Thomas*, 27 Fed. Rep. 429, where, after the overruling of the defendants' demurrer to the bill, they answered, and before replication was filed the plaintiff died, and the cause was dismissed on motion of the defendants for want of revivor or of prosecution. As reported, the decision shows but a single cause, yet, as a matter of fact, there were eight similar cases brought at the same time by the same plaintiff against various defendants. Like demurrers were overruled in all of them, with leave to answer, etc., but no answer was filed in any of the other cases. The taxation of costs was the same in all, including the solicitor's \$20 docket fee, and a motion to retax was made in each case for the purpose of having the docket fee



stricken out. Upon full consideration again of this subject these motions were overruled, and the taxation of the docket fees sustained. In the opinion in that case I said:

"I have not the least doubt that congress meant to give, in every equity and admiralty case, a taxed fee of twenty dollars, whenever and however it was finally ended, (with the single exception specifically mentioned in the statute,) and that it did not intend to merely provide a fee for the ceremony of trying the case before the judge on its merits, leaving all other services unprovided for, and without any fee at all, and devolving upon the court in these cases to determine, on facts not in the record, whether or not they were so far tried on the merits as to be charged for in the bill of costs; and thus substituting those words 'tried on the merits' for 'final hearing,' as used in the statute."

Since this decision there have been but three cases reported upon the exact question: *Wigton v. Brainerd*, 28 Fed. Rep. 29, where the docket fee was denied in a suit dismissed "for want of prosecution;" but the report does not show the facts, nor what, if anything, had ever been done in the case. In *Central Trust Co. v. Wabash, etc., Ry. Co.*, 32 Fed. Rep. 684,—an action to foreclose the mortgage on the defendant company, the property being in the hands of receivers,—Gilliland, by petition, intervened for damages from fire caused by a locomotive operated by them. On a reference to a master proof was taken and the claim established and allowed, but the petitioner was denied a docket fee to his solicitor because "the hearing was had upon an incidental or collateral issue that arose in the progress of a foreclosure suit." In *Ryan v. Gould, Id.*, 754, after bill, answer, and replication, the case was dismissed, without prejudice, on complainant's motion, with costs to defendants. The case arose in the southern district of New York, and Judge LACOMBE, in his opinion, says:

"The decisions upon this point are numerous and conflicting. In the views expressed by Judge HAMMOND in *Partee v. Thomas, supra*, I entirely concur; but the prior decisions in this circuit are controlling of the question here, and the docket fee must be disallowed."

Counsel for plaintiff here in his brief says: "It is my impression that the bill was not filed until after the application for a preliminary injunction was refused." In this his "impression" is entirely at variance with the facts of the case as shown by the record. Nor could the motion have been made even, or any step whatever have been taken in regard to it, or concerning the cause at all in any way, until after the bill was filed. Indeed, the very institution of an equity cause is the filing of complainant's bill. Sup. Ct. Eq. Rules 11 and 12. Even the subpoena to answer only issues for such defendants as are named in the prayer for process, (rule 23,) "and if an injunction, or writ of *ne exeat regno*, or any other special order pending the suit, is required, it shall also be specially asked for," (rule 21.) It is wholly inconceivable how a plaintiff in equity could move for a preliminary injunction, or a court could act upon such a motion, in the absence of his bill showing what he wanted enjoined, or against whom he desired such injunction to operate. Rule 25 prescribes the practice "whenever an injunction is asked for by the

bill," and provides that "special injunctions shall be grantable only upon due notice to the other party, by the court in term, or by a judge thereof in vacation, after a hearing, which may be *ex parte* if the adverse party does not appear at the time and place ordered." Evidently this cause was dismissed as a direct consequence of a denial to the plaintiff of its motion for this injunction. The only object of the bill, which was under oath, and drawn with the utmost care and at great length, and fortified by many documents filed as exhibits, was to enjoin the defendant compress company from violating the terms of a certain contract alleged to exist between the parties. Its suit for this purpose was presented to the court by the bill in the strongest possible light; and the plaintiff, with good reason, no doubt, wisely concluded that, if a preliminary injunction could not be obtained upon its own showing, undefended by answer or proof of its adversary, it would be useless to expect a perpetual injunction at the end of prolonged litigation. Such being the case, and the voluntary dismissal of the cause being the direct result of the action of the court in denying the motion of the plaintiff, the reasoning in *Goodyear v. Sawyer*, *supra*, and *Partee v. Thomas*, *supra*, will support the taxation of the docket fee to the solicitor here, although no answer or demurrer was filed as in those cases respectively. And, indeed, in several of the reported cases in which such docket fees were denied, the rulings seem to have been upon the ground that the termination of the particular case was due solely to the action of the parties, uninfluenced by, and not the result of, any action by the court therein. Thus in *Coy v. Perkins*, 13 Fed. Rep. 111, 112, where there was an appearance by defendant, who filed a demurrer to the bill, which was never acted upon by the court, so far as the report shows, and several terms afterwards the cause was dismissed by direction of complainant, the solicitor's docket fee was denied by GRAY and LOWELL, JJ., but the argument used there certainly supports my ruling here. Mr. Justice GRAY, in the opinion, says:

"We are of opinion that upon the face of the statute the intention of the legislature is manifest that it is only where some question of law or fact involved in or leading to the final disposition actually made of the case has been submitted, or at least presented to the consideration of the court, that there can be said to have been a final hearing which warrants the taxation of a solicitor's or proctor's fee of \$20; as, for instance, where the court, on motion and argument, dismisses for irregularity an appeal from the district court, as in the case, before Mr. Justice NELSON, of *Hayford v. Griffith*, 3 Blatchf. 79; or where the plaintiff discontinues, after the court has substantially decided the merits of the case, either by an opinion expressed at the hearing upon the merits, as in the case of *The Bay City*, before Judge BROWN, 3 Fed. Rep. 47, or by a previous interlocutory decree, as in *Goodyear Dental Vulcanite Co. v. Osgood*, [2 Ban. & A. 529,] decided by Judge SHEPLEY in February, 1877."

So in the brief report of *Lock Co. v. Colvin*, 14 Fed. Rep. 269, it appears that the plaintiff voluntarily discontinued the case after answer filed, and the solicitor's docket fee was held not to be taxable, because "there was no hearing and decision of the court." And in *McLean v.*



*Clark*, 23 Fed. Rep. 861, a demurrer to the bill had been overruled, with leave to answer. After the answer was filed, and while the case was pending upon bill and answer, (as the report would seem to indicate,) the plaintiff applied for a taxation of this solicitor's docket fee against the defendant, and it was, of course, under all the cases, except perhaps in New York, properly denied, for the suit was still pending in the courts, the decree upon the demurrer resulting not in the termination of the cause, but its further litigation. Judge BROWN says:

"But in determining what has been 'a trial or final hearing' which will authorize the taxation of a docket fee, we think that regard should be had to the result of such hearing or trial, and that we should treat that only as a final hearing in law which is a final hearing in fact. Hence if, in this case, the demurrer had been sustained, and the bill dismissed, the hearing of such demurrer would have undoubtedly been a final hearing, within the meaning of section 824."

So in *Mercartney v. Crittenden*, 24 Fed. Rep. 401, a demurrer was overruled, and defendants answered, and subsequently plaintiff voluntarily dismissed his bill without prejudice. Judge SAWYER held the solicitor's docket fee not taxable, saying:

"Had there been a final decree entered upon the ruling on the demurrer, without further pleadings, the hearing on the demurrer might well have been regarded as a 'final hearing,' contemplated by the act. But the decree dismissing the bill was not in consequence of the decision on the demurrer."

And in *Consolidated, etc., Co. v. American, etc., Co.*, 24 Fed. Rep. 658, the solicitor's docket fee was not held taxable in a cause voluntarily dismissed by the complainant after issue joined by answer and replication and before proof; but the dismissal was "without the determination of any question in the case by the court," and "before any hearing either interlocutory or final." In *Andrews v. Cole*, 20 Fed. Rep. 410, a final decree was obtained upon *pro confesso* without answer or demurrer, and the court held this docket fee taxable, because "the consideration of the bill is a hearing, and is final when it results in the final disposition of the cause." In like manner the docket fee was held taxable in *The Alert*, 3 Fed. Rep. 620, where a vessel was seized in a proceeding *in rem*, and the case discontinued by libellant's consent, and the vessel released upon payment of his claim and costs before claim or answer by the owners. "Such a motion, [to release the vessel,] when granted, terminates the cause, so far as the vessel is concerned; and the hearing thereon is deemed a final hearing, within the principle of the case of *Hayford v. Griffith*, 3 Blatchf. 79," where the dismissal was upon a motion for an omission to file security for costs.

It is not deemed necessary to further review the cases, as they are all cited in *Goodyear v. Sawyer*, *supra*, and *Partee v. Thomas*, *supra*, though for a somewhat different purpose than in the case at bar; and in thus distinguishing them I do not wish to be understood as at all abandoning my opinion expressed in those two decisions, that this docket fee is taxable in every equity and admiralty cause, "whenever and however it was finally ended,"—that such was the intention of the statute, and its

reasonable construction, as evidenced by the general law of equity costs in England, in our courts before the fee-bill act of 1853, and almost all the earlier cases under the act, and many of the later ones. But it is not necessary to decide this case alone upon that broad construction, since it falls equally within the distinction, which seems to be well recognized, that where the termination of such suit is the result or consequence of a ruling of the court upon any question of law or fact properly presented for decision, no matter in what form, and irrespective of the state of the pleadings after bill or libel filed, the solicitor's docket fee of \$20 is taxable with the other costs, whether the termination be by dismissal or otherwise, or obtained at the instance of one party or the other, or by the action of the court *mero motu*. Motion overruled.

### ELLIOTT v. SHULER *et al.*

(Circuit Court, W. D. North Carolina. April 20, 1892.)

#### 1. REMOVAL OF CAUSES—SPECIAL PROCEEDING BY ADMINISTRATION—SALE OF REAL ESTATE.

A special proceeding by an administrator to obtain a license to sell the real estate of his intestate for the payment of debts is within the act of congress providing for the removal of "any suit of a civil nature, at law or in equity," from a state to a federal court, though the federal court could not have had original jurisdiction of the proceeding.

#### 2. SAME—NATURE OF PROCEEDING—EQUITABLE JURISDICTION.

Though such proceeding be treated by the state court as equitable in its nature, yet, not coming within any of the recognized heads of equitable jurisdiction, it must, on removal, be placed on the law docket of the federal court.

#### 3. SAME—WAIVER OF OBJECTIONS.

The proceeding having been removed on the petition of defendant, she thereby waived all questions pertaining to the jurisdiction of the federal court, except the total absence of jurisdiction.

#### 4. SAME—LANDS OF INTESTATE—SALE FOR DEBTS.

Lands purchased by a defaulting cashier with the funds of his bank, and caused by him to be conveyed to his wife, are not within Code N. C. § 1446, describing the real estate of a decedent which may be sold for the payment of his debts on the application of his administrator as being "all rights of entry and rights of action, and all other rights and interests in lands, tenements, and hereditaments, which he may devise, or by law would descend to his heirs," since the cashier never acquired any legal or equitable estate in the lands so purchased.

#### 5. SAME—FOLLOWING TRUST FUNDS.

In such case plaintiff's remedy is by an equitable proceeding to charge the land in the hands of the wife with a trust for the satisfaction of the claims of the bank; a form of relief which cannot be afforded by the federal court in the present proceeding.

#### 6. SAME—DESCENDIBLE ESTATE.

An allegation that intestate at the time of his death was entitled to a vested remainder in fee of the residence place in which his widow, the defendant, has a life estate, is sufficient as an allegation of an estate in the intestate "which by law would descend to his heirs," within said section 1446, making the same liable for the payment of his debts.

At Law. A special proceeding by the plaintiff, as administrator, to obtain a license to sell the lands of his intestate to procure assets for the payment of debts, commenced in Catawba superior court, and removed to this court by nonresident defendants. Motion on the part of the

plaintiff to remand to state court. Motion on the part of defendants to dismiss the proceeding. Both motions denied.

*C. A. Cilley and Chas. Price, for plaintiff.*

*Burwell & Walker and F. W. Stevens, for defendants.*

DICK, District Judge. From an examination of the duly-certified transcript of the process, pleadings, papers, and record transmitted to this court by the clerk of the superior court of Catawba county, I find the following uncontroverted facts as to the condition of this case in the state court at the time of removal into this court: A special proceeding was commenced by the plaintiff against the defendants in said superior court before the clerk, by a summons duly issued on the 24th of April, 1891, notifying the defendants to appear within 20 days after the service of the summons, and answer the complaint to be filed in the clerk's office; and, if they failed to comply, the plaintiff would apply to the court for the relief demanded in the complaint. The complaint was filed on the 27th of April, 1891. As it appeared upon affidavit that the defendants were nonresidents of the state, constructive service of process was duly made under an order of publication. An answer was filed by Mrs. Shuler, one of the defendants, on June 24, 1891. On the same day a sufficient petition and bond was filed by Mrs. Shuler in the said superior court before the clerk, praying for the removal of this case to this court. The petition and bond were in conformity with the act of congress, and the clerk at once made an order for removal. From this order the plaintiff prayed an appeal to the superior court in term time; and at a subsequent term of said court the judge affirmed the order of the clerk, and made a further order of removal of this case to this court. A duly-certified transcript of the pleadings and proceedings in the said state court was filed in the office of the clerk of this court October 13, 1891. At the October term of this court, 1891, the counsel of plaintiff made a motion to remand to the state court, insisting that this court could not acquire jurisdiction of this case, as the removal statutes only applied to cases of such a nature as could be originally commenced in a federal court. This motion was overruled, with leave to the counsel of plaintiff to renew the motion at the next term. As the motion has been renewed at this term, I deem it proper to set forth my reasons for now affirming my former decision.

Congress has conferred upon the United States courts jurisdiction to hear and determine all cases and controversies of whatsoever nature that arise between citizens of different states, and authorized parties entitled by law to apply for the removal of such cases and controversies from state courts into the United States circuit courts, even in cases where the latter courts could not have original jurisdiction of such controversies. This privilege conferred by the removal statutes may be claimed as to all suits in state courts, whether of limited or general jurisdiction, and cannot be ousted or annulled by the statutes of states assuming to confer jurisdiction exclusively upon their own courts in matters of local administration. The superior court, before the clerk in which this spe-

cial proceeding was pending at the time the petition for removal was filed, was a court vested by law with judicial cognizance of the subject-matter and parties. This case certainly comes within the meaning of the act of congress providing for the removal of suits from state courts to the circuit courts of the United States. *Railway Co. v. Whitton*, 13 Wall. 270; *Gaines v. Fuentes*, 92 U. S. 10; *Hess v. Reynolds*, 118 U. S. 78, 5 Sup. Ct. Rep. 377; *Clark v. Bever*, 139 U. S. 103, 11 Sup. Ct. Rep. 468; *Marshall v. Holmes*, 141 U. S. 589, 12 Sup. Ct. Rep. 62.

The motion of the counsel of defendants to dismiss the case for the want of jurisdiction is more difficult to determine. I was at first surprised at such a motion, as the counsel making it had so ably and vigorously resisted the motion to remand; and it at once occurred to me that, if a motion to dismiss were allowed, the jurisdiction of both courts would be defeated, and the plaintiff would be deprived of the benefit of a suit which could not be instituted in any other court or in any other manner than it was begun. Upon the questions of law presented I heard with pleasure the arguments of counsel on both sides, and I have carefully considered their well-prepared briefs, and will now announce my opinion on the matter. The complaint of the plaintiff as administrator, setting forth the statements and facts required by the state statute (Code, § 1436<sup>1</sup>) and praying the court for a license to sell the bonds mentioned to make assets for the payment of the debts of his intestate, brought the case fully within the jurisdiction of the superior court, and gave that court judicial cognizance of the subject-matter, and authorized it to proceed to acquire jurisdiction over all parties interested in said lands. The state law conferred upon the plaintiff this right, which did not exist at the common law, and prescribed a specific mode of procedure to enforce it, and now that the case has been properly removed from the state court such right should be enforced in this court according to the state laws, as far as is consistent with the forms and modes of procedure observed and practiced in United States courts, so as to give effect to this state policy and laws. *Clark v. Smith*, 13 Pet. 195; *U. S. v. Ottman*, 1 Hughes, 313. In federal courts a special proceeding, like the one before us, is regarded as a proceeding *in rem*, in which sufficient representations in the petition filed call into exercise the jurisdiction of the court in which the case is instituted. *Grignon v. Astor*, 2 How. 319; *Florentine v. Barton*, 2 Wall. 210; *Mohr v. Manierre*, 101 U. S. 417. In the case of *Hudson v. Coble*, 97 N. C. 260, 1 S. E. Rep. 688, the supreme court of this state announces the doctrine that "a proceeding to sell lands for assets to pay the debts of a decedent is essentially equitable, and the court has all the power of a court of equity to accomplish the purpose." This doctrine may be applicable in the superior court of this state, which can ascertain, adjust, and determine legal and equitable rights and principles in the same civil action or spe-

<sup>1</sup> Code N. C. § 1436, provides that, "when the personal estate of a decedent is insufficient to pay all his debts, including the charges of administration, the executor, administrator, or collector may, at any time after the grant of letters, apply to the superior court of the county where the land, or some part thereof, is situated, by petition, to sell the real property for the payment of the debts of such decedent."

cial proceeding; but this principle cannot be fully applied in federal courts, in which legal and equitable jurisdiction cannot be blended in the administration of justice. The principle is well settled that the chancery jurisdiction of federal courts is not affected by state laws creating special jurisdictions. The chancery powers of federal courts are uniform everywhere in the Union, and are independent of state laws, which cannot restrict, enlarge, or in any way materially modify the equitable jurisdiction of such courts. As a general rule, the equitable jurisdiction of the courts of the United States can only be exercised in the mode and manner of proceeding well established and observed by courts of equity in enforcing and administering the rights of parties to suits.

As the case now before us is founded upon a new right and remedy granted the plaintiff by a state statute, and does not come within some of the recognized heads of equitable jurisdiction, we think the remedy of the plaintiff is at law, and the case must be placed on the law docket of this court. *Von Norden v. Morton*, 99 U. S. 378; *Searl v. School-Dist.*, 124 U. S. 197, 8 Sup. Ct. Rep. 460. The removal of this case does not divest the plaintiff of any of the substantial rights vested in him by the state law, or deprive him of the benefit of the special proceeding by which he sought to enforce them in the state court in the manner and form provided by the state statute. The superior court before the clerk, and the superior court before the judge, are co-operating departments of one and the same court. *Brittain v. Mull*, 91 N. C. 498. On the removal of the case the entire jurisdiction of the superior court was transferred to this court, which can now proceed to administer the state laws, and ascertain and adjust the legal rights of the parties as fully and completely as could have been done in the state court of original jurisdiction. *Duncan v. Gegan*, 101 U. S. 810. This assertion of jurisdiction certainly cannot be complained of by the defendant. The state court had acquired rightful jurisdiction over her personally and over the subject-matter, and had authority to determine the case on its merits. On her petition and prayer the case was removed, and she only acquired the right to have the case heard and tried on its merits in this court of her own selection. By her voluntary act she waived all questions pertaining to the jurisdiction of the court, except the total absence of jurisdiction. When there is a total absence of jurisdiction of the subject-matter a federal court *sua sponte* or on motion of a party at any time will dismiss or remand a case removed from a state court. In *Fost. Fed. Pr.* § 391, I find the following announcement of a legal principle which is well sustained by the cases cited in note:

"Wherever there is a total absence of jurisdiction over the subject-matter in the state court, so that it had no power to entertain the suit in which the controversy was sought to be litigated in its then existing or any other form, there can be no jurisdiction in the federal court to entertain it on removal, although in some other form it would have plenary jurisdiction over the case made between the parties."

The counsel of defendants insisted with confident earnestness and much force of argument that the complaint of plaintiff in paragraphs 5, 6, and 7, makes representations that show that the lands alleged to have been purchased by intestate with trust funds, and caused to be conveyed to his wife in fraud of creditors, do not come within the provisions of the statute under which this proceeding was instituted, (Code, § 1446,<sup>1</sup>) as the intestate never acquired any legal or equitable estate in the same. This position seems to be well sustained by the cases cited in brief: *Rhem v. Tull*, 13 Ired. (N. C.) 57; *Greer v. Cagle*, 84 N. C. 385. They further insisted that the complaint of plaintiff alleges affirmatively that the money used in the purchase of all the lands mentioned was a trust fund belonging to the depositors of the bank of which the intestate was cashier, and if there is any right or cause of action it is an equitable right to follow the fund so obstructed, and subject the land to payment, and that such equitable right can only be enforced by the depositors in a court of equitable jurisdiction, and that relief cannot be afforded in this court in the present form of procedure. I am strongly inclined to the opinion that this position is well taken, and is sustained by the authorities cited in brief: *King v. Weeks*, 70 N. C. 372; *Bank v. Simonton*, 86 N. C. 187.

I will not even intimate an opinion as to the force and effect of the matter of estoppel set up in the answer, as the question was not discussed on the argument, and no reference is made to it in the brief of the counsel of plaintiff.

The complaint of plaintiff in paragraph 4 represents that his intestate at the time of his death was entitled to a vested remainder in fee of the highly improved and valuable "residence place" in which his widow—the defendant Mrs. Shuler—has a life estate. This representation of a legal estate in the intestate at the time of his death, which descended to his heirs at law, comes clearly within the provisions of the statute, (Code, § 1446,) and gave jurisdiction to the state court to proceed against such estate to subject it to the payment of the debts of the intestate.

The question of jurisdiction is the only one now before me for decision. I will reserve the other questions presented in the pleadings, arguments, and briefs for determination at the final hearing of the cause. The motion to remand and the motion to dismiss are both disallowed.

<sup>1</sup> Code N. C. § 1446, provides that "the real estate subject to sale under this chapter shall include all the deceased may have conveyed with intent to defraud his creditors, and all rights of entry and rights of action, and all other rights and interests in lands, tenements, and hereditaments, which he may devise, or by law would descend, to his heirs."



*In re VINTSCHGER et al,**(Circuit Court, S. D. New York. April 15, 1892.)***TARIFF ACT—SIMULATED TRADE-MARK—MANDAMUS.**

Certain merchandise, consisting of metal polish, was imported into the port of New York on the 15th of March, 1892. The collector of customs declined to admit the merchandise to entry, on the ground that, pursuant to the provisions of section 7 of the tariff act of October 1, 1890, he had received from the secretary of the treasury facsimiles of a certain trade-mark filed in the treasury department by "The Meyers Putz Pomade Company," which facsimiles were duly recorded at the New York customhouse pursuant to instructions contained in a circular of the treasury department dated October 31, 1890, and that said collector had decided that the trade-mark borne by the goods attempted to be entered simulated or copied the trade-mark so filed and recorded at the customhouse in New York. On an application to the circuit court for a *mandamus* to compel the collector to take evidence as to the validity of the trade-mark filed by the Myers Putz Pomade Company in Washington, and the right of the importers to use the trade-mark upon their goods, *held*, that the circuit court had no jurisdiction to grant a *mandamus*, and that the question whether the decision of the proper customs officers that any particular import was within the prohibition of the statute was reviewable by the courts, and, if so, in what way, was not before the court in this proceeding.

*Application for Mandamus.*

This was an order to show cause why a *mandamus* should not issue to compel the collector of the port of New York to take and hear the evidence and proofs of the applicants, composing the firm of Markt & Co., and to determine whether one E. Meyers, of the Meyers Putz Pomade Company, were the owners of an alleged trade-mark, and whether, notwithstanding the facsimile of the alleged trade-mark of the Meyers Putz Pomade Company on file in the office of said collector, entry should be refused of certain goods imported by the said firm of Markt & Co. It appeared from the affidavit upon which the order to show cause was granted that the applicants, composing the firm of Markt & Co., doing business in New York city, imported the merchandise in question, namely, a certain quantity of metal polish, called "Universal Metall Putz Pomade;" that on or about the 14th day of March, 1892, the firm of Markt & Co. attempted to enter the same at the customhouse in the city of New York, but that the collector of said port refused to allow the goods to be entered, upon the grounds that he, the said collector, had received from the secretary of the treasury a certificate to the effect that the Meyers Putz Pomade Company had, in accordance with section 7 of chapter 1244 of the Laws of the United States of 1890, (the tariff act of October 1, 1890,) caused to be deposited with the department of the treasury a facsimile of a trade-mark which the said Meyers Putz Pomade Company claimed as domestic manufactures, and that he, the said collector, had neither the power nor the time to investigate the question whether or not the Meyers Putz Pomade Company were domestic manufacturers, or the rightful owners of the said trade-mark.

The affidavit of the said applicants for the *mandamus* further set forth that one E. Meyers, who had been succeeded by the Meyers Putz Pomade Company, was formerly the agent of the firm of Schmitt & Foerderer, the manufacturers of the goods in Germany, and as such agent,

and as long ago as 1886, imported goods into this country under the identical marks and trade-marks which he and the Meyers Putz Pomade Company now claimed were their property; further, that the Meyers Putz Pomade Company was a corporation incorporated under the laws of West Virginia, having its principal office at Boston, Mass., and that the trade-mark which the Meyers Putz Pomade Company claimed, was derived from one E. Meyers, who was formerly the agent of said firm of Schmitt & Foerderer, which latter firm had used such trade-mark long prior to its alleged adoption by the Meyers Putz Pomade Company. On the return of the order to show cause the affidavit of the collector of customs at New York was read, by which it appeared that on or about the 19th day of February, 1892, the deponent, as such collector, received from the treasury department at Washington a letter dated February 18, 1892, inclosing the two facsimiles of the trade-mark therein referred to of the Meyers Putz Pomade Company, which facsimiles were duly recorded at the New York customhouse February 23, 1892, pursuant to instructions contained in the circular of the treasury department dated October 31, 1890, (printed in Synopsis Decisions of the Treasury Department for 1890, No. 10,309;) that the merchandise attempted to be entered was invoiced from Wahlershausen-Cassel, Germany, as "metal polish," contained in small tin boxes, having on the top of each an inscription or trade-mark, which boxes were in condition to be put upon the market of this country and sold; that said merchandise was examined according to law by the appraiser of said port of New York, who, on the 23d day of March, 1892, made his official return thereof to deponent as such collector, stating therein, among other things, "trade-mark illegal;" that deponent, as such collector, thereupon, exercising due and proper care, decided that the articles of merchandise imported as above did copy or simulate the trade-mark of "The Meyers Putz Pomade Company," of which facsimiles were received from the treasury department, and recorded, and filed in the New York customhouse, as above set forth; and that such articles of merchandise should not be admitted to entry at the customhouse and port of New York.

Section 7 of the tariff act of October 1, 1890, above referred to, is as follows:

"Sec. 7. That on and after March first, eighteen hundred and ninety-one, no article of imported merchandise which shall copy or simulate the name or trade-mark of any domestic manufacture or manufacturer shall be admitted to entry at any customhouse of the United States. And, in order to aid the officers of the customs in enforcing this prohibition, any domestic manufacturer who has adopted trade-marks may require his name and residence and a description of his trade-marks to be recorded in books which shall be kept for that purpose in the department of the treasury, under such regulations as the secretary of the treasury shall prescribe, and may furnish to the department facsimiles of such trade-marks; and thereupon the secretary of the treasury shall cause one or more copies of the same to be transmitted to each collector or other proper officer of the customs."

On behalf of the applicants for the *mandamus* it was argued that repeated applications had been made for relief both to the collector of the

port and to the secretary of the treasury without effect, and that, unless the court interfered by *mandamus* to compel the collector to examine into the question of the legality of the alleged trade-mark filed in the treasury department at Washington, and the right as claimed by the importers to use the same as their own, the importers seemed to be without remedy, as their merchandise was deteriorating in value, and possession thereof was refused them by the collector. On behalf of the collector it was urged (1) that the circuit court of the United States had no authority or power to issue a writ of *mandamus* as an original and independent proceeding; the United States attorney citing, among other authorities, *Bath Co. v. Amy*, 13 Wall. 244; *McIntire v. Wood*, 7 Cranch, 504; *McClung v. Silliman*, 6 Wheat. 601. (2) That, even if the court had jurisdiction, *mandamus* would lie only where there is a refusal to perform a ministerial act involving no exercise of judgment or discretion; or where the officer refuses to decide, and the aggrieved party could have the decision of the officer reviewed by another tribunal; citing *Commissioner v. Whiteley*, 4 Wall. 522; *Decatur v. Paulding*, 14 Pet. 515. (3) That more cannot be required of a public officer by *mandamus* than the law has made it his duty to do; citing *Ex parte Rowland*, 104 U. S. 612.

*Goepel & Raegener*, for applicants.

*Edward Mitchell*, U. S. Atty., and *James T. Van Rensselaer*, Asst. U. S. Atty., for collector.

LACOMBE, Circuit Judge. Under the provisions of section 7 of the tariff act of October 1, 1890, the question whether a domestic manufacturer has adopted a name or trade-mark, and whether any articles of imported merchandise do copy or simulate such name or trade-mark, are to be determined, in the first instance, by the administrative officers to whom the execution of the tariff laws is intrusted. The provision of the same section that a record shall be kept in the treasury department, describing such trade-marks, does not make that record conclusive evidence of the fact that the person who "may require his name and residence and a description of his trade-marks to be recorded," is a domestic manufacturer, or has any trade-mark. The record book is, in the language of the statute, but an "aid" to the customs officers, and the prohibition is directed only against articles which copy or simulate the genuine trade-marks of *bona fide* domestic manufacturers. Whether the decision of the proper customs officers that any particular import is within the prohibition is reviewable in the courts, and, if so, in what way it may be presented for review, is not now before this court. This application is for a *mandamus* to compel the collector to examine into the facts, and decide whether entry should be refused or not, and it is abundantly settled by authority that the power to issue a writ of *mandamus* as an original and independent proceeding does not belong to the United States circuit courts. *Bath Co. v. Amy*, 13 Wall. 244.

Motion denied.

## NEW YORK &amp; T. S. S. Co. v. ANDERSON. (No. 42.)

(Circuit Court of Appeals, Second Circuit. February 16, 1892.)

No. 42.

## 1. MASTER AND SERVANT—PERSONAL INJURIES—CONTRIBUTORY NEGLIGENCE.

In an action by a sailor for personal injuries caused by the negligent handling of a winch while the vessel was discharging cargo, it appeared that the winch was operated by a man from shore, according to whistle signals given by the sailor, and his neglect of the signals caused the injuries. Plaintiff testified that the winchman had informed him of his deafness, and requested him to whistle loudly. The winchman's carelessness had caused the breaking of some barrels before the accident in question, but up to that time (an hour or more) he had obeyed the signals as given. *Held*, that it was proper to refuse an instruction that plaintiff's continuing his work with knowledge of the winchman's incompetency would preclude a recovery, since it is for the jury to determine whether or not he was justified in believing, until the accident, that the winchman could handle the winch properly.

## 2. SAME—EVIDENCE—RES GESTÆ.

Statements made by the winchman to the sailor in reference to his deafness are competent evidence as part of the *res gestæ*.

## 3. SAME—NEGLIGENCE—EVIDENCE.

The statements as to the winchman's deafness, and his carelessness in breaking the barrels by lowering them too rapidly, are more than a *scintilla* of evidence of his incompetency, and sufficient to justify the submission of the question to the jury.

## 4. APPEAL—REVIEW—REFUSAL OF NEW TRIAL—EXCESSIVE VERDICT.

The circuit courts of appeals have no power to review a decision refusing to grant a new trial on the ground that the verdict was against the evidence, and was for excessive damages.

47 Fed. Rep. 38, affirmed.

Error to the Circuit Court of the United States for the Southern District of New York.

At law. Action by Charles Anderson against the New York & Texas Steamship Company for personal injuries. Verdict and judgment for \$4,141.67 for plaintiff. 47 Fed. Rep. 38. Defendant brings error. Affirmed.

*Butler, Stillman & Hubbard*, (*Wilhelmus Mynderse*, of counsel,) for plaintiff in error.

*George L. Carlisle*, for defendant in error.

Before WALLACE and LACOMBE, Circuit Judges.

PER CURIAM. This is a writ of error by the defendant in the court below to review a judgment of the circuit court, entered upon the verdict of a jury for the plaintiff. The plaintiff was a seaman, one of the crew of the steamship San Marcos, and while he was helping discharge cargo at the port of Key West received severe injuries by being struck by some of the cargo while it was being raised from the hold. The plaintiff recovered upon the theory that his injuries were caused by the carelessness of a fellow servant,—the winchman who had the management of the steam winch by which the cargo was being raised from the hold,—and that the defendant was negligent in that the winchman was incompetent for his place. Error is assigned because the trial judge refused to direct the jury to find a verdict for the defendant, because he refused to give certain specific instructions to the jury, requested by

the defendant, and because he refused to set aside the verdict as contrary to evidence upon the motion of the defendant for a new trial. The plaintiff was stationed on the upper deck, to receive the cargo as it reached him, loaded in slings, from the hold, conduct the slings to the side of the vessel, and start the load down the skids to the dock. Other men, some from the crew and some from the shore, were at work in the hold, filling the slings with cargo; and one Bronson, a man from the shore, had charge of the steam winch by which the cargo was hoisted and lowered. Bronson's winch was between decks, and it was his duty to operate it according to signals to be given to him by the plaintiff by blowing a steam whistle. The signal to raise a load was one blast, the signal to stop was one blast, and the signal to lower was two blasts. According to the testimony of the plaintiff, after the work had proceeded for an hour or more, and when a sling of cargo had been hoisted from the hold and conducted by him to the rail of the vessel, he blew one blast of the whistle as a signal to raise it so as to carry it over the rail. He testified that this signal was obeyed, and he then blew one blast to stop, which was not heeded, whereupon he repeated the signal almost instantly, but that Bronson, instead of stopping, lowered the sling load, and it struck the plaintiff, and led to his injuries.

The only testimony on the trial to indicate that the winchman was incompetent, because of deafness or otherwise, was given by the plaintiff himself. He testified that before commencing work Bronson told him to blow the whistle very loud, as he was deaf, and could not hear very well; that previous to the accident, while the cargo was being unloaded, some barrels were broken, because they were lowered too fast, and at that time he heard a conversation between the master of the steamship and two men standing by, in which the master asked who was at the winch, and one of them told him that the winchman did not understand how to drive a winch, and was deaf. He also testified that he could see that Bronson was not used to driving a winch, because "he seemed to be scared of the steam, and didn't know how to use it." Everything thus testified to by the plaintiff was contradicted by witnesses for the defendant, as was also his testimony respecting the circumstances of the accident.

The judge instructed the jury, in substance, that the plaintiff was not entitled to recover unless they found that the winchman was incompetent, either from deafness or otherwise, to an extent rendering him unfit for the duty to which he was assigned. He also instructed them, in substance, that the plaintiff was not entitled to recover if he was negligent himself in continuing to work after he had information of the deafness or incompetency of the winchman. No exceptions were taken by the defendant to the instructions given, but the defendant requested the judge to give three additional instructions, and excepted to his refusal to do so. Two of the instructions thus requested and refused embodied the proposition that, if the plaintiff had information that the winchman was incompetent, and continued to work without objection, he was not entitled to recover for an injury caused by the winchman's incompe-

tency. The third instruction requested and refused was covered by the instructions which the judge had already given, and does not require further consideration. After the rendition of the verdict, the defendant made a motion before the trial judge to set it aside as contrary to evidence, and for excessiveness of damages, and the motion was denied. It is doubtful whether the refusal to direct a verdict for the defendant presents any valid exception. *U. S. v. Bank of Metropolis*, 15 Pet. 377. No grounds were assigned as the basis for the request, and, as the defendant took no exceptions to the instructions of the judge by which he left it to the jury to decide the issues of negligence as questions of fact, it would seem that the defendant acquiesced in his view that the case could not be disposed of as one which should not be submitted to the jury. We do not think the defendant was entitled to the specific instructions asked for, following the charge to the jury, in the unqualified terms of the requests. The plaintiff, as a sailor, was amenable to rigid discipline for disobedience of orders. He was injured while discharging a duty to which he had been assigned by his superior officer, and which he was performing under the eye of the master of the ship. Notwithstanding what he had heard and observed about the deafness and inexperience of the winchman, for an hour at least, and, according to some of the witnesses, for a period of several hours, the winchman had heard and obeyed the signals, and performed his duty properly. In view of these facts, it would have been erroneous to instruct the jury that, if the plaintiff had any information that the winchman was incompetent, or had all the information which he had been shown to have, he could not recover. Irrespective of the consideration that any complaint on his part would probably have been treated as an act of insubordination, the facts presented a fair question for the jury whether, notwithstanding what he had heard and seen, he was not justified until the accident took place in believing that the winchman was sufficiently competent to manage the winch safely.

Assuming that the general request to direct a verdict for the defendant sufficiently raises the question whether there was sufficient evidence of negligence on the part of the defendant to warrant the submission of the case to the jury, we are constrained to decide that there was, although the case for the plaintiff was very weak, and was overwhelmingly disproved by the evidence introduced by the defendant, and the verdict was one which it would seem could not have been reached upon any intelligent consideration of the case. The rule is that, when the evidence given at the trial, with all the inferences that the jury can justifiably draw from it, is insufficient to support a verdict for the plaintiff, so that such a verdict, if returned, must be set aside, the court is not bound to submit the case to the jury, but may direct a verdict for the defendant. *Randall v. Railroad Co.*, 109 U. S. 478, 3 Sup. Ct. Rep. 322; *Goodlett v. Railroad*, 122 U. S. 391, 7 Sup. Ct. Rep. 1254. The statements made by the winchman himself were competent evidence as a part of the *res gestæ*, and the declarations of an agent of the defendant, made in the course of his duties. The jury were authorized to infer

from the circumstances of the accident, and from the previous conduct of the winchman when the barrels were broken, either that he was inattentive and careless, or that he was inexperienced, or hard of hearing. The circumstance that the load of cargo by which the plaintiff was injured was lowered contrary to his signal did not necessarily require them to infer that the winchman was deaf or inexperienced. This may have happened as well in consequence of some casual inadvertence on his part, or by his pure negligence, or by some excusable mistake; and the fact that for an hour or more previously, while operating the winch, he had heard the signals given by the plaintiff, and had managed the winch properly, gave rise to a presumption of his competency which was as cogent, if not more so, than any presumption against it arising from the fact of the accident. But if they believed that the winchman made the statement testified to by the plaintiff, we cannot say that, in conjunction with the circumstances of the accident, and his previous conduct with the winch when the barrels were broken, there was not something more than a *scintilla* of evidence of his incompetency and sufficient to justify the judge in submitting the question to the jury. *Railroad Co. v. Stout*, 17 Wall. 657. We regret that we have no power to review the decision of the court below in refusing to grant a new trial, based upon the grounds that the verdict was against the evidence, and was for excessive damages. *Persons v. Bedford*, 8 Pet. 433, 446; *Barreda v. Silbee*, 21 How. 146, 167; *Insurance Co. v. Folsom*, 18 Wall. 237, 249; *Railroad Co. v. Faloff*, 100 U. S. 24, 31.

The judgment is affirmed.

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*In re CROWLY.*

(Circuit Court, S. D. New York. February 25, 1892.)

**CUSTOMS DUTIES—GOODS INVOICED AS ENTIRETIES—SEGREGATION.**

Certain importations were entered at the port of New York in February and March, 1891, consisting of goods invoiced as wool robes with silk embroidery, silk and metal embroidery, and silk and cotton embroidery, which were in fact combination dress patterns, composed of worsted material separated into two parts, one part containing the embroidery and the other part being plain, the value of each robe, consisting of two pieces, as above, being stated on the invoice as an entirety, and the value of each robe being given in francs. Said merchandise was classified for duty by the collector as "manufactures of worsted embroidered," and duty assessed thereon at the rate of 60 cents per pound and 60 per cent. *ad valorem*, under paragraph 893, Schedule K, and the proviso contained in paragraph 873 of Schedule J of the tariff act of October 1, 1890. Protest by the importer, claiming that the merchandise was dutiable under Schedule K, par. 893, of said tariff act, at the rate of 44 cents per pound and 50 per cent. *ad valorem*. *Held*, that the decision of the board of general appraisers, segregating the values of the robes so as to assess the duty upon the embroidered and plain parts of each robe separately, should be affirmed, but that the court would not consider the question of the correctness of the general appraisers' decision as to the rate of duty imposed upon the goods, inasmuch as no statement of errors against the decision of the board of general appraisers had been filed in the circuit court by the importer.

V.50F.no.6—30

**At Law.**

Application by the collector of the port of New York, under the provisions of section 15 of the act of congress entitled "An act to simplify the laws in relation to the collection of the revenues," approved June 10, 1890, for a review of the decision of the board of general appraisers at this port, separating or segregating the values for duty of certain merchandise imported during the months of February and March, 1891, and invoiced as entireties as wool robes with silk embroidery, some with silk and metal embroidery, and some with silk and cotton embroidery, which goods were classified by the collector for duty as "manufactures of worsted embroidered, 60/60," and duty assessed thereon at the rate of 60 cents per pound and 60 per cent. *ad valorem*, under the provisions of Schedule K, par. 398, and the proviso contained in paragraph 373 of Schedule J of the tariff act of October 1, 1890. Against this classification the importer had protested, claiming that the merchandise was dutiable under Schedule K, paragraph 395, of said tariff act, at the rate of 44 cents per pound and 50 per cent. *ad valorem*. Testimony was offered by the importer before the board of general appraisers, showing that the merchandise consisted of robes or combination dress patterns, composed of worsted goods embroidered with silk and other materials, as mentioned in the invoices; that each robe consisted of about 10 meters of material, separated into two parts,—one part, of about 2 meters, being embroidered, and the other part, of 8 meters, being plain, in the case of each of the robes. It appeared, also, that for the purposes for which these goods were intended the parts could not be readily used or sold, one without the other, while the embroidered piece might be sold separately, as a piece of trimming, especially if the remainder of the robe had been spoiled, although in that case it would be sold at a reduced value from the regular price. It was shown from the invoices offered in evidence that the articles were invoiced at a stated price in francs for each robe, and that the parts were not divided on the invoices into plain and embroidered, but the robes were invoiced as entireties. The board of general appraisers overruled the protest of the importer, holding that the proviso in paragraph 373 provided that textile fabrics composed of wool, when embroidered by hand or machinery, should be treated for dutiable purposes as if they were embroideries composed of wool, under paragraph 398. The board further held that the separated parts of the so-called robes should have been segregated as to the values of the embroidered and plain materials, which were subject to different rates of duty, and the appraisers should have appraised the value of the respective parts, and the duties fixed by law should have been imposed thereon, and ordered that the entries should be so reliquidated. The importer took an appeal to the circuit court. On the trial in the circuit court, it was argued in behalf of the collector and the government that as neither the importer nor the collector had signified dissatisfaction with the appraisement of the merchandise as entireties according to the in-



voices, under section 13 of the act of June 10, 1890, it was not within the power of the board of general appraisers to order a reappraisement of the merchandise, which would be necessary to determine the value of the separated parts, and that for the purpose of such reappraisement the board of general appraisers was only an appellate tribunal. It was further argued that the importer having filed in the circuit court no statement of errors against the decision of the board of general appraisers, under section 15 of the above-mentioned act of June 10, 1890, the only matter before the circuit court was the determination of the question raised by the collector's appeal, which was only that the board erred in ordering the values of the separated parts of the robes to be segregated for the purposes of duty.

*Edward Mitchell*, U. S. Atty., and *James T. Van Rensselaer*, Asst. U. S. Atty.

*Curie, Smith & Mackie*, for importer.

LACOMBE, Circuit Judge. The decision of the board of appraisers is affirmed, and the court declines to go into the question as to whether they correctly determined that the silk embroidery made the article upon which it was placed dutiable as if it had been embroidered in wool, for the reason that there has been no statement of any error of law or fact complained of, touching such decision, filed in this court, or any application for review thereof in that particular.

## UNITED STATES v. FORD.

(District Court, E. D. Missouri, E. D. May 3, 1892.)

### 1. OLEOMARGARINE ACT—VIOLATION.

Act Cong. Aug. 2, 1886, § 6, requires retail dealers to sell oleomargarine only from the original stamped packages, "and to pack it in suitable packages, marked and branded as the commissioner of internal revenue, with the approval of the secretary of the treasury, shall prescribe," and imposes a specific penalty for its violation. *Held* that, the required approval of the department being merely as to the kind of marks to be used, an indictment may be had for neglect to conform therewith. *U. S. v. Eaton*, 19 Sup. Ct. Rep. 704, distinguished.

### 2. SAME—INDICTMENT.

In indictments under section 6 for neglect to properly mark the package of oleomargarine, the regulation covering marks and brands made by the commissioner of internal revenue should be pleaded in substance.

At Law. Prosecution of Anderson F. Ford for neglect to properly mark packages of oleomargarine. On demurrer to the indictment. Overruled.

*George D. Reynolds*, U. S. Atty.

*D. P. Dyer*, for defendant.

THAYER, District Judge, (orally.) In this case the indictment is under the sixth section of the oleomargarine act against Anderson F. Ford, a retail dealer in oleomargarine, for selling oleomargarine in packages with-

out marking the packages with the word "Oleomargarine." A demurrer has been filed, and the question arises whether, under the recent decision of the supreme court of the United States in *U. S. v. Eaton*, 12 Sup. Ct. Rep. 764, (No. 291, October term, 1891,) the indictment is valid or invalid. In the case of *U. S. v. Eaton* it appears from the decision that the defendant, who was a wholesale dealer in oleomargarine, had failed to keep a book showing the oleomargarine received by him, and from whom and to whom the same was sold and delivered. For this he was indicted under section 18 of the act of August 2, 1886, (24 St. p. 212,) for neglecting, omitting, and refusing to do a thing required by law to be done. The court held that the act of August 2, 1886, did not require a wholesale dealer in oleomargarine to keep such a book as the indictment in that case described, or to keep any book in fact; that the duty of keeping the book was a duty that had been imposed solely by a regulation of the commissioner of internal revenue, and that a person could not be punished criminally for failing to discharge a duty so imposed. The decision in effect holds that congress had not declared the particular act complained of to be an offense; that it was an offense created, if at all, by a regulation of the commissioner of internal revenue, and that the regulation was an exercise of legislative powers, not vested in the commissioner. In the case at bar the facts are quite different. By section 6 of the act of August 2, 1886, congress specifically provided that all oleomargarine should be packed by manufacturers in firkins, tubs, or other wooden packages not before used, each containing not less than 10 pounds, the same to be marked, stamped, and branded "as the commissioner of internal revenue, with the approval of the secretary of the treasury, shall prescribe." Retail dealers were required to sell only from the original stamped packages in quantities not exceeding 10 pounds, and to pack the same in suitable wooden or paper packages, marked and branded "as the commissioner of internal revenue, with the approval of the secretary of the treasury, shall prescribe." The very same section of the law imposed a specific penalty for selling oleomargarine in any other form than in wooden or paper packages as above described. This section of the law, therefore, fully and completely describes a criminal offense. It requires packages of oleomargarine to be packed in a given way, and to be branded and marked before they are sold in such manner as the commissioner of internal revenue shall prescribe. It also imposes a specific penalty if they are not so marked and branded when sold. The decision in the case of *U. S. v. Eaton* does not go to the extent of holding that because congress left it to the commissioner of internal revenue to prescribe the kind of marks and brands to be used, which was a mere matter of detail, therefore dealers cannot be punished for selling oleomargarine without such marks and brands. The difficulty in the *Eaton Case* was that congress had not created any such offense as that for which the defendant was indicted. The commissioner had in fact assumed to amend the law. But in the case at bar there is no such difficulty. The offense charged in the indictment is one fully described in the sixth section of the act. The marks

and brands prescribed by the commissioner are such as he was specially authorized to prescribe. In the case at bar, therefore, the indictment states an offense against the laws of the United States, unless the decision in *U. S. v. Eaton* is understood to mean that no regulation of the commissioner of internal revenue can have the force and effect of law. My opinion is, in view of numerous decisions of the supreme court in prior cases, that that is not the meaning which the court intended to convey.

Another question arises in this case, and that is whether the regulation made by the commissioner of internal revenue concerning marks and brands is pleaded. I think such regulations should be pleaded in substance in indictments, but I am of the opinion that the regulation of the commissioner is sufficiently set out in this indictment. The demurrer is therefore overruled.

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UNITED STATES v. GREENHUT *et al.*

(District Court, D. Massachusetts. May 16, 1892.)

**ILLEGAL TRUSTS AND MONOPOLIES—INDICTMENT.**

Act Cong. July 2, 1890, (26 St. p. 209,) "to protect trade and commerce against unlawful restraints and monopolies," provides, in section 2, that "every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons to monopolize, any part of the trade or commerce among the several states, or with foreign nations, shall be deemed guilty of a misdemeanor," etc. *Held*, that an indictment thereunder which fails to allege that defendants monopolized, or conspired to monopolize, trade and commerce among the several states, or with foreign nations, fails to state an offense, even though it does allege that they did certain acts with intent to monopolize the traffic in distilled spirits among the several states, and that they have destroyed free competition in such traffic in one of the states, and increased the price of distilled spirits therein.

**At Law.** Prosecution of Joseph B. Greenhut and others for violation of the law against monopolies: Indictment quashed.

*Frank D. Allen*, U. S. Atty.

*Elihu Root, Richard Olney, Simpson, Thacher & Barnum, Charles A. Prince, and Borden Hall*, for defendants.

**NELSON**, District Judge. This is an indictment under the second section of the act of congress approved July 2, 1890, entitled "An act to protect trade and commerce against unlawful restraints and monopolies." 26 St. p. 209. The indictment sets forth that the defendants are the officers of the Distilling and Cattle Feeding Company, a corporation chartered by the laws of the state of Illinois, and having its principal place of business in Peoria, in that state; that, as such officers, they purchased or leased seventy-eight theretofore competing distilleries within the United States; and, within certain dates specified, used, managed, controlled, and operated said distilleries, and manufactured sixty-six million gallons of distilled spirits, and sold the product within the United States, part of it in the district of Massachusetts, at prices

fixed by them, the whole being seventy-five per cent. of all the distilled spirits manufactured and sold within the United States during the period; that all said acts (except the purchasing and leasing of the distilleries) were done with the intent to monopolize to the company the manufacture and sale of distilled spirits in Massachusetts, and among the several states, to increase the usual prices at which distilled spirits were sold, to prevent and counteract free competition in the sale of distilled spirits, and thereby to exact great sums of money from citizens of Massachusetts and of the several states, and from all others purchasing; that, in pursuance of such intent, the defendants, as such officers, agreed with D. T. Mills and Co. and other dealers in Massachusetts that, if such dealers would buy all their supplies of distilled spirits from the company for six months, the company would give them a rebate of two cents a gallon on their purchases; that by means of the rebate agreements and by their control of the distilleries, and of the manufacture, sale, and prices of seventy-five per cent. of all the distilled spirits manufactured and sold in the United States during the period named, the company, and the defendants as its officers, had made large sales of distilled spirits to D. T. Mills and Co. and other dealers in Massachusetts at prices fixed by the defendants in excess of the usual prices at which such spirits were then sold in that state, such spirits having been manufactured in other states, and transported therefrom into Massachusetts, and had unlawfully monopolized to said company the manufacture and sale of distilled spirits, and had increased the usual prices at which distilled spirits were then sold in Massachusetts, and had prevented and counteracted the effect of free competition in the price of spirits in Massachusetts, and had exacted and procured great sums of money in said district from D. T. Mills and Co. and others. To this indictment the defendant Greenbut filed a motion to quash, and the other defendants demurred, upon the ground that the indictment is insufficient in law, and does not charge any offense created by any statute of the United States.

The second section of the act is as follows:

"Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons to monopolize any part of the trade or commerce among the several states, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court."

An indictment framed under this section should contain a distinct averment in the words of the statute, or in equivalent language, that, by means of the acts charged, the defendants had monopolized, or had combined or conspired to monopolize, trade and commerce among the several states or with foreign nations. This indictment contains no such averment. It does not charge that the defendants entered into any unlawful combination or conspiracy. Nor does it contain any averment that they had monopolized trade or commerce among the several states

or with foreign nations. It avers merely that by means of the acts alleged they had monopolized the manufacture and sale of distilled spirits, without stating that in so doing they had monopolized trade and commerce in distilled spirits among the several states or with foreign nations. It is true that the indictment charges that the defendants have done certain things with intent to monopolize the traffic in distilled spirits among the several states, and that they have increased the usual prices at which distilled spirits were sold in Massachusetts, and have prevented and counteracted the effect of free competition in such traffic in Massachusetts. But none of these things are singly made offenses by the statute. The indictment in this particular is clearly insufficient according to the elementary rules of criminal pleading, and charges no offense within the letter or spirit of the second section of the statute.

Other questions presented upon this indictment were argued by counsel, and among them the important questions whether the acts charged constitute an unlawful monopoly, within the meaning of the statute; and, if they do, whether congress has the constitutional authority to declare such acts to be unlawful and criminal, and whether the things charged against the defendants were not rather the doings of the corporation than of its officers. In regard to these questions it is only necessary to remark that they seem to be of such a character as to require that they should not be decided finally against the government by the trial court, but should be reserved for the determination of the appellate court, when presented upon an indictment not otherwise insufficient in law. Indictment quashed. Judgment for the defendants.

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CUERVO v. JACOB HENKELL Co. *et al.*

(Circuit Court, S. D. New York. March 14, 1892.)

1. **TRADE-MARK—INFRINGEMENT—INJUNCTION.**

A cigar manufacturer, to protect his trade-mark, may have an injunction restraining a box maker from furnishing boxes with those trade-marks to other cigar manufacturers, and against all who knowingly combine for that purpose.

2. **SAME—DEFENSES—INFRINGEMENT BY OTHERS.**

It is no defense that Spanish labels similar to such trade-mark had been used by various manufacturers for many years, nor that imitations of the trade-marks were sold or used, in the absence of evidence that it was with the consent or acquiescence of the owner.

In Equity. Bill by G. Garcia Cuervo against the Jacob Henkell Company and others for infringement of trade-mark. Heard on motion for a preliminary injunction. Granted.

*Jones & Govin*, for complainant. *Wise & Lichtenstein*, for defendants.

LACOMBE, Circuit Judge. There is no dispute as to the facts of this case. The complainant, a manufacturer of cigars, is concededly the owner of a trade-mark, which as an entirety is embodied in four sepa-

rate labels placed inside and outside the boxes containing his cigars. The goods thus marked and put up have obtained a wide celebrity, and for the last 25 years have had an extensive sale in this and other states of the Union. The defendants do not make or deal in cigars. They manufacture cigar boxes, which they sell to cigar makers. They also procure from lithographers labels which are almost an exact reproduction of those used by the complainant, even the signature being copied therein. That boxes, thus labeled, are so close an imitation of the packages in which complainant sells his goods, that an ordinarily careful purchaser would be deceived thereby, is not controverted. Not only do the defendants affix to their boxes the three labels which are placed thereon before packing, but with each box they also sell to their customers a fourth label, which can only be placed on the box, as complainant places it, after the box is filled and closed. Were there any conflict as to the intent of the defendants, it would be difficult to escape the conviction that they prepare these boxes for the express purpose of enabling their customers to foist upon the public goods not of complainant's manufacture, representing them to be genuine. But there is no conflict; defendants concede that they know for what purpose their labeled boxes are to be used, and that they make and sell them for that purpose. In defense it is urged that it has been for many years the custom of the cigar trade in this country to use what are known as "Spanish labels;" that labels like those complained of in this suit have been on open sale at various lithographers, and could be obtained by any one; and that nearly all the cigar box manufacturers in this city, as well as in other cities in this country, have made and sold boxes bearing labels similar to those complained of in this suit. As to the imitation of labels of other manufacturers,—“Spanish labels” generally, as defendants call them,—that is wholly immaterial. Complainant is not to be deprived of his trade-mark because other owners of other trade-marks suffer infringement without objection; and as to other imitations of his own trade-mark there is not a particle of evidence to show that these were made or sold with his consent or acquiescence. This defense has been so frequently and forcibly condemned by authority that further discussion is profitless. *Taylor v. Carpenter*, 3 Story, 458; 2 Woodb. & M. 7; Browne, Trade-Marks, § 685, and cases cited. Nor is there anything to the suggestion that injunction will not lie against defendants, because they do not themselves make, pack, or sell the fraudulent cigars. No doubt they may make the boxes without objection. There is no trade-mark, so far as appears, in the style, size, or shape of a cigar box. But they do much more. They procure labels counterfeiting the complainant's, and assemble these labels with their boxes, with the obvious purpose of enabling others, by the use of the labels, to palm off their goods upon the public as the goods of the complainant. Complainant is clearly entitled to an injunction against all who knowingly combine together to accomplish that purpose. *De Kuyper v. Witteman*, 23 Fed. Rep. 871; *Hostetter Co. v. Brueggeman-Reinert Distilling Co.*, 46 Fed. Rep. 188. Motion granted.

SCRIBNER v. CLARK *et al.*

(Circuit Court, N. D. Illinois. April 9, 1888.)

## 1. COPYRIGHT—INFRINGEMENT—TITLE OF COMPLAINANT.

In a suit for the infringement of a copyright, where it is shown that the copyright was taken in the name of the complaining publisher as "proprietor," defendant cannot object that the author was a married woman, and that her husband was entitled to the fruits of her literary labor; for it will be presumed that the legal title of the author was properly vested in complainant.

## 2. SAME.

Complainant's title is sufficiently made out to enable him to maintain the suit where it is shown that he took the copyright in the name under which he did business, the name of a firm to all of whose rights he had succeeded on its dissolution.

## 3. SAME—MEASURE OF DAMAGES.

Where the infringing publication uses only a part of the matter of the original, and is issued in a different and much cheaper form, the measure of damages is the amount of profits realized by the infringer, and not the amount of profits that would have been realized to the copyright owner by the sale of an equal number of copies of the copyright edition.

## 4. SAME—DECREE—FORFEITURE.

Though the bill prays the forfeiture of all the infringing books, and the plates used in their production, it is unnecessary to grant any other relief than damages, where it is shown that the infringer's place of business, with all the books and plates in question, has been destroyed by fire.

In Equity. Bill by Charles Scribner against Belford Clark & Co. for infringement of copyright. Decree for complainant. Affirmed in 12 Sup. Ct. Rep. 734.

*W. C. Larned*, for complainant.

*Hutchinson & Partridge*, for defendants.

BLODGETT, District Judge. This is a bill in equity charging the defendants with infringement of a copyright owned by the complainant of a publication entitled, "Common Sense in the Household: a Manual of Practical Housekeeping. By Marian Harland." The case was referred to one of the masters of the court to take proofs and report findings upon the question of infringement, and he has reported that the defendants, by the publication and sale of two books set out and described in the bill of complaint, one under the title of "How to Cook," and the other under the title of "Economy Cookbook," have infringed upon the complainant's copyright by incorporating into their said publication something over 50 pages of the matter of complainant's book, as well as substantially following the arrangement of subjects and headings. *Myers v. Callaghan*, 10 Biss. 139, 5 Fed. Rep. 726. I have carefully examined the proof upon which the master bases his findings, and am satisfied that the finding was fully justified by the testimony. The case is now before me on defendants' exceptions to the master's findings, and on complainant's motion for a decree in pursuance of the master's report. It was objected at the hearing that the complainant could not recover in this case, because the proof shows that Mrs. Terhune, the author of this book, whose *nom de plume* is Marian Harland, was a married

woman at the time the copyright in question was taken, and that by the common law her husband is entitled to the benefits of her literary work, as well as any other proceeds of her industry during coverture. I do not think this point can avail the defendants, because the proof shows that the first edition of the work was copyrighted in the name of "Charles Scribner & Co., Proprietors;" and the second edition, which is the one now in controversy, was copyrighted in the name of "Charles Scribner's Sons, Proprietors;" and, as the proof shows that Mrs. Terhune settled from time to time with the owners of the copyright for her royalties, the court will presume that her legal title as the author of these books was in some due and proper manner conveyed to and vested in the persons who secured the copyright thereof. Acquiescence for so many years by all the parties in this claim of proprietorship in the copyright is, it seems to me, enough to answer this suggestion of Mr. Terhune's possible marital interest in his wife's earnings. It is certain that, if there is any ownership in this work by copyright at all, it is in the complainant, in whose name the copyright was taken and now stands, so far as is shown by the proof in this case. If the law of the domicile of Mrs. Terhune entitles her husband to any part of her earnings, that is a matter to be settled between her husband and the complainant, and which the defendants cannot interpose as a defense to a trespass upon the complainant's property rights in this copyrighted book.

It is further objected by the defendants that the complainant's title is not sufficiently made out to justify him in maintaining this suit, but this objection I do not think is sustained. The proof shows that the first edition was copyrighted in the name of "Charles Scribner & Co.," a firm of book publishers at that time well known in the United States. This firm was dissolved shortly after the first copyright was obtained by the death of Mr. Charles Scribner, the senior member, and the business assumed and carried on by "Scribner, Armstrong & Co." as successors to all the trade, business, and good will of Charles Scribner & Co., who continued the publication of this book, with other business, without question or interference. About 1878 this firm was dissolved, and was succeeded by the firm of "Charles Scribner's Sons," consisting of Charles Scribner, the present complainant, and John Blair Scribner, who succeeded to all the rights, property, interests, and good will of the firm of Scribner, Armstrong & Co. In January, 1879, the firm of Charles Scribner's Sons was dissolved by the death of John Blair Scribner, and the present complainant, by purchase of the interest of the deceased member, became the sole successor of the preceding firm, with the right to use the name thereof, and has continued to carry on the business under the name of "Charles Scribner's Sons." The second copyright was taken out in September, 1880, after the death of John Blair Scribner, and after the present complainant, under the name of "Charles Scribner's Sons," had succeeded to all the rights of the preceding firm; and this copyright was taken in the name of "Charles Scribner's Sons," under which name the complainant, Charles Scribner, was then doing business.



The infringement in question is charged upon the last edition; and, upon the facts shown in the record, there can be no doubt that an infringement of this copyright owned by the complainant in his business name is fully shown. In regard to this last edition, it can make no difference, so far as the defendants are concerned, how the complainant acquired the right to Mrs. Terhune's literary work. It is enough that the proof shows that he took the copyright of the second edition in the name under which he then conducted his business, and whether he has paid Mrs. Terhune any royalties or not is a matter of no concern to the defendants. The trespass charged in the bill, and established by the proof, is upon the property of the complainant, to which he has title by virtue of his copyright.

The only question left for consideration is the amount of damages to be awarded. The book covered by the complainant's copyright was written and prepared by Mrs. M. Virginia Terhune, an authoress well known in this country by her *nom de plume* of "Marian Harland." The first edition was published in 1871, and the copyright taken in the name of Charles Scribner & Co., under a contract between the firm and Mrs. Terhune that the firm should have the exclusive right of publishing the work for a term of seven years from the date of the copyright, and should pay the author the sum of 30 cents per copy as royalty on all books sold. A new edition of the work was prepared by Mrs. Terhune in 1880, which was duly copyrighted in the name of "Charles Scribner's Sons," as proprietors, on the 18th of September of that year. By agreement between complainant and Mrs. Terhune, the retail price of both editions of the book was to be \$1.75 per volume, and the proof shows that the profits of the publishers were about 56 cents per copy, net. It is contended on the part of complainant that the rule of damages in this case should be the same as that adopted in *Pike v. Nicholas*, L. R. 5 Ch. App. 261, referred to in *Drone*, Copyright, p. 535. This rule is that the defendant is to account for every copy of his book sold as if it had been a copy of complainant's book, and to pay the complainant the profit which the latter would have received from the sale of so many additional copies. The proof in this case shows, and it is a conceded fact, that the infringing book published by the defendants was a cheap edition intended for popular sale at news stands, a small edition of a little over 9,000 copies having been sold at about 60 cents a copy, and a still cheaper edition having been put upon the market at 10 cents a copy, of which the defendant sold 60,671 copies. While the rule contended for as to the measure of damages may have been a proper one in the case of *Pike v. Nicholas*, it seems to me it is not the proper rule in this case, inasmuch as the defendants only used part of the material of the complainant's book, and as their edition was a much cheaper one, and their sales at a very much lower price. If the defendants had put their editions upon the market at the same price at which the complainant sold his books, the rule in *Pike v. Nicholas* might be adopted here; but it does not follow that if defendants had put upon the market such editions of their book as were published by the complainant they could, or would, have

sold over 70,000 copies. The fair and rational presumption from the facts is that it was the low price at which the defendants' books were offered in the market that caused these large sales. It seems to me the just and proper rule in this, as in all other cases of this character, is to ascertain the profits the defendants made by their piracy of the complainant's work, and fix that as the measure of the complainant's damages; and, as the only proof as to the amount of these profits comes from the defendants, this is the only proof to be considered on this question. The defendants' books of account have been produced before the master, and show that the profit on the sales of the two editions published by them, that is, the proceeds of the sales, less cost of production and selling, was \$1,092.53; and this amount must therefore be taken as the measure of the complainant's damages in this case.

The bill contains the usual prayer for the forfeiture of all the books on hand, and of the plates, etc., used by the defendants in the production of the pirated work. About a year ago, and since the commencement of this suit, the place of business of the defendants was destroyed by fire, and it is conceded that all the books on hand, together with their stereotyped plates, engravings, etc., used in the publication of this work, were totally destroyed at that time, and that defendants have not reproduced these plates, or continued the publication of the work. This renders it unnecessary to grant any relief upon the prayer for forfeiture, and leaves the complainant entitled only to a decree for perpetual injunction against the further publication of the book, and for the amount of damages above stated, with the costs of this suit.

## THE CALVIN S. EDWARDS.

GRAVES *et al.* v. THE CALVIN S. EDWARDS.

(Circuit Court of Appeals, Second Circuit. February 16, 1892.)

## SHIPPING—DAMAGE TO CARGO—PERIL OF THE SEA.

On the evidence, *held*, that the damage suffered by the cargo of the Calvin S. Edwards was not occasioned by the negligence of her master and crew, but was due to perils of the sea, and hence that the vessel was not liable for such loss.

Appeal from the District Court of the United States for the Eastern District of New York. Affirmed.

In Admiralty. Libellant shipped on board of the schooner Calvin S. Edwards a cargo of lumber to be transported from Norfolk to New York. The vessel encountered a severe gale, which lasted for 16 hours, and which left her leaking so badly that her master and crew abandoned her, being taken off by a passing boat. Thereafter she was picked up, and towed to New York, when both she and her cargo were sold in a suit brought against them to recover salvage. See 46 Fed. Rep. 815. This libel was filed by the owners of the cargo, who claimed that the schooner was abandoned, not by reason of perils of the sea, but because of the negligence of her crew; also that she was unseaworthy, being 31 years old. The district court delivered the following opinion:

"The evidence does not show that the omission to perform the contract of the carrier in regard to the libelants' lumber arose from unseaworthiness of the vessel. The fact that the forward pump was out of order is not evidence that the vessel was unseaworthy at the time of the charter, nor does the evidence show that the leaking of the vessel arose from the schooner's being old. Many vessels as old as this are seaworthy for the purpose of carrying a cargo of lumber. Neither does the disaster to the vessel appear to have arisen from negligence on the part of her master or crew in the navigation. What caused the abandonment of the voyage was the severe storm which the vessel endured for sixteen hours, during which time nearly all her sails were blown away, her foreboom broken, her boat washed away, both anchors parted from the chains, and all the fresh water either washed overboard or spoiled. The condition in which the vessel was left by the storm justified her abandonment. The libel must be dismissed, with costs."

*Peter S. Carter*, for appellants.

*Robert S. Minturn*, for appellees.

Before WALLACE and LACOMBE, Circuit Judges.

PER CURIAM. We are satisfied with the opinion of the court below in this case, and affirm the decree.

## THE ROLF.

LAW *et al.* v. THE ROLF.

(Circuit Court of Appeals, Second Circuit. February 16, 1892.)

## COLLISION—SAIL VESSELS CROSSING—COLLISION RULES, ART. 14, (c.)

Collision occurred on the high seas, on a clear morning, between the ship Rolf and the bark Boyd. The Rolf, bound from Havre to Sandy Hook, was sailing at least two points free, with the wind on her starboard side. The Boyd, bound from New York to Hong Kong, had the wind on her port side. Her contention was that she was sailing closehauled. The Rolf's witnesses asserted that the Boyd also was sailing free. The Boyd did not alter her course. The Rolf put her helm up after collision was inevitable, but was struck on her starboard side. *Held*, on the evidence, that the Boyd, as well as the Rolf, was sailing free, and hence, under the International Collision Rules, art. 14, (c.)—(33 St. at Large, p. 441.)—the Boyd was bound to avoid the Rolf, which had the wind on her starboard side, and was liable for her failure so to do.

47 Fed. Rep. 220, affirmed.

In Admiralty. Appeal from the District Court of the United States for the Eastern District of New York. Affirmed.

*Wing, Shoudy & Putnam*, (*Harrington Putnam*, of counsel,) for appellants.

*Buller, Stillman & Hubbard*, (*Wilhelmus Mynderse*, of counsel,) for appellee.

Before WALLACE and LACOMBE, Circuit Judges.

PER CURIAM. We are satisfied with the opinion of the court below in this case, and affirm the decree.

## THE MOONLIGHT.

## THE JOHN F. WINSLOW.

## MIDDLETON v. THE JOHN F. WINSLOW AND THE MOONLIGHT.

(District Court, S. D. New York. April 18, 1892.)

## 1. COLLISION—VESSEL AT BULKHEAD—LANDING OUTSIDE—RISK.

The landing of a heavy vessel in a strong tideway outside of a light vessel, which is lawfully moored at a bulkhead, is wholly at the risk of the vessel so attempting to land, and she is liable for any injury she may inflict on the vessel at rest.

## 2. NAME—TUG AND TOW—IMPROPER LANDING—WHEN BOTH LIABLE.

Where a tug with a tow alongside attempts to land outside another boat, and both tug and tow concur in making the attempt, and a bad landing is made through the influence of both, both are responsible for any damage such landing may occasion.

In Admiralty. Libel for collision.

*Carpenter & Mosher*, for libellant.

*Goodrich, Deady & Goodrich, for the tug.*  
*Alexander & Ash, for the schooner.*

BROWN, District Judge. On the 6th of April, 1891, the tug John F. Winslow took in tow upon a hawser the schooner Moonlight, loaded with a cargo of wood, consigned to Benjamin F. Gerken, who had a wood yard at Seventy-Fifth street, East river. The schooner was taken to the short dock at Seventy-Fifth street, headed down river against the flood tide, and a line temporarily made fast to the dock from outside of a brick barge that was unloading there. Being told that he would get a berth sooner at Seventy-Sixth street, the master requested the tug to assist him in going there, to which the tug assented. The landing at Seventy-Sixth street was a bulkhead, alongside of which were already moored two boats, the libelant's barge being the outside boat, and light. The line to the Seventy-Fifth street dock was cast off, and the schooner allowed to drift up stern first in the strong flood tide, while the tug still kept hold of her, regulating and checking her movements as desired. When she had got abreast of the libelant's boat, her sternway was stopped by the tug, and, both tug and schooner putting their wheels to port, the schooner was gradually worked alongside of the libelant's boat and then made fast to the shore. The libelant claims that she came alongside with a crash, causing the canal boat to spring a leak badly; so that she gradually filled with water, and before she could be rescued on the next day, she was swamped by the swell of a passing steamer, when, being cut loose from the boat to which she was attached, she drifted away with the tide and became a total loss. The above libel was filed to recover the damage.

The evidence is of the most contradictory character. A number of the libelant's witnesses who were present testify that the schooner landed against the libelant's boat with a loud crash; one said it could be heard half a block away; the captain of the schooner says she landed against the canal boat so gently, that she would not have broken an eggshell.

The landing of such a schooner alongside a light canal boat in a strong tideway is evidently not free from either difficulty or danger. I think it was wholly at the risk of the schooner and tug. The canal boat was rightly where she was. The right to land a third vessel, loaded as this schooner was, outside of a light canal boat, was certainly not an absolute right; and the schooner, therefore, took whatever risk attended it. The great weight of testimony is that the schooner came alongside with a sufficient blow to account naturally for the leak that followed. The wood loaded on deck projected over the schooner's rail; and when she sagged up against the canal boat, the wood, or the fenders on the side of the wood, necessarily caught the upper part of the canal boat's side, and created a far greater strain by lateral pressure against the tops of her timbers, than would have occurred in the ordinary meeting of boats side to side.

The most unusual circumstance in the matter is the fact that the captain of the canal boat, who was aboard at the time, made no complaint

against the schooner either then or afterwards. His unusual reticence is urged as evidence that the claim is ill grounded or fictitious. The master, however, immediately went to the agent's office to report the difficulty. It is plain that he did not apprehend any immediate loss of the boat; and he made no effort to keep the boat clear by pumping; explaining that the leak was too great to be controlled in that way. The captain had also only come aboard that day a few hours before, replacing the former captain discharged. His appearance shows that he was a person of little energy or efficiency, though sufficiently intelligent. Taking these circumstances altogether, I am inclined to think they sufficiently account for his conduct, without any impeachment of his good faith, or of the general credit of the narrative given by the libelant's witnesses. In appearance, manner, and testimony they compare favorably with the captain of the schooner.

Whether the tug was or was not bound to take the schooner to Seventy-Sixth street after having arrived at Seventy-Fifth is immaterial, since upon the schooner's request she acceded, and took charge of landing her at Seventy-Sixth street. Both were active in making the landing up to the moment the libelant's boat was struck; both concurred in making the attempt; and the sagging against the canal boat was under the influence of the tug and the schooner alike; both were immediate agents, and equally active in the work; and both are, therefore, equally responsible for the result.

The libelant's boat was no doubt an old one. She was bought in April, 1889, for \$350, and the repair bills since were small. She was, however, in fair condition for the class of business in which she was engaged; she was of value to the owner, in a lawful business, and was without fault. The libelant is, therefore, entitled to recover his actual damage. *The Granite State*, 3 Wall. 310. Besides the ordinary repair bills, her depreciation since she was purchased would be about \$50 per year. Two hundred and fifty dollars would, therefore, seem to be a fair allowance for the boat; and for the other items mentioned upon the trial \$150 would probably be a reasonable allowance, making \$400, with interest. But, as the evidence of the damage was not perhaps fully gone into, if either party is not satisfied with this sum, he may have an order of reference, paying the costs thereof if a more favorable result is not secured.

## FARMERS' LOAN &amp; TRUST CO. v. GRAPE CREEK COAL CO.

(Circuit Court, S. D. Illinois. May 7, 1892.)

## CORPORATIONS — FORECLOSURE OF MORTGAGE — RECEIVER'S CERTIFICATES — EQUITY JURISDICTION.

In a suit to foreclose a mortgage on the property of a coal mining company the court has no power, as against the objection of even a small minority of the holders of the mortgage bonds, to authorize a receiver appointed in the suit to issue certificates which shall be a first lien on the mortgaged property, in order to enable him to continue the operation of the mines.

In Equity. Bill by the Farmers' Loan & Trust Company against the Grape Creek Coal Company to foreclose a mortgage. A receiver was appointed, and he now asks leave to issue receiver's certificates.

*Runnells & Burry*, for Farmers' Loan & Trust Co.

*W. J. Calhoun*, for J. G. English, receiver.

*Hess & Johnson*, for Travellers' Ins. Co. and other objecting bondholders.

GRESHAM, Circuit Judge. The defendant, a private corporation, whose chief business is mining and selling coal, conveyed to the complainant, in trust, lands and two coal mines in Vermilion county, Ill., to secure an issue of bonds amounting to \$500,000. An installment of interest was allowed to remain due for more than six months, and this bill was filed to foreclose the trust deed. Joseph G. English, who was appointed receiver, asks for an order authorizing him to issue receiver's certificates not exceeding in all \$24,000, which shall be a first lien upon the trust property, to enable him to pay taxes now due, amounting to \$3,428.64, take up outstanding certificates amounting to \$6,400, which were issued under an order of the Vermilion circuit court, in a suit to foreclose the same trust deed, and to continue the operation of the mines. The receiver represents that, with additional working capital, he could operate the mines profitably, and better protect them. The holders of 75 per cent. of the bonds and the corporation join in the receiver's request. The holders of the remaining 25 per cent. resist the application. The corporation is insolvent. It is not claimed that the receiver is without means to pay taxes, and it is chiefly to enable him to continue the operation of the mines for anticipated profits that he desires authority to issue certificates.

When it becomes necessary for a court of chancery to take possession of property which is the subject of litigation, by placing it in the hands of a receiver, all expenses incident to its safe-keeping and preservation are properly chargeable against it; and, if there be no income, such expenses will be paid out of the proceeds of the *corpus* before distribution to lien or other creditors. It does not follow, however, that because property of a private corporation or a natural person may be thus protected and preserved before sale, that, in order to raise money to operate it for profit, a court may place a charge upon it in advance of exist-

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ing liens. Pending a suit to foreclose a mortgage executed by a railroad corporation, the road may be operated by a receiver, and debts contracted for labor, supplies, and other necessary purposes before as well as after the appointment of a receiver, may be made a first lien upon income, and, if that is not adequate, upon the *corpus* of the property. In the exercise of this exceptional and extraordinary jurisdiction, which is of comparatively recent origin, courts have entered orders making receiver's certificates first liens on the mortgaged property. This has been done, however, on grounds not applicable to mortgages executed by private corporations. A railroad corporation is a *quasi* public institution, charged with the duty of operating its road as a public highway. If the company becomes embarrassed and unable to perform that duty, the courts pending proceedings for the sale of the road will operate it by a receiver, and make the expense incident thereto a first lien. This is done on account of the peculiar character of the property. It is generally mortgaged to secure bonds, and persons who invest in such securities know that the mortgage rests upon property previously impressed with a public duty. Private corporations owe no duty to the public, and their continued operation is not a matter of public concern. It is only against railroad mortgages that the supreme court of the United States has sustained orders giving priority to receiver's certificates representing particular indebtedness, and, as already stated, then only on principles having no application to a mortgage executed by a private corporation owing no duty to the public. *Fosdick v. Schall*, 99 U. S. 235; *Barton v. Barbour*, 104 U. S. 126; *Miltenberger v. Railroad Co.*, 106 U. S. 286, 1 Sup. Ct. Rep. 140; *Union Trust Co. v. Railroad Co.*, 117 U. S. 434, 6 Sup. Ct. Rep. 809; *Wood v. Trust Co.*, 128 U. S. 421, 9 Sup. Ct. Rep. 131; *Kneeland v. Trust Co.*, 136 U. S. 89, 10 Sup. Ct. Rep. 950; *Morgan's, Etc., Co. v. Texas Cent. Ry. Co.*, 137 U. S. 171, 11 Sup. Ct. Rep. 61.

In *Wood v. Trust Co.* the court said:

"The doctrine of *Fosdick v. Schall* has never yet been applied in any case except that of a railroad. The case lays great emphasis on the consideration that a railroad is a peculiar property, of a public nature, and discharging a great public work. There is a broad distinction between such a case and that of a purely private concern. We do not undertake to decide the question here, but only point it out."

In *Kneeland v. Trust Co.*, *supra*, in discussing the jurisdiction of the chancellor to displace the lien of a railroad mortgage, the court said:

"Upon these facts we remark, first, that the appointment of a receiver vests in the court no absolute control over the property, and no general authority to displace vested contract liens. Because, in a few specified and limited cases, this court has declared that unsecured claims were entitled to priority over mortgage debts, an idea seems to have obtained that a court appointing a receiver acquires power to give such preference to any general and unsecured claims. It has been assumed that a court appointing a receiver could rightfully burden the mortgaged property for the payment of any unsecured indebtedness. Indeed, we are advised that some courts have made the appointment of a receiver conditional upon the payment of all un-



secured indebtedness in preference to the mortgage liens sought to be enforced. Can anything be conceived which more thoroughly destroys the sacredness of contract obligations? One holding a mortgage debt upon a railroad has the same right to demand and expect of the court respect for his vested and contracted priority as the holder of a mortgage on a farm or lot. So, when a court appoints a receiver of railroad property, it has no right to make that receivership conditional on the payment of other than those few unsecured claims which, by the rulings of this court, have been declared to have an equitable priority. No one is bound to sell to a railroad company, or to work for it; and whoever has dealings with a company whose property is mortgaged must be assumed to have dealt with it on the faith of its personal responsibility, and not in expectation of subsequently displacing the priority of the mortgage liens. It is the exception, and not the rule, that such priority of liens can be displaced. We emphasize this fact of the sacredness of contract liens for the reason that there seems to be growing an idea that the chancellor, in the exercise of his equitable powers, has unlimited discretion in this matter of the displacement of vested liens."

And further on in the same opinion the court said:

"If, at the instance of any party rightfully entitled thereto, a court should appoint a receiver of property, the same being railroad property, and therefore under an obligation to the public of continued operation, it, in the administration of such receivership, might rightfully contract debts necessary for the operation of the road, either for labor, supplies, or rentals, and make such expenses a prior lien on the property itself."

In the language above quoted, there is a plain implication that the limited power which courts may exercise in displacing the liens of railroad mortgages should not and cannot be extended to mortgages executed by private corporations. The court is not asked to subvert the lien of the mortgage on the ground that the trustee or bondholders have got possession of anything which, in equity, belongs to general creditors. It is to enable him to operate the mines for the benefit of bondholders, against the wish of part of them, that the receiver desires to be invested with authority to issue certificates which shall be a prior lien upon the property embraced in the trust deed. Extensive as are the powers of courts of equity, they do not authorize a chancellor to thus impair the force of solemn obligations and destroy vested rights. Instead of displacing mortgages and other liens upon the property of private corporations and natural persons, it is the duty of courts to uphold and enforce them against all subsequent incumbrances. It would be dangerous to extend the power which has been recently exercised over railroad mortgages, (sometimes with unwarranted freedom,) on account of their peculiar nature, to all mortgages. The power does not exist, and the application is denied.

HOFFMAN *et al.* v. KNOX *et al.*

(Circuit Court of Appeals, Fourth Circuit. May 24, 1902.)

No. 8.

## 1. REHEARING—FINAL DECREE.

A decree fixing the priority of claims against an insolvent corporation, and directing the sale of its property for their payment, is a final decree, within equity rule 88, relating to rehearings.

## 2. BILL OF REVIEW—APPARENT ERROR.

Where a decree fixes the priority of claims against an insolvent corporation under the authority of an act of the state legislature, the question of the validity of the act not being raised at the time, a bill of review will not lie for apparent error, because the act is subsequently adjudged unconstitutional and void by the state courts on the ground of a defective title.

## 3. SAME—PERFORMANCE OF DECREE—DELAY.

In proceedings against an insolvent corporation claims for supplies were adjudged prior to the lien of mortgage bondholders under authority of an act of the state legislation, (as to the validity of which no question was raised,) and its property was directed to be sold. One of the bondholders became the purchaser, the others giving a bond as security for the deferred payments. Eighteen months thereafter the state court declared the act unconstitutional and void because of a defective title; whereupon the mortgage bondholders filed a petition for rehearing, (which was treated as a bill for review,) praying a vacation of so much of the decree as awarded priority to the supply claims. *Held*, it not appearing that complainants had performed the decree as to deferred payments, nor offered to place the supply claim creditors in the same position as before the decree was entered, and owing to the lapse of time, the petition should have been dismissed.

*Knox v. Iron Co.*, 42 Fed. Rep. 378, reversed.

Appeal from the Circuit Court of the United States for the Western District of Virginia. Reversed.

Statement by FULLER, Circuit Justice:

This was a bill filed by Samuel Knox against the Columbia Liberty Iron Company, alleging that the company had purchased a large tract of iron ore and woodland for the expressed consideration of \$270,000, which was paid in its stock and in 6 per cent. first mortgage bonds to the amount of \$150,000, the total issue of which was for \$219,000, the balance having been pledged as collateral security, and in 6 per cent. second mortgage bonds to the amount of \$145,000; that the mortgages bore the same date, and were secured upon the tract of land, and all the property of the company of every description, and its corporate franchises. It was further averred that complainant was the holder of certain of said mortgage bonds of both issues; that default had been made in the payment of interest after demand; that complainant had made various loans to the company, which it had failed and was unable to pay, and that there were other liabilities represented by promissory notes, open accounts for merchandise and supplies, and for wages and salary; that the company was insolvent, and had not the funds to carry on its ordinary business, although a large income could be derived therefrom, and to avoid the sacrifice of the property, and the disastrous consequences of suspending its business, it was necessary that a court of equity should interpose for the immediate appointment of a receiver, with power to administer the company's affairs. The bill prayed for such appointment, for injunction, and general relief. The company filed its answer, in which it "admitted the truth of the averments, and



submitted its interests to the court;" and the court appointed two receivers for the company, with authority to continue its operations, and with instructions to report to the court the condition and circumstances of the company, and its liabilities and debts.

On September 30, 1886, several creditors of the company filed a petition in the cause by leave of court, on behalf of themselves and other similarly situated, setting up certain supply claims recorded by them under the act of the general assembly of Virginia of April 2, 1879, averring that receivers' certificates had been issued; that there were many other like claims; that the affairs of the company were not improving; and praying that the proper accounts might be taken, and a decree for the sale of the property be granted. On October 14, 1886, the cause was referred to a special master to ascertain and report the debts outstanding against the company, not including the first and second mortgage bonds, and the priorities of the debts, if any. On the 4th of February, 1887, a petition was filed on behalf of one Pollard and all other creditors of the company who might avail themselves of the benefit of the same, praying for the removal of the two receivers, and the appointment of a single receiver. This petition (and rule thereon rendered) was answered by both of the receivers, one of whom stated "that he accepted the position of receiver of said company only at the request of Mrs. Mary W. Pearson, George W. Pearson, and Chas. L. Pearson, of Trenton, N. J., the largest holders of the capital stock of said company, and who now own or control a majority of both the first and second mortgage bonds, and of the complainant Samuel Knox, the petitioner Pollard, and Jacob Wissler;" and expressing entire willingness to relinquish the trust. On the 17th of February, 1887, Mary W. Pearson, Charles L. Pearson, and George W. Pearson, of New Jersey, filed their petition in the cause, by leave of court, setting forth their ownership of 1,885 shares of the capital stock of the iron company; and also that they were holders of 107 of the first mortgage bonds of the company in their own names, and others as collateral; and also of 112 of the second mortgage bonds; and stating that they were not satisfied with the present management of the receivers; that one of said receivers was named at the instance and request of said petitioners and others, and still had their entire confidence, but that a disagreement between the two militated against the proper management of the trust; and they requested the appointment of one Wissler as sole receiver. Thereupon the receivers were removed, though not upon any ground reflecting upon them personally, and Wissler appointed.

On February 14, 1887, the report of the master was filed, setting forth the outstanding indebtedness, not including the first and second mortgage bonds, and awarding priority to the labor and supply claims as stated therein. To this report exceptions were filed on behalf of a large number of claimants and creditors, and among others, on the 14th of March, 1887, exceptions by Mary W. Pearson, Charles L. Pearson, George W. Pearson, and H. H. Yard, creditors and bondholders of the company, their 1st, 2d, and 3d exceptions being:

"So far as it reports 'all labor claims open on the books of said company up to June 10, 1886, and closed on that day per the several statements filed by the claimants or their assignees. Said claims fell due on said June 10, 1886, and if even not recorded on the 14th of October, 1886, should be reported as subsisting liens, in the intent and meaning of the statute, and must be reported with priority as of that date with the common class, with all that stood unrecorded on that day, even should any of them have been recorded afterwards.' (2) Because he reports the words 'office agent,' used in the statute, as applying to the position of treasurer of said Columbia Liberty Iron Company. (3) As improperly construing the words 'conductors' and 'captains,' as applying to the position of managers."

Several other exceptions questioned the allowance of particular items as liens, or in respect of priority or of amount. The report was recommitted, with instructions to consider any testimony upon the various exceptions, and another report was made on May 11, 1887, to which exceptions were filed. The report and exceptions related particularly to the construction of the statutes of Virginia in relation to labor and supply claims, and as to whether claimants were barred under that statute, and generally to the classification of claims. The report was again recommitted, and on June 17, 1887, the court by decretal order of that date directed the master to make, state, and settle the following accounts: (1) An account of the indebtedness of the company due by mortgage or deed of trust upon its property, and by whom and in what proportions held, and how evidenced, and the priorities or equities among the several holders or claimants thereof. (2) An account of other indebtedness of the company, together with any priorities by way of lien or otherwise; and in this connection stating specially any lien of any sort that might subsist against any part of the company's property, so stated that there might appear a full and correct account of the company's indebtedness, and with the respective priorities of the same, with a view to a sale of the property. (3) An account of the property, real and personal, of the company. (4) Any other account which any party in interest may require or the commissioner may deem of importance.

On August 31st, a partial report of the special master was made. This was followed by a decree September 8, 1887, disposing of the various exceptions to the master's reports, overruling, among others, the first exception of Mary W. Pearson and others, and sustaining exceptions to particular items. It was decreed, among other things, that all claims for labor and supplies that had not matured more than six months before the order of reference, October 14, 1886, or, having matured more than six months prior thereto, had been recorded, should be liens upon the property and franchises of the company superior to that of the bondholders of the company, and must be paid before said bonds; that all claims which had matured more than six months prior to October 14, 1886, and not recorded as required by the statutes of Virginia, within six months after maturity, were not liens on the company's property, and were subordinate to the bondholders; that, as between claims for labor and supplies furnished said company, the labor claims were prior, and must be paid first; and that the president, treasurer, secretary, and

manager were not entitled to priority, but must be treated as general creditors. It was further ordered and decreed that the special master proceed and complete his accounts as directed by the decretal order of June 17, 1887, stating therein all liens upon the property of the company in the order of their priority, in accordance with the opinion of the court expressed in the decree. The disposition of one claim was reserved for further consideration on the master's report.

On September 24, 1887, a report was made by the master, stating the accounts specifically as directed. Exceptions were filed to this report by Mary W. Pearson and others in respect of two specified claims. On October 14, 1887, a decree was entered reciting that the cause came on to be heard upon the papers formerly read and proceedings theretofore had, the report of September 24th, etc., and overruling the exceptions to the report, which report was approved and confirmed, and special commissioners appointed (all parties in interest waiving delay for redemption) to make sale of the property in question, at public auction as prescribed, for one quarter cash on confirmation, and the balance in one, two, and three years, with interest from day of sale. The property was accordingly sold on January 5, 1888, to George W. Pearson, for \$51,000, and by decree of May 26, 1888, the report of the sale, under the decree of October 14, 1887, was confirmed, there being no exceptions; a deed directed to be given; payment of the costs of suit and of sale out of the cash payment and distribution of the balance ordered; and settlement of the receiver's accounts. Provision was also made for the collection of the deferred payments, to be disbursed under future order of court.

May 8, 1889, Mary W. Pearson, George W. Pearson, and Charles L. Pearson, on behalf of themselves and all other holders of the first mortgage bonds of the company, applied to the court for leave to file a petition for rehearing or bill of review to review the decrees of September 8, 1887, and October 14, 1887, and on July 19, 1889, leave to do so was granted. The prayer of this petition or bill of review was that the decrees named should be reviewed, reversed, and set aside, so far as they established and adjudged the rights of other creditors of the company to be superior or equal to those of petitioners. The petition set forth the various orders, proceedings, and decrees heretofore referred to, and claimed that there were no superior equities in favor of the labor and supply claims entitling them to a lien superior to the mortgage bonds; that the acts of the legislature of Virginia, which it had been held created a prior lien in favor of these claims, were unconstitutional and void; that the petitioners were entitled to a vendor's lien upon the property; and that the special master erred in refusing to recognize this lien, and in giving the labor and supply claims superiority to the first mortgage bonds. To the filing of this petition or bill the labor and supply claimants objected, and after it had been filed, by leave of court, demurred, assigning as grounds that the petitioners had no vendor's lien; that the acts of the Virginia legislature referred to were not unconstitutional and void; and that the petition did not allege that the matters

therein set up had been discovered after the rendition of the decrees complained of, and could not have been produced by the use of due diligence before. They also filed an answer in which they denied any error in the decrees, the existence of any vendor's lien, and the unconstitutionality of the legislative acts; and contended as to the latter that, if a defect existed, it had been cured by section 2485 of the Virginia Code of 1887. They also insisted that their equities were superior to those of the bondholders, and that the latter were estopped by the decrees, and their own acquiescence in them, or by lapse of time. The answer further claimed that the capital stock of the company had never been paid in, and constituted a fund for the payment of debts. December 19, 1889, the court rendered a decree, which sustained the first ground of demurrer, that as to the vendor's lien, and overruled the others, and reheard and set aside the decrees in question, and referred the cause to a special master, who reported, February 17, 1891, that only the mortgage bonds which were held as collaterals for loans by the company ought to be held to have been negotiated, and to constitute valid liens under the mortgages; that the bonds apportioned among themselves by the original corporators of the company could not, as against the creditors of the company, be said to have been negotiated, and were not, therefore, liens; that the labor claims were prior liens upon the franchises and property of the company, and that the supply claims were also such prior liens; that, if this were not so, the sale should be set aside, and such creditors permitted to bid; and that there were unpaid subscriptions to the amount of \$218,625, which he was of opinion was a trust fund for the payment of debts, and should be collected from the delinquent subscribers. Various exceptions were filed by the parties in interest. On July 1, 1891, the court entered a decree that the labor and supply claims had no priority, and that the capital stock of the company had been fully paid, and was not liable to assessment for the payment of debts, and directing payment in the order therein stated. From these decrees the labor and supply creditors were allowed an appeal.

*John E. Roller*, for appellants.

*Geo. E. Sipe* and *John T. Harris, Jr.*, for appellees.

*Ed. S. Conrad*, for Mary W. Pearson and other petitioners.

Before FULLER, Circuit Justice, BOND, Circuit Judge, and Hughes, District Judge.

FULLER, Circuit Justice, after stating the facts, delivered the opinion of the court.

By the decrees of September 8 and October 14, 1887, all claims against the property in question, and the order of their priority, and the exceptions to the various reports, were disposed of, and the then final report of the master, as amended and reformed in accordance with the views of the court, was approved and confirmed, and thereupon commissioners were appointed to sell the entire property upon the terms of one fourth cash, and the balance payable in one, two, and three years, with

interest from the date of sale, with security. The sale thereupon took place and was confirmed May 26, 1887, and distribution made of the cash payment, and a final settlement with the receiver was directed. It seems to us that these decrees were and must be regarded as constituting a final decree in the case. We treat them together because the decree of September 8th, while it disposed of nearly all the claims and exceptions, reserved the determination of a specific claim or claims, which was arrived at by the adjudication of October 14th, and it was the latter, which, all these matters being concluded, decreed the sale. If an appeal had been taken by the present appellees to the supreme court of the United States, and the decree had been affirmed, the court below would have had nothing to do but to execute the decree which it had already entered. What remained to be done was merely in execution of what been determined, such as the collection of the outstanding payments, settling the receiver's accounts, payment of costs, and the like; and this is no less so because some other creditor might turn up, and seek to come in under the decree. The bringing of the fund into court was for the final distribution as decreed, and not to be held pending the ascertainment of the principles upon which it should be distributed. *Hill v. Railroad Co.*, 140 U. S. 52, 11 Sup. Ct. Rep. 690; *Bank v. Sheffey*, 140 U. S. 445, 11 Sup. Ct. Rep. 755. The petition for rehearing presented May 8, 1889, came too late. Equity rule 88. The circuit court held, however, that the petition could be treated as, and in fact was, a bill of review for errors apparent, and might be filed as such. Considered in this aspect, did the court err in the decree entered thereon December 19, 1889, reversing and setting aside the decrees of September 8 and October 14, 1887, "in so far as they gave priority to the claims of the supply and labor creditors of the said Columbia Liberty Iron Company as superior to the rights of the first mortgage bondholders?" This question is to be determined without resort to the proofs, upon the pleadings, proceedings, and decrees which in this country constitute the record proper.

Assuming that these were fully set forth in the bill, the demurrer raised the question. Being overruled, the decrees were reversed; if sustained, the bill would have been dismissed. Other matters are referred to, but they may be disregarded on this inquiry, and the bill taken as a pure bill of review for error apparent, thus stated by the circuit court, in its opinion, which will be found reported in 42 Fed. Rep. 378:

"In the master's reports, as confirmed, priority is given to certain labor and supply claims, contracted by the company before the appointment of the receivers, over the bonds secured by the mortgage. This priority was in accordance with the provisions of two acts of the general assembly of Virginia, approved, respectively, March 21, 1877, and April 2, 1879. Since the entry of the decrees of September 8 and October 14, 1887, in this cause, the Virginia statutes giving labor and supply claims a priority over the liens of the mortgage bondholders have, as to supply claims against railroad corporations, been declared by the court of appeals of Virginia to be unconstitutional, as in violation of article 5, § 15, of the constitution of Virginia. *Fidelity Ins., etc., Co. v. Shenandoah Val. R. Co.*, 86 Va. 1, 9 S. E. Rep. 759.

And this court has also, after full argument, in *Fidelity Ins., etc., Co. v. Shenandoah Iron Co.*, 42 Fed. Rep. 372, decided the act of April 2, 1879, to be unconstitutional as to both labor and supply claims against mining corporations. It is in view of these decisions that these petitioners ask leave to file their petition to have this cause reheard, and the decrees of September 8 and October 14, 1887, reviewed and reversed. \* \* \* But if it could be conceded that the decrees of September 8 and of October 14, 1887, are final decrees, the court is of opinion that the petition can be treated as, and in fact is, a bill of review for errors apparent on the face of the record, and might be filed as such. The recent decisions referred to, as deciding that the statute giving labor and supply claims the priority over the lien of the mortgage bondholders is unconstitutional, clearly presents a question of error on the face of the record. \* \* \* Since the rendition of the decrees complained of, the highest state court has declared the statute upon which the lien rests, or out of which it arises, to be invalid because unconstitutional, and federal courts will judicially notice and accept such decision."

To sustain a bill of review for error of law apparent, the decree complained of must be "contrary to some statutory enactment, or some principle or rule of law or equity recognized and acknowledged, or settled by decision, or be at variance with the forms and practice of the court." 2 Daniell, Ch. Pr. (5th Ed.) \*1577. The general rule is that such a bill does not lie to correct a mere error, which would, in effect, render it nothing more than a substitute for an appeal.

In *Perry v. Phelps*, 17 Ves. \*174, \*177, Lord ELDON said:

"There is a great distinction between error in the decree and error apparent. The latter description does not apply to merely erroneous judgments, and this is a point of essential importance; as, if I am to hear this case upon the ground that the judgment is wrong, and that there is no error apparent, the consequence is that in every instance a bill of review may be filed; and the question whether the case is well decided will be argued in that shape, not whether the decree is right or wrong on the face of it. The cases of error apparent, found in the books, are of this sort, an infant not having a day to show cause, etc., not merely an erroneous judgment."

So, also, a decree against the statute law is the subject for a bill of review, as, for example, a decree directing a legacy to be distributed contrary to the statute of distributions. Story, Eq. Pl. § 405. So where a decree was entered for the sale of mortgaged premises, capable of division, to pay the whole mortgage debt, when only a small part of the debt was due. *James v. Flak*, 9 Smedes & M. 144. And where a foreclosure decree was made contrary to the terms of the mortgage. *Mickle v. Maxfield*, 42 Mich. 304, 3 N. W. Rep. 961. These are manifest errors not open to controversy, and while the modern practice has tended to allow the court of first instance to review or reverse its own decrees, for an erroneous application of the law to the facts found, whenever an appellate tribunal would do so for the same cause, this has certainly not been carried so far as to ignore the rule in principle. That principle is that the remedy for mere error in a final decree is by appeal, and that the error apparent for which such a decree may be impeached by bill of review must be more than the result of mistaken judgment.

The ground upon which the supreme court of appeals of Virginia proceeded, and the circuit court, following the rule laid down by that court,



in the cases referred to, was that the acts in question, so far as they related to supply creditors and to mining and manufacturing companies, were unconstitutional and void, as in violation of the provision of the state constitution that "no law shall embrace more than one subject, which shall be expressed in its title." Const. Va. art. 5, § 15. It is ordinarily held that, if the subject of an act be expressed in the title in general terms, it will be sufficient under constitutional provisions like that quoted. The determination of the question whether the title of a particular act is comprehensive enough to reasonably include the several objects which the statute assumes to affect is one of great delicacy, and upon which opinions might well differ; and a decree rendered upon one view or the other, while it might be reversed by the appellate court as erroneous, can hardly be said to carry that error upon its face which is required as the basis of a bill of review.

If the question of the validity of these laws was raised in this case before the rendition of the final decree, and the circuit court erroneously determined that they were not obnoxious to constitutional objection, the remedy for such error would have been by appeal, and we do not think that the circuit court, because after the lapse of the term it arrived at a different conclusion in another case, could properly entertain a bill of review to impeach such a decree. The presumption was in favor of the constitutionality of the statute and the burden of proof on the party setting up its unconstitutionality; and if the court, upon its attention being drawn to the subject, judicially recognized the acts as valid, that determined the question for the case, if permitted to remain undisturbed without invoking the interposition of an appellate tribunal. The fact that nearly 18 months after the decree of October 14, 1887, the court of appeals of Virginia decided these laws to be unconstitutional for the reason stated, was not enough in itself to create error of law apparent, and justify a bill of review on that ground or that of new matter *in pais*.

Undoubtedly, the courts of the United States, as a general rule, properly follow the construction placed upon the constitution or laws of a state by the decisions of its highest tribunal, unless they conflict with or impair the efficacy of some provision of the federal constitution or a federal statute or a rule of general commercial law, (*Gormley v. Clark*, 134 U. S. 328, 348, 10 Sup. Ct. Rep. 554;) but this rule cannot be applied where the construction contended for has not been announced at the time of the final adjudication by the United States court, so as to make the latter erroneous on its face by relation. On the other hand, we cannot find that these bondholders raised any question whatever as to the validity of these laws, but, on the contrary, the exceptions they filed were directed to throwing out particular claims as not within the terms of the statutes, or claims in whole or in part as barred thereunder. It is a general rule that a bill of review will not lie to impeach a consent decree. *Thompson v. Maxwell*, 95 U. S. 391. And if these complainants chose to acquiesce in the allowance of these claims under these statutes, they had a perfect right to do so, but ought not now to be allowed, in view of a decision rendered eighteen months after this decree, to say

that error was committed in particulars which they waived by their conduct. They could not approbate and reprobate at the same time, and, in the interest of the stability of judicial decision, their want of diligence ought to be held fatal to their application.

The last of these decrees was rendered October 14, 1887, and the sale of the property was made thereunder. The amount bid at the sale was \$51,000, and no exceptions were taken, (presumably because that was sufficient to cover the preferential claims, or nearly so,) notwithstanding, as alleged, the property cost the ancestor of the Pearsons nearly \$200,000, and was sold to the company by them for some \$219,000 first mortgage bonds, \$101,000 second mortgage bonds, and stock of the company to the amount of \$499,625, which bonds and stock the circuit court held were fully paid for by the property so sold. The purchase was made by one of the complainants in the bill of review, whose bonds for the deferred payments were secured by his cocomplainants as sureties. The relief sought was not the vacation of the decrees of September 8 and October 14, 1887, but only of so much thereof as awarded these priorities, and the application to file the bill was not made until the 8th of May, 1889, the decision of the court of appeals of Virginia having been announced on the 11th day of the preceding April. The decree rendered reviewed and reversed only so much of the prior decrees as gave priority to appellants' claims, and thereby the opportunity to bid, or get others to bid, at the sale of this valuable property, was cut off by the very decrees which were only reversed so far as their claims were concerned. It may be that such opportunity would have availed nothing, but that does not change the matter in principle. It is the rule, subject, however, to some exceptions, that, before a bill of review can be filed, the decree must be first obeyed and performed. Thus, if money is directed to be paid, it ought to be paid before the bill of review is filed, though it might afterwards be ordered to be refunded. *Ricker v. Powell*, 100 U. S. 104, 108.

It does not appear that these complainants had performed the previous decree when their bill of review was permitted to be filed. On the contrary, they objected that the second payment then due might be disbursed under the prior decree, and it would be impossible for them to recoup. Nor did they ask that the sale be set aside, nor in any manner offer to place these creditors in the same situation that they occupied before that decree was entered; but, after having proceeded upon the theory of the validity of these laws, they came forward with their bill of review to obtain a reversal of so much of the decrees as was opposed to their interests, leaving what was made in their favor to stand. We are of opinion that they were called upon to present their contention before, if they intended to insist upon it. Cases are not to be tried by piecemeal, and it would open a wide door to persistent litigation if parties should be permitted to lie back, and then renew controversies in this manner.

The decrees of the circuit court appealed from are reversed, and the cause remanded, with a direction to dismiss the petition for rehearing or

bill of review, and for further proceedings upon the basis of the finality of the decrees of September 8 and October 14, 1887, in conformity to this opinion.

PACIFIC POSTAL TELEGRAPH CABLE CO. v. WESTERN UNION TEL. CO.

SAME v. SEATTLE, L. S. & E. RY. CO.

(*Circuit Court, D. Washington, N. D. April 4, 1902.*)

1. TELEGRAPH COMPANIES—GRANT BY RAILROAD—CONSTRUCTION.

A contract whereby a railroad company grants to a telegraph company a right of way along its road for a telegraph line, and agrees that it will not grant such right for the construction of any other telegraph line, does not vest in the telegraph company such an exclusive interest in the railroad's right of way for telegraph purposes as would entitle it to an injunction against the construction of another telegraph line thereon.

2. SAME—EXCLUSIVE RIGHT OF WAY—ULTRA VIRES.

A contract by which a railroad company undertakes to grant the exclusive right to construct and maintain a telegraph line along its road to a single company is *ultra vires* and void.

In Equity. Bill for an injunction to prevent the Western Union Telegraph Company from constructing and operating a telegraph line on the right of way of the Seattle, Lake Shore & Eastern Railway Company between certain stations. The court having granted a restraining order *pendente lite*, the defendants moved to vacate said order. Motion granted.

*Struve & McMicken and Hughes, Hastings & Stedman*, for plaintiff.

*Turner & McCutcheon*, for defendants.

HANFORD, District Judge. The only ground for the restraining order, which, at the time it was made, seemed to me to justify it, is that the complainant claims to be the owner of an interest in the strip of land known as the right of way of the defendant the Seattle, Lake Shore & Eastern Railway Company, upon which the defendant the Western Union Telegraph Company proposes to enter, and construct and operate a telegraph line, without the consent of the plaintiff, and without compensation to plaintiff for such appropriation and use of property to which it claims title. Upon the present hearing this appears to me to be the only ground of complaint, worthy of consideration, against either of the defendants. I would regard it as sufficient if the claim of title appeared to be valid. The defendants, however, deny that plaintiff has any title to the premises, or any interest therein other than an easement; that is to say, a right of way for its own telegraph line. The only basis for the plaintiff's claim of title is found in the

following clauses of a contract made by the plaintiff with the Seattle & West Coast Railway Company:

"The railway company hereby grants right of way for said line of telegraph along the route of its road, and upon its grounds, and agrees to furnish labor for loading the poles upon the cars, and for distributing and setting the same, under the direction of the telegraph company's foreman, together with their free transportation. The railroad company agrees to furnish office room in its railway stations, and an operator wherever required, for its railway business, who shall also transact the business of the telegraph company, at such stations, under the rules and regulations of the telegraph company, it being understood that all receipts for commercial telegraph business shall belong to the telegraph company. \* \* \* The telegraph company shall have free transportation for men and material necessary for the maintenance and operation of its telegraph lines, and the railway company hereby agrees that it will not grant right of way along its road for the construction of the line of any other telegraph company, and that it will not transport men or material for any other telegraph company, except at the regular tariff rates of said railway company, and for delivery at its regular stations. \* \* \* This contract shall continue for twenty-five years from the date hereof."

The complainant avers that the Seattle, Lake Shore & Eastern Railway Company acquired the right of way for that portion of its road between Woodenville or Snohomish Junction and the town of Sedro, by a grant from said Seattle & West Coast Railway Company, subject to said contract. The argument is that the contract is a conveyance, and that it vests in the complainant the exclusive right to the entire strip of land for telegraph purposes, during the term specified, which right amounts to an interest in the land, and is a legal estate. Against the contention for such a construction of the contract, it is, first, to be observed that the only granting words therein appear to be limited in their application to the right of way for a single telegraph line. There is no indication in the contract of the idea that the plaintiff should have control over the right of way for any purpose other than the conduct of its own telegraph business. If correct in the position assumed by it in this case, the complainant would have the right to sell to other telegraph companies, or sublet to them privileges to construct and maintain telegraph lines upon the premises. The provisions of the contract itself in the clauses above quoted are antagonistic to this pretense. The railway company by the contract promised that it would not permit the construction of other telegraph lines upon its right of way, nor afford other telegraph companies facilities for transportation of materials, except as specified. This clause created a mere personal obligation. It did not convey the title to any property. On the contrary, it amounts to an assertion by the railway company of both an obligation and a right to control the future use of the ground acquired by it for its railroad.

If the contract, in explicit terms, granted such an interest in the premises as plaintiff claims, I should have to hold it to be *ultra vires* and void, for the reason that the laws of the territory of Washington,



in force when it was made, did not authorize a railway corporation to transfer land acquired for railroad purposes, by lease, so as to divest itself of its duties and obligations to the public as to the use of such property. By the plaintiff's own showing it appears that the Seattle & West Coast Railway Company was incorporated to do a general transportation business by rail, and to be a competitor for interstate and international commerce. Its franchise from the state, therefore, made it to a certain extent a public agent endowed with part of the sovereign power of the commonwealth; and a railroad constructed in this state by a corporation organized under the laws of the state, or its predecessor, the territory, must necessarily be a highway for public use, in and to which the public have rights limited and regulated by law. There is no statute authorizing such a transfer of property in the right of way and control thereof as the plaintiff now claims was made to it by said contract, and, without express authority conferred by a statute, no transfer of such property, or of the right to control the same, could be made, whereby the rights of the public, or a third party, *e. g.*, the Western Union Telegraph Company, could be in any manner abridged. *Lakin v. Railroad Co.*, (Or.) 11 Pac. Rep. 68; *Breslin v. Car Co.*, (Mass.) 13 N. E. Rep. 65; *Palmer v. Railway Co.*, (Idaho,) 16 Pac. Rep. 553; *Railroad Co. v. Brown*, 17 Wall. 445; *Railroad Co. v. Crane*, 113 U. S. 433, 434, 5 Sup. Ct. Rep. 578; *Oregon R. & N. Co. v. Oregonian Co.*, 130 U. S. 1, 9 Sup. Ct. Rep. 409; *Van Dresser v. Navigation Co.*, 48 Fed. Rep. 202; *U. S. v. Western Union Tel. Co.*, 50 Fed. Rep. 28.

Telegraph lines are to serve the public, and wherever they are connected with a railroad as incidental to the railway business, the rights of the public respecting the same must be governed by the principles applicable to other branches of the service; and the public policy which underlies the numerous decisions of the courts of this country, denying the right of a railway corporation to divest itself of responsibility and invest another with its powers and functions, touches directly the question in this case as to the right of one corporation to transfer to another an exclusive right for telegraph purposes to the occupancy and control of property acquired as a necessary means of serving the public. A contract made by a railway company, whereby it attempts to create a monopoly in the use of its property for the transmission of news and intelligence, is just as invalid as a contract would be whereby a railway corporation should attempt to confer upon one individual or corporation an exclusive right to have any particular commodity transported as freight over its railway. Whether this contract be regarded as an intended conveyance of an interest in the property, or as a covenant affecting the title to the right of way, or as a contract creating simply a personal liability, it is not such a contract as a court of equity can uphold or decree to be specifically performed; and, at least, as against the defendant the Western Union Telegraph Company, it is void, except in so far as it confers upon the plaintiff the right to maintain unmolested its telegraph line, and conduct its business without

interruption; which right is in no manner menaced by the proposed action of the defendants. The motion to vacate the restraining order is therefore granted.

NEW YORK, L. E. & W. RY. CO. v. BENNETT *et al.*

(Circuit Court of Appeals, Sixth Circuit. June 6, 1893.)

No. 11.

1. CARRIERS OF PASSENGERS—SECOND-CLASS TICKETS—CONNECTING LINES.

Where a second-class railway ticket provides that "no agent or employe has power to modify this contract in any particular," neither the ticket agent nor baggage master at a station where the holder is required to change cars has authority to instruct such passenger to take a limited express train, upon which only first-class tickets are accepted.

2. SAME.

As between the conductor of such a limited train and the passenger, the ticket is conclusive evidence as to the latter's right of transportation, and the conductor has no authority to accept it for passage on that train.

3. SAME.

One who has applied for and purchased a second-class ticket, and has used such tickets before, is bound by its terms, whether he has read them or not.

4. SAME.

The failure of a train carrying second-class passengers to connect with the proper train of another road, the two roads forming a through line, does not impose upon the second road an obligation to transport passengers holding second-class through tickets upon the next train,—a limited express,—upon which such tickets are not valid.

5. SAME—EJECTION OF PASSENGER.

A woman with two infant children, traveling on a second-class ticket, boarded a limited train, upon which first-class tickets only are valid. The conductor refused her ticket, and at the next important station she was put off. It was in the evening, and she remained at the depot for a time, till at her request she was sent to an hotel, and the next day money was collected with which she returned home, where she had an attack of nervous prostration. She testified, concerning the language of the conductor in refusing her ticket: "It was very rough; so much so that is what scared me most. If he had spoken pleasant to me, it would have been so much better. He spoke up in such a commanding way." She further said that at the depot the conductor said something about sending her to a hospital in a patrol wagon. *Held*, that the evidently imperative manner and form of speech of the conductor are not actionable in the absence of violence, or other willful misconduct, and a verdict for defendant should have been directed.

In Error to the Circuit Court of the United States for the Southern Division of the Eastern District of Tennessee.

Action by Mrs. Hattie A. Bennett and her husband, John R. Bennett, against the New York, Lake Erie & Western Railway Company for damages. Verdict and judgment for plaintiff. Defendant brings error. A motion to dismiss the writ of error was heretofore denied, (49 Fed. Rep. 598.) Judgment reversed.

Statement by SWAN, District Judge:

This is an action on the case commenced by attachment in the circuit court of Hamilton county, Tenn., for the ejection of Mrs. J. R. Bennett,

one of the defendants in error, from the passenger train of the railway company, *en route* from Cincinnati to New York. The action sounds in tort, and the declaration claims damages for the mortification incident to the plaintiff's removal from the train, and for an alleged false arrest and imprisonment of the female plaintiff at Dayton, Ohio, as part of the wrong and injury attending her expulsion. Upon the petition and bond of the plaintiff in error the case was removed to the circuit court of the United States for the southern division of the eastern district of Tennessee. It was there tried, and a verdict for \$1,500 rendered for the plaintiff, upon which judgment was subsequently entered. From that judgment the defendant below took this writ of error, and the case is here for review on exceptions duly taken. Defendant pleaded "not guilty."

The material facts involved are in the main condensed from the testimony of the plaintiff Hattie A. Bennett, and her husband, who joins with her in the action. Mrs. Bennett desiring to go to Binghamton, N. Y., with her two infant children, her husband applied for and purchased for her from the agent of the Cincinnati Southern Railroad, in August, 1890, at Chattanooga, Tenn., a limited ticket to New York, paying therefor \$20. The ticket was composed of three coupons,—one for passage to Cincinnati, one to Dayton, and the third thence to New York,—and on each coupon were printed the figures and letters "2nd," indicating the class of the ticket. This designation and notice was also printed in the body of the ticket, as one of the terms and limitations of the contract. The ticket, except the first coupon, is as follows:

**"TICKET."**

**QUEEN AND CRESCENT ROUTE**

**ONE PASSAGE**

**OF CLASS INDICATED TO POINT ON**

**N. Y., LAKE ERIE, & WESTERN R. R.**

**BETWEEN PUNCH MARKS.**

On Coupons attached, when Officially Stamped, subject to the following Contract.

- 1st. In selling this Ticket and checking Baggage hereon, this Company acts only as Agent and is not responsible beyond its own line.
- 2nd. This Ticket is subject to the STOP-OVER regulations of the line over which it reads.
- 3rd. It is VOID for passage if any alterations or erasures are made hereon, or if more than one date is canceled.
- 4th. The UNPUNCHED FIGURE on the Coupons of this Ticket indicates its Class.
- 5th. This Ticket is good until used, unless limited by stamp or written indorsement or cancelled by punch in the margin of Contract.
- 6th. IF LIMITED as for time, this Ticket will be void after midnight of date cancelled by "L" punch in margin hereof and is subject to the exchange either in whole or in part at any point on the route for a continuous Passage Ticket or Check.
- 7th. When this Ticket is signed below by the purchaser, it is NOT TRANSFERABLE, and if presented by any other person than the original holder it will be taken up and full fare collected. The holder will write his (or her) signature when required to do so by Conductors or Agents.

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The evidence is that the price of a first-class ticket from Chattanooga to New York on the train she took was some six or eight dollars more, and that J. R. Bennett knew that fact, though he testified that the one purchased "was just as good to him as if he had paid \$40 for it, and that he had traveled on the same ticket, [i. e., of the same class,] and never had any trouble." Mrs. Bennett took the Cincinnati Southern train at Chattanooga, August 10, 1890, and reached Cincinnati at 7 A. M.,—two hours late for the connecting train,—and there waited until 6:25 P. M., when, as she testifies, a ticket agent told her the New York train left. She also says that she took her ticket to a baggage master, to see that her baggage was put on the train, and he told her she would take the 6:25 P. M. train to New York, which was a first-class train. She took that train, and gives this version of the occurrences for which she sues:

"When the conductor came for tickets, the first thing he said to me, he says: 'What are you on this train for?' I says: 'Why, what is the trouble?' He says: 'This is not your train. This train goes right through to New York.' I said: 'Did it? Well, what is the trouble?' He says: 'Your ticket does not call for this train. You must get off at Dayton, or I'll put you off.' 'Well,' I says, I don't see why I should be put off this train if the train is going through to New York.' I did not know of any trouble, and I told the conductor I would like to know what the trouble was. I did not like to be delayed any longer. I had been delayed through the day; had to wait in Cincinnati through the day. Well, he says: 'You get off. You must get off. If you don't I'll put you off. I ought to put you off down in the country.' He says: 'Why did you not show the ticket at the train?' I says: 'I did.' He says: 'You did not.' I says: 'I took it to the ticket agent, and I have proof of it.' He says: 'Well, give it to me.' And after examining the ticket he took off a portion of the ticket and then gave me this little white ticket. I had two small children with me, and of course hated to get off at Dayton. I can't remember just what took place there, the excitement was too much for me. He (the conductor) said he would take me off anyway, and then he says: 'We will see that you get on the next train all right,'—that was going out between eleven and one o'clock that night. Between one and two o'clock that night he came in with a policeman, and said: 'Your train is due, you must go and get your children on board.' Then I tried to have him know, and shook my head, that I could not, that I did not want to go any further. I was lying there, and I could not speak very well; I had such a bad spell; and I did not like to go any further. I felt very bad, and there was nobody to meet me when I got to New York, and just being in the condition I was, I was going there for my health. I thought if I got any worse, I had better go back home. Then he seemed to be out of patience, and says: 'I would like to know what you are going to do. You can't stay here in the depot. You have not got any money.' I motioned to him to hold down, so I could whisper, and I says: 'You telegraph to my husband. I know he will aid me.' He says: 'I know what I'll do. I'll send for the patrol wagon, and we will take you to the hospital.'"

She was subsequently assisted to an hotel near the depot, where she was properly cared for until noon of the next day, when she returned home, where she had a severe attack of nervous prostration. She was asked:

*"Question.* You say the only thing the conductor said about your ticket was that it did not call for that train? *Answer.* That is what he said. He said I had no business on that train."

On cross-examination she admitted that the day the policeman at the depot, finding she had not enough money to go back home, solicited the balance, and turned it over to her; that her baggage was checked at Central Depot at Chattanooga for the whole route; that before the train left Dayton the conductor told her that her ticket did not call for that train, and that the next train, for which it was valid, would arrive about midnight, but she preferred to wait until she felt better or go back home.

*"Question.* What wrong had been done to you up to that time? *Answer.* I could not tell you how much wrong. I was wronged through my feelings. I think I was very much wronged. [She does not know how she got to the ladies' waiting room, but supposes she was led there by the conductor.] *Q.* If there was anything else that was done to you I will be very much obliged if you will tell the jury what it was. *A.* I don't know of anything. *Q.* You have already stated what the conductor said to you when he came to take up your ticket, between Cincinnati and Dayton,—that he told you you ought not to be on that train. State whether,—what his manner was, whether it was rough and harsh, or it was kind and gentle. *A.* It was very rough. So much so that is what scared me most. If he had spoke pleasant to me it would have been so much better. He spoke up in such a commanding way."

She states that "no other insult or indignity was offered by any one else except the conductor." There is no evidence that plaintiff was arrested or imprisoned, or was subjected to any expense while at Dayton. The foregoing states all that is material of the plaintiff's testimony relevant to the conduct of the conductor and the circumstances of her expulsion at Dayton. The plaintiff was ejected from one of the cars of a first-class limited train, upon which, under the regulations of the company, only passengers having first-class tickets were allowed to ride. The testimony of the conductor, who is an employe of the Cincinnati, Hamilton & Dayton Railroad, does not vary essentially from that of the passenger, except that he denied all ungentlemanly conduct. The record shows that the plaintiff, with her children, were escorted by the conductor and station officer into a safe and comfortable waiting room in the railroad station at Dayton, which was well watched and lighted, where she remained without molestation, until, at her own request, she was assisted to an hotel, where she was provided with dinner gratuitously, while the officer on duty at the station went to the depot, and there collected enough money to pay her return fare to Chattanooga.

*Lewis Shepherd and Frank Spurlock, for plaintiff.*

*Thomas H. Cook, for defendant.*

Before JACKSON, Circuit Judge, and SAGE and SWAN, District Judges.

SWAN, District Judge, (*after stating the facts as above.*) Under the form of action adopted it was essential to recovery that the plaintiffs should establish either a breach of defendant's express contract, evidenced by



the ticket, for the carriage of plaintiff to New York, or by competent evidence, that defendant, by its agents, conductors, or servants, had violated the implied contract to protect its passengers against insult and violence, which the law attaches to the duties of a common carrier of passengers. It is not contended that the case made by the plaintiff meets the first of these requirements. Plaintiff, through her husband, had applied for and accepted a second-class ticket, which expressed, it is admitted, the contract between the company and herself for her transportation to New York. It was such a ticket as she had been accustomed to purchase for that route. Having accepted it, she was bound by its terms, whether or not she knew or read them. *Boylan v. Railroad Co.*, 132 U. S. 150, 10 Sup. Ct. Rep. 50; *Fonseca v. Steam-Ship Co.*, 153 Mass. 553, 27 N. E. Rep. 665. It provided among its printed conditions that "no agent or employe has power to modify this contract in any particular," and in its body, and upon the margin of each of its constituent coupons, notified the holder of its class and limitations. In the face of these notifications no assurance given plaintiff by the baggage master or the ticket agent at Cincinnati, of whom she claims to have made inquiries, could confer any right of transportation not expressed by the ticket itself, even had those officers been employes of defendant, which is not shown. *Boylan v. Railroad Co.*, *supra*. As between the conductor and the passenger, the ticket was conclusive evidence of the extent of the latter's right of transportation, and the conductor had no authority to give it any greater effect by permitting plaintiff to travel on that train. *Frederick v. Railroad Co.*, 37 Mich. 342; *Hufford v. Railway Co.*, 53 Mich. 118, 18 N. W. Rep. 580; *Mosher v. Railroad Co.*, 127 U. S. 390-396, 8 Sup. Ct. Rep. 1324; *Boylan v. Railroad Co.*, 132 U. S. 146-150, 10 Sup. Ct. Rep. 50.

The failure of the train on the Cincinnati Southern Railroad to make connection at Cincinnati with that upon which plaintiff was entitled to travel was not the fault of defendant, nor did it impose any obligation upon it to transport plaintiff on the train from which she was ejected. Her contract gave her no right of passage on that train, as plainly appears from its terms. No other is pleaded or proved. She was therefore wrong in her refusal to leave, and became thereby technically a trespasser, to whom the railroad company owed only proper care and civility until her removal could be lawfully effected. *Edwards v. Railroad Co.*, 81 Mich. 364, 45 N. W. Rep. 827, and cases cited. We are brought, therefore, to the examination of the incidents preliminary to and attending her removal from the train, which is the only remaining ground of action. The declaration avers that defendant's conductor was guilty of using "violent, abusive, and rough language towards plaintiff;" that he employed "force and violence" in ejecting her; and, in substance, charges that "defendant's several wrongs and outrages as aforesaid, [meaning thereby the conductor's language, and the violence used in plaintiff's ejection,] and \* \* \* the wrongful, cruel, and inhuman treatment of plaintiff by defendant, its agents and servants," caused plaintiff's illness, and the permanent injury and disability for which,

*inter alia*, the suit is brought. There is no evidence that any violence was offered plaintiff, or any force employed, to effect her removal from the car to the waiting room at Dayton.

The learned judge who tried the cause declined to direct a verdict for defendant upon the whole evidence, and submitted to the jury the determination of the question whether the evidence made a proper case for punitive damages. His rulings on these points were seasonably excepted to, and error is assigned upon them. Without repeating the narrative of Mrs. Bennett, the substance of which, relative to the manner and incidents of her removal from the train, is given above, we are constrained to hold that these rulings were erroneous. To warrant the recovery of exemplary or punitive damages "there must have been some willful misconduct, or that entire want of care which would raise the presumption of a conscious indifference to consequences," (*Railroad Co. v. Ames*, 91 U. S. 495;) or, as it is put in *Philadelphia, etc., Co. v. Quigley*, 21 How. 213, 214:

"Whenever the injury complained of has been inflicted maliciously or wantonly, and with circumstances of contumely or indignity, the jury are not limited to ascertainment of a simple compensation for the wrong committed against the aggrieved person. But the malice spoken of in this rule is not merely the doing of an unlawful or injurious act. The word implies that the act complained of was conceived in the spirit of mischief or of criminal indifference to civil obligations."

The later cases are to the same effect. *Railroad Co. v. Humes*, 115 U. S. 521, 6 Sup. Ct. Rep. 110; *Barry v. Edmunds*, 116 U. S. 550-563, 6 Sup. Ct. Rep. 501; *Railroad Co. v. Harris*, 122 U. S. 597-609, 7 Sup. Ct. Rep. 1286. While it is for the jury, in a proper case, to determine the character of the wrong inflicted, and the measure of damages to be applied, the evidence must justify the court in submitting to them either or both inquiries as questions of fact. Plaintiff was on the train under an entire misconception of her contract relations to the carrier, and without right. Of that fact and its consequences she was fully informed by the conductor. If, in imparting that information, and the performance of the duty to his employer which plaintiff's refusal to leave the train, and her failure to pay the fare, devolved upon him, his language was opprobrious and insulting, or his conduct oppressive and contumelious, the corporation is undoubtedly responsible *civiliter* for the tort. The law, however, is not so unreasonable as to exact from the conductor of a passenger train, or the master of a steamship, upon whose vigilance and competency the lives and safety of passengers are dependent, a rigid observance of the formal amenities of social life, in the necessarily hurried discharge of his varied and important duties. It requires that he shall demean himself with civility, and shall protect passengers from insult and violence from others. Beyond this it has no standard of conduct, no code of manners. Of necessity, his communications with his passengers are in the main purely of a business nature. He has scant time for explanations; none for discussion or loquacity. The natural effect of his great and urgent responsibilities is to beget a characteristic brev-

ity and bluntness of manner and speech, varying in degree with the temperament and circumstances of the individual, often perhaps displeasing to the sensitive and inexperienced traveler, yet as far-removed from legal censure as the demand of a lawful right in terse phrase. While his own and his employer's interest would be best served by a uniformly complaisant speech and demeanor, the mere lack of both is not insult; nor is his failure to gauge his address to the sensibilities, temperament, or latent ailments of his passengers an actionable dereliction. When called upon to declare the invalidity of a ticket, or to deny a passenger's claim to transportation, or to announce his duty to eject a person who refuses to pay fare, if he uses only the customary plain and positive diction of business, his employer cannot be mulcted in damages, or legally reprehended for his plain speaking or peremptory manner. *Rose v. Railroad Co.*, (N. C.) 11 S. E. Rep. 526.

Accepting plaintiff's own testimony as to what transpired between herself and the conductor, and laying out of view entirely the latter's version, there is no legal basis for the instruction which permitted the jury to award exemplary damages against the defendant. There was neither vituperation, epithet, contumely, nor aspersion in the language used by the conductor. It was a plain, matter of fact announcement that under the rules of the company, which left the officer no discretion, he could not accept the ticket she tendered for her transportation on that train, and she must leave the car at Dayton, or it would be his duty to remove her. Less than this he could not lawfully have done. More than this he did not do. There is even no complaint that this was said in a loud tone. True, she says of the conductor's manner: "It was very rough. So much so that is what scared me most. If he had spoken pleasant, it would have been so much better. He spoke in such a commanding way." The concluding phrase of this extract from her testimony at once defines the extent of her grievance, and is the severest criticism she makes upon the treatment of which she complains. The legal criterion of the conductor's address and conduct must be found in his language and manner, not in the plaintiff's opinion of their propriety, nor the epithets and adjectives by which she characterizes them. An imperative manner and form of speech is not actionable. Something more tangible than these is necessary to sustain an action of this nature, and, *a fortiori*, liability to exemplary damages. Plaintiff's was a mortifying experience, and its consequences are to be regretted, but they must be charged to her own negligence in taking the wrong train, and her refusal to comply with the lawful demand of the conductor, which necessitated and justified her ejection, the circumstances and place of which are not open to legal criticism. For the error pointed out in the instruction as to the liability of defendant to exemplary damages, and for the refusal of the court to direct a verdict for the defendant, the judgment must be reversed, and a new trial granted. It is unnecessary to decide the other questions presented by the bill of exceptions. Judgment reversed, with costs, and a *venire de novo* ordered.

UNITED STATES v. STEENERSON *et al.*

(Circuit Court of Appeals, Eighth Circuit. May 16, 1893.)

No. 57.

## 1. PUBLIC LANDS—TITLE—REPLEVIN FOR TIMBER.

When the ownership of logs alleged to have been cut on land belonging to the United States depends upon the ownership of the land, the title to the land may be investigated and determined in an action of replevin brought by the United States to recover the logs.

## 2. SAME—PRE-EMPTION—CANCELLATION—COMMISSIONER.

The commissioner of the general land office, by virtue of the general power of supervision vested in him over the acts of the register and receiver of the local land offices, may cancel a pre-emption entry, and the final certificate issued to the pre-emptor, on the ground that the entry was fraudulently made and void under Rev. St. U. S. § 2262.

## 3. SAME—VALIDITY—COLLATERAL ATTACK.

When such cancellation has been made the pre-emptor has no such final adjudication in his favor in the certificate issued by the local offices as that his right to the land cannot be collaterally attacked, or that the invalidity of the certificate must be adjudicated in a proceeding brought for that purpose.

## 4. SAME—CANCELLATION OF ENTRY—EVIDENCE—REPLEVIN.

And therefore, in an action of replevin by the United States for logs cut on public lands which defendant claims by virtue of the canceled entry and certificates, the United States is entitled to introduce evidence of such cancellation, and that the entry was fraudulently made by the pre-emptor for the purpose of enabling defendant to strip the land of timber.

In Error to the Circuit Court of the United States for the District of Minnesota.

Replevin by the United States against Christopher Steenerson and others, copartners as the Clear Water Land & Logging Company, Hugh Thompson, and Marcus Johnson, for certain logs. There was judgment for defendants, and plaintiff brings error. Judgment reversed.

*Eugene G. Hay*, U. S. Atty.

*Halvor Steenerson*, *Frank B. Kellogg*, and *C. A. Severance*, for defendants in error.

Before CALDWELL, Circuit Judge, and SHIRAS, District Judge.

SHIRAS, District Judge. The facts necessary for a proper understanding of the questions presented by the record in this case are as follows: In September, 1883, one Hans Hanson made a pre-emption entry of the S. W.  $\frac{1}{4}$  of section 33, township 147, range 38 W., situated in Beltrami county, Minn. On June 24, 1884, he filed a declaratory statement of pre-emption, and on November 1, 1884, made final proof of entry, including the necessary payments, and received a certificate from the receiver of the land office at Crookston, Minn., showing payment in full for the land named. On the same day the certificate was issued to him Hanson executed a deed of the land to Andrew Steenerson, who was a partner in the defendant firm, known as the "Clear Water Land & Logging Company." That company, during the winter of 1885-86, cut from the land named about 754,000 feet of logs, and placed them in the waters of the Clear Water river. On the 29th of April, 1886, the United States brought the present action in the United States circuit court for the district of Minnesota to recover possession of said logs, a

writ of replevin being issued and levied, the defendant company giving bond under the provisions of the state statute, and thereby regaining possession of the logs levied on. The case was tried by the court, a jury being waived. On behalf of the United States it was proved that the land named had formed part of the public domain, and that no patent had ever been issued therefor, and that the logs in question had been cut from the trees growing thereon. On behalf of the defendants it was proved that Hans Hanson had entered the land as above stated, and had obtained the receiver's certificate, showing final payment in November, 1884, and that the defendant company had cut the logs after that date under right and title derived from Hanson. Thereupon, on behalf of the United States, evidence was offered tending to show that Hanson did not enter the land for the purpose of actual settlement and residence, as required by the provisions of the statute authorizing pre-emption entries, but for the sole purpose of enabling the defendant firm to strip the land of the timber growing thereon; that said firm employed him to make the entry in their interest, and for the purpose named, paying him the sum of \$500 for so doing; that the amount of timber cut was far more than was needed for the actual cultivation or improvement of the land; and that, in pursuance of such illegal bargain, as soon as Hanson obtained the certificate showing final payment upon the land, he executed a conveyance thereof to one of the defendant firm; and that in the year 1890 the commissioner of the general land office canceled the entry made by Hanson and the final certificate issued to him, on the ground that the entry was not made in good faith, but merely for the purpose of enabling the defendant firm to strip the land of the timber growing thereon. The evidence thus offered was, upon objection made, ruled out, to which ruling exceptions were duly taken, and thereupon judgment was rendered in favor of the defendants, the court holding that, "until the invalidity of the certificate had been judicially ascertained and declared by some tribunal having authority to investigate the case and so adjudicate, the United States had no such title or right of possession to the logs in controversy as would enable it to maintain replevin."

It is well settled that the United States can maintain an action of replevin to retake logs wrongfully cut from land belonging to the government, and, where the ownership of the logs is dependent upon the question of the title of the lands from which the logs were cut, that issue may be investigated and determined in the action of replevin. Thus in *U. S. v. Cook*, 19 Wall. 591, an action in replevin, brought to recover possession of logs cut upon an Indian reservation in Wisconsin by the Indians occupying the same, and by them sold to the defendant, Cook, the supreme court decided that the fee title of the lands was in the United States; that the Indians had the right of occupancy, but not the right to cut the timber for purposes of sale merely; that such cutting was waste; that, "under such circumstances, when cut, it became the property of the United States absolutely, discharged of any rights of the Indians therein. The cutting was waste, and, in accordance with well-settled principles, the owner of the fee may seize the timber cut, arrest

it by replevin, or proceed in trover for its conversion;" and that the United States was entitled to the same remedies for the recovery of the property as an individual citizen. In *Schulenberg v. Harriman*, 21 Wall. 44, there was involved the title to certain pine logs cut from lands granted to the state of Wisconsin to aid in the construction of railroads in that state. The defendant was the agent of the state, and the controversy was, in fact, between the plaintiff and the state, it being admitted that the plaintiff had the actual possession of the logs when the same were seized by the agent of the state, from whom the plaintiff replevied them. The supreme court held that the rights of the parties were dependent upon the ownership of the land from which the logs were cut, and, investigating that question, the court found that the title remained in the state, and, so finding, held that—

"The title to the land remaining in the state, the lumber cut upon the land belonged to the state. Whilst the timber was standing it constituted a part of the realty; being severed from the soil its character was changed; it became personalty, but its title was not affected; it continued, as previously, the property of the owner of the land, and could be pursued wherever it was carried. All the remedies were open to the owner which the law affords in other cases of the wrongful removal or conversion of personal property."

In *Beecher v. Wetherby*, 95 U. S. 517,—an action in replevin for logs cut from a section of land situated in Wisconsin,—the plaintiff claimed title to the land under patents issued by the United States in 1872, and the defendant under patents from the state, issued in 1865 and 1870. The land had at one time been occupied by the Menomonee Indians, but it was claimed that the fee passed to the state upon its admission to the Union, and when the Indians ceased to occupy it, the right of occupancy followed the fee, and hence the land and the right to the timber thereon became wholly vested in the state, and hence passed to the defendants under the patents issued by the state. Thus the right to the logs was shown to be dependent upon the ownership of the land from which they had been cut, and that issue required the determination of the question whether the fee of the land passed to the state by force of the grant contained in the act of congress under which Wisconsin became a state in the Union, or whether the fee passed by the patents subsequently issued by the United States. The court, after a full examination of the facts presented on the record, held that the title of the land had passed to the state, and therefore the plaintiff acquired nothing under the patents issued to him at a subsequent date, and hence had no property in or right to the timber in dispute. These decisions of the court of last resort settle beyond cavil the propositions that standing timber is a part of the realty upon which it grows; that, when severed therefrom, its character changes to personalty, but the title thereto is not affected by such severance; that, if cut and carried away by a wrongdoer, the owner of the land may retake the timber wherever found; that, when thus retaken by means of a writ of replevin, it is open to both parties in the replevin action to assert title to the realty from which the timber was cut, as proof of the ownership of the timber; that, when conflicting claims to the title of the



reality are thus asserted, it becomes the duty of the court to determine, in the replevin action, which party has the better title to the realty, in order to determine the ownership of the timber.

From the facts disclosed on the record now before us it appears that the title to the realty from which the timber was cut was squarely at issue between the parties. The ownership of the logs was clearly dependent upon the question of the ownership of the land, to which both parties asserted title, and hence it became the duty of the court to investigate and adjudicate that issue. On behalf of the United States it was proven that the land was originally part of the public domain, and that no patent or other grant of title had been made. To meet the *prima facie* case thus made, the defendants proved that Hanson had made a pre-emption entry of the land, had completed the requisite payments and obtained the receipt or certificate of the receiver of the local land office showing such payment in full. Thereupon it was proposed, on behalf of the United States, to introduce evidence tending to show that the entry made by Hanson was not in good faith, and was in fact fraudulent, and made solely for the purpose of enabling the defendant firm to strip the land of the timber, and that the commissioner of the land office had canceled the entry on the ground of fraud. The trial court held that, until the validity of the certificate of final payment had been judicially ascertained and declared by some tribunal having authority to investigate the case, the United States had no such title or right of possession to the logs in controversy as would enable it to maintain replevin. As we gather it from the record, the court held that the entry made by Hanson, and the issuance to him of a certificate of final payment by the receiver of the local land office, regardless of the question of fraud in such entry, conveyed, as against the United States, the title and consequent right of possession of such realty to the pre-emptor in such sense that the United States, in order to revest the title in itself, must institute judicial proceedings to set aside the apparent or defeasible title vested in the pre-emptor and his grantees. In support of this view many decisions of the supreme court are cited by counsel, in which it is held that, when the right to a patent for lands has once become vested in a purchaser or pre-emptor, the same are segregated from the public domain, are no longer subject to entry, and the vested right to the patent thereto is equivalent to a patent actually issued. See *Carroll v. Safford*, 3 How. 441; *Witherspoon v. Duncan*, 4 Wall. 210; *Stark v. Starrs*, 6 Wall. 417; *Myers v. Croft*, 13 Wall. 291; *Wirth v. Branson*, 98 U. S. 118; *Simmons v. Wagner*, 101 U. S. 260; *Deffebach v. Hawke*, 115 U. S. 405, 6 Sup. Ct. Rep. 95; *Cornelius v. Kessel*, 128 U. S. 456, 9 Sup. Ct. Rep. 122. The principle on which these decisions are based is that when a homesteader or pre-emptor has, in good faith, performed all the acts which, under the provisions of the statutes of the United States, are necessary to complete his right to the land, then he becomes, equitably, the owner of the same, and the United States holds the naked legal title as a trustee for his benefit. For the protection of his rights, thus acquired, it is held that in a contest involving the title of the land an established

right to a patent will be deemed to be the equivalent of a patent. This rule, however, has been adopted solely as a means for the protection of those who have, in good faith, established a right to a patent by performance of the requisite conditions. The final certificate or receipt acknowledging payment in full, and signed by the officers of the local land office, is not in terms nor in legal effect a conveyance of the land. It is merely evidence on behalf of the party to whom it is issued. In a contest involving the title to land, wherein a person claims adversely to the United States, it is open to such claimant, notwithstanding the legal title remains in the United States, to prove that by performance on his part of the requisite acts he has become the equitable owner of the land, and that the United States holds the legal title in trust for him; but, as the claimant in such case has not received a patent or formal conveyance, and has not become possessed of the legal title, he is required to show performance, on his part, of the acts which, when done, entitle him, under the law, to demand a patent of the land. When evidence of this kind is offered on behalf of the claimant it is open to the United States to meet it by proof of any fact or facts which, if established, will show that the claimant has not become the real owner of the realty. If it be true, in a given case, that the entry of the land was not made in good faith, but in fraud of the law, certainly it cannot be said that the claimant has become the equitable owner of the land, and that the United States is merely a trustee holding the legal title for his benefit. Fraud vitiates any transaction based thereon, and will destroy any asserted title to property, no matter in what form the evidence of such title may exist. *The Amistad*, 15 Pet. 518; *League v. De Young*, 11 How. 185.

It is well settled in Minnesota that in an action of replevin, wherein title to property is claimed under a deed of assignment or other formal conveyance, the validity thereof may be attacked on the ground of fraud, and such issue may be determined in the replevin proceedings. *Blackman v. Wheaton*, 13 Minn. 326, (Gil. 299); *Tupper v. Thompson*, 26 Minn. 385, 4 N. W. Rep. 621; *Furman v. Tenny*, 28 Minn. 77, 9 N. W. Rep. 172. When it is desired to obtain the cancellation of a deed or patent conveying the legal title of realty on the ground of fraud it is necessary to invoke the aid of a court of equity, but where the relief sought is not equitable in its nature a court of law is certainly competent to adjudicate the issue of fraud. In the case at bar it is not claimed that a patent to the land had been issued, and therefore the legal title remained in the United States. The circuit court in effect held that proof of entry and the execution of the receipt showing final payment deprived the United States of the title to the land, regardless of the question whether such entry and payment were made in good faith or fraudulently, and that, before the United States could maintain its right to the logs in controversy, it must, by the adjudication of some proper tribunal, set aside and cancel the title to the realty held by Hanson under his pre-emption entry. It cannot be questioned that the land department is primarily charged with the duty of supervising the disposition of the public domain; and in cases within its jurisdiction, and

wherein final action has been had authorizing the disposition of land, such action cannot be collaterally assailed. *Steel v. Smelting Co.*, 106 U. S. 447, 1 Sup. Ct. Rep. 389; *Smelting Co. v. Kemp*, 104 U. S. 636; *Davis v. Wiebbold*, 139 U. S. 507, 11 Sup. Ct. Rep. 628. Thus, if it appears that under the direction of the land office, a patent has been issued to a pre-emptor, or that the right of the pre-emptor to a patent has been finally adjudged in his favor by the department, and nothing remains to be done but the ministerial act of issuing and delivering the patent in accordance with the judgment of the department, then the right of the pre-emptor is evidenced by a final judgment of the land department in his favor, which cannot be collaterally assailed; but if it appears in a given case that when, in the proper course of business, the commissioner of the land office was called upon to determine whether the pre-emptor was entitled to a patent, he adjudged that the entry was fraudulent and therefore void, then the claimant is without a final adjudication in his favor and he must resort to other evidence to sustain his claim.

It is broadly affirmed on behalf of defendants that the land department had no power to cancel the final receipt for any reason, and that the act of the commissioner in so doing was a nullity. This is the equivalent of the proposition that the issuance of a final receipt or certificate of payment by the receiver of a local land office ends the control of the department over the land, and deprives the United States of the title thereto, which is certainly not the law. Thus it is said in *Bell v. Hearne*, 19 How. 262, that—

“The commissioner of the general land office exercises a general superintendence over the subordinate officers of his department, and is clothed with liberal powers of control, to be exercised for the purpose of justice, and to prevent the consequences of inadvertence, irregularity, mistake, and fraud in the important and extensive operations of that office for the disposal of the public domain.”

And in *Cornelius v. Kessel*, 128 U. S. 456, 9 Sup. Ct. Rep. 122, it is declared that—

“The power of supervision possessed by the commissioner of the general land office over the acts of the register and receiver of the local land offices in the disposition of the public lands undoubtedly authorizes him to correct and annul entries of land allowed by them where the lands are not subject to entry, or the parties do not possess the qualifications required, or have previously entered all that the law permits. The exercise of this power is necessary to the due administration of the land department. If an investigation of the validity of such entries were required in the courts of law before they could be canceled, the necessary delays attending the examination would greatly impair, if not destroy, the efficiency of the department. But the power of supervision and correction is not an unlimited or arbitrary power. It can only be exerted when the entry was made upon false testimony, or without authority of law. It cannot be exercised so as to deprive any person of land lawfully entered and paid for. By such entry and payment the purchaser secures a vested interest in the property, and a right to a patent therefor, and can no more be deprived of it by order of the commissioner than he can be deprived by such order of any other lawfully acquired property.”

In the light of these decisions of the supreme court it cannot be successfully maintained that the commissioner of the general land office had

not the power to supervise the action of the officers of the local land office, and to annul the entry made by Hanson on the ground that the same was fraudulent, and sustained by false testimony; but it is equally true that such action of the commissioner, being practically *ex parte*, is not conclusive, and that it is still open to Hanson and his grantees to establish a right to the land by proving a valid entry on his part and performance by him of the acts required to complete a pre-emption entry. On the trial below the defendants undertook to assert title to the land, as evidence of the ownership of the logs in dispute, by proving entry, the filing of the declaratory statement required by section 2262 of the Revised Statutes, and payment to the receiver. To overcome this evidence the United States offered to show that the entry so made was fraudulent, and the declaratory statement was false, and therefore no title or right to the land vested in Hanson or in his grantees, they being active participants in such fraud, such being the express declaration of section 2262 of the Revised Statutes, which reads as follows:

"Before any person claiming the benefit of this chapter is allowed to enter lands he shall make oath before the receiver or register of the land district in which the land is situated that he has never had the benefit of any right or pre-emption under section twenty-two hundred and fifty-nine; that he is not the owner of three hundred and twenty acres of land in any state or territory; that he has not settled upon and improved such land to sell the same on speculation, but in good faith to appropriate it to his own exclusive use; and that he has not, directly or indirectly, made any agreement or contract, in any way or manner, with any person whatsoever, by which the title which he might acquire from the government of the United States should inure, in whole or in part, to the benefit of any person except himself; and, if any person taking such oath swears falsely in the premises, he shall forfeit the money which he may have paid for such land, and all right and title to the same; and any grant or conveyance which he may have, except in the hands of *bona fide* purchasers, for a valuable consideration, shall be null and void, except as provided in section twenty-two hundred and eighty-eight. \* \* \*

The evidence which the United States sought to introduce tended to prove that Hanson entered the land, not for settlement and improvement by him for his own benefit, but for the express benefit of the logging company, and under an agreement with them to convey the land as soon as it could be done, in order that the company, under guise of right, might strip the land of the timber growing thereon. Such facts, if proven, would certainly show that Hanson never acquired a valid title, legal or equitable, to the land as against the United States, and as the defendants, in support of their right to the logs cut from the land, put in evidence the entry and declaratory statement made by Hanson, it was open to the United States to prove that such entry was in violation of the statute, and the statement was false, and therefore no rights were acquired thereunder by Hanson or by his grantees, who aided in the perpetration of the fraud thus established. We hold, therefore, that it was error to rule out the evidence offered by the United States. The same should have been admitted with such other competent testimony as either of the parties might have offered upon the question of the validity of the entry made by Hanson; that question being one involved in the issues in the case, and one which it was the duty of the court to deter-

mine in order to adjudicate the ownership of the logs. The judgment of the court below is therefore reversed, and the cause is remanded with instructions to grant a new trial.

KNIGHTS TEMPLAR & MASONS' LIFE INDEMNITY CO. v. BERRY *et al.*

(Circuit Court of Appeals, Eighth Circuit. May 16, 1892.)

No. 81.

1. LIFE INSURANCE—CONFLICT OF LAWS—LOCUS OF CONTRACT.

A policy of life insurance, which does not become a binding contract until its delivery, is governed by the laws of the state in which the insured lives, to whom it was there delivered by a resident agent of the company, although it was executed and dated at the company's office in another state.

2. SAME—SUICIDE—ASSESSMENT COMPANIES.

Rev. St. Mo. § 5382, providing that, "in all suits upon policies of insurance on life hereafter issued," it shall be no defense that the insured committed suicide, unless he contemplated suicide in applying for the policy, any stipulation in the policy to the contrary notwithstanding, applies to all life insurances, whether issued by assessment or level premium companies, except as otherwise provided by statute.

3. SAME—REPEAL OF ACT.

Acts Mo. 1837, regulating assessment life insurance companies, is limited (section 10) to companies "doing business under this act," and further provides "that nothing herein contained shall subject any corporation doing business under this act to any other provisions or requirements \* \* \* except as herein set forth." *Held*, that an assessment company which has not complied with the requirements of the act cannot be heard to claim that section 10 repealed, so far as applicable to assessment companies, the provision of Rev. St. Mo. § 5382, annulling stipulations against payment of insurance in case of suicide.

4. SAME.

No force can be given to an argument that assessment insurance was not within the contemplation of the legislature at the time of the enactment of Rev. St. Mo. § 5382, in the absence of facts showing that business on that plan was not carried on at that time in the state.

5. SAME—ASSESSMENT AND BENEFIT SOCIETIES.

An assessment "life indemnity company," having no lodges, or social, charitable, benevolent, or literary features, and neither paying sick dues, nor giving other attention to members in distress or poverty, is a life insurance company, and is subject to the regulations imposed by the insurance laws, as distinguished from the laws relating to co-operative benevolent societies, although its insurance is confined in practice, but not by its charter, to members of the Masonic fraternity.

46 Fed. Rep. 439, affirmed.

In Error to the Circuit Court of the United States for the Western District of Missouri.

Action by William Berry and others against Knights Templar & Masons' Life Indemnity Company. Trial to the court. Judgment for plaintiffs. Defendant brings error. Affirmed.

Samuel P. Huston and Thomas H. Parrish, for plaintiff in error.

F. H. Bacon, George Hall, and E. M. Harber, for defendants in error. Before SANBORN, Circuit Judge, and SHIRAS, District Judge.

SHIRAS, District Judge. On the 6th day of July, 1885, the Knights Templar & Masons' Life Indemnity Company issued a policy of insurance upon the life of John B. Berry, wherein it was provided that upon due

notice and satisfactory proof of the death of said Berry the company would pay, in 60 days after receipt of such proof, to the children of said Berry, the sum of \$5,000, subject to the limitation contained in section 1, art. 7, of the constitution of the corporation. On the 7th day of November, 1889, the said John B. Berry committed suicide, and due notice and proof of his death were given to the company. The company refused to pay the full amount named in the policy, claiming that by the express provisions of the policy self-destruction by the insured, whether sane or insane, rendered the contract for the payment of \$5,000 void, and the company was only bound to pay the amount which had been paid in assessments by the insured. This action was brought in the circuit court for the western district of Missouri, to recover the full sum of \$5,000. The case was tried to the court, a jury being waived. The parties stipulated that the company was liable for the full amount claimed by the plaintiffs, unless excused by the clause in the policy providing that the same should be void in case of suicide; that the policy sued on was issued at the office of the company at Chicago, Ill., was sent to the agent of the company at Trenton, Mo., and was by him delivered to John B. Berry at that place. The court further found that the business of the defendant company is that of life insurance, and nothing else; that there is no social, charitable, benevolent, or literary feature in its organization, or in the conduct of its business; that it has no lodges, pays no sick dues, distributes no aid, and gives no attention to members in distress or poverty. As conclusions of law the court held that the defendant company "is not a co-operative benevolent society, nor a fraternal brotherhood having a community interest, but an incorporated life insurance company on the co-operative or assessment plan, not for mutual benevolence, but for mutual insurance, and as such it comes within the purview of the statutes of Missouri relating to life insurance companies." That the contract of insurance was made in the state of Missouri, and is therefore controlled by the provisions of section 5982 of the Revised Statutes of Missouri, which are as follows: "In all suits upon policies of insurance on life hereafter issued by any company doing business in this state, it shall be no defense that the assured committed suicide, unless it shall be shown to the satisfaction of the court or jury trying the cause that the assured contemplated suicide at the time he made his application for the policy, and any stipulation in the policy to the contrary shall be void;" and that the fact of suicide would not defeat the right of recovery. For the findings of fact and law at length, see 46 Fed. Rep. 439. Judgment in favor of plaintiffs having been entered for the full amount of the policy, the case was brought to this court upon writ of error; and, as stated in the brief of counsel for the company, "the sole question involved is whether the Missouri statute in reference to suicide makes the contract in reference to suicide void." On behalf of the plaintiff in error it is averred "that upon the facts found and the pleadings in the case the contract was made and to be executed in the state of Illinois, and is to be construed by the laws of that state."

It appears from the findings of fact that the company is a corporation

created under the laws of Illinois; that it was engaged in soliciting business in Missouri, having agents in the latter state for that purpose; that by the express terms of section 1, art. 4, of the charter of the company, the contract of insurance does not become binding until the delivery thereof to the insured, and that the policy sued on in this case was delivered by the agent of the company to Berry at Trenton, Mo., at which place the application for the issuance of the policy had been made and delivered to the agent of the company. Under these circumstances, it cannot be successfully maintained that the contract was made in Illinois. In its inception and completion it was made in Missouri, and is therefore to be construed in connection with the provisions of the statutes of that state. The facts of this case bring it clearly within the ruling of the supreme court in *Assurance Soc. v. Clements*, 140 U. S. 226, 11 Sup. Ct. Rep. 822, in which it is held that a policy issued in New York by a corporation of that state upon the life of a resident of Missouri, it being provided in the application that the contract should not take effect until actual payment of the first premium, did not become a completed contract until the payment of the premium and the delivery of the policy; and that, as these acts were done in Missouri, the policy must be deemed to be a Missouri contract, and to be governed by the laws of that state. When, therefore, the policy sued on in the present cause was issued and delivered to John B. Berry in Missouri, the clause found therein touching liability for death by suicide was nugatory under the provisions of the statutes of Missouri then in force, provided the policy or contract of insurance is of such a nature as to be subject to the section of the statute in question. It is contended on behalf of the company that the section of the statute is not applicable, "because insurance upon the assessment plan was not within the contemplation of the legislature at the time the suicide clause was enacted;" the argument being that as the issuance of contracts of insurance on the assessment plan had not been entered upon when section 5982 was originally enacted, and as there was not a general statute then in force in Missouri, authorizing companies to carry on this particular kind of insurance, it must be held that this section is applicable only to policies of insurance issued by what are termed the "old-line companies." The section in question was intended to establish a general rule applicable to the business of life insurance, and not merely to limit the powers of a particular class of companies. By its terms it is applicable to all policies of insurance on life, and is not confined to any particular kind of company. Any company engaged in Missouri in the business of life insurance is subject to the provisions of the section, unless it appears that such company is by other sections of the statutes or laws exempt from the operation of the general statute.

The defendant company, according to the findings of the trial court, is not a benevolent or fraternal society, but is purely a life insurance company, carrying on business on what is known as the "assessment plan." The sole business of the corporation being that of life insurance, it cannot avail itself of provisions of the Missouri statutes applicable to associations organized for benevolent, social, or fraternal purposes.

There is nothing in the findings of fact from which it can be inferred that the business of life insurance upon the assessment plan may not, in fact, have been in existence in Missouri when section 5982 was first enacted, and therefore no force can be given to the argument that insurance on that plan was not within the contemplation of the legislature in enacting the clause in question. It thus appears that on the 6th day of July, 1885, it was the law of Missouri that no company engaged solely in the business of life insurance in such state could exempt itself from liability for death by suicide, unless it appeared that the insured contemplated suicide when he made application for such insurance; and, as the defendant company was engaged solely in the business of life insurance, it is clear that the policy issued by it on the day named, on the life of John B. Berry, was so issued subject to the provisions of the statute of Missouri then in force.

Upon the assumption that the act passed by the legislature of Missouri in 1887 supersedes and repeals all provisions of the general insurance laws theretofore applicable to companies operating upon the assessment plan, counsel for the plaintiff in error have made a very able argument in support of the proposition that from the date of the adoption of the act of 1887 the provisions of section 5982 were repealed as to assessment companies, and that the rights of the parties are now to be determined by the terms of the policy sued on, the same as though the suicide clause of the Missouri statute had never been enacted. We do not deem it necessary to determine the question whether this provision of the Missouri statute is to be deemed to be within the rule stated in *Ewell v. Daggs*, 108 U. S. 143, 2 Sup. Ct. Rep. 408, to the effect that when the right to avoid a given contract is given to a party thereto by statutory enactment on some ground of public policy, there being nothing in the contract *mala in se*, such right of avoidance being merely a privilege belonging to the remedy, and not being an element in the contract itself, may, by a subsequent repealing statute, be taken away, and the rights of the parties be thus left subject to the provisions of the contract by them entered into, or whether the provision of the Missouri statute preventing the company from exempting itself from liability for death by suicide, in force when the policy was issued, did not become part of the contract of insurance, under the general rule that the law of the place where a contract is entered into and is to be performed becomes part of the contract itself, in which event subsequent legislation by the state could not take away rights acquired under the policy when it was issued. Before this question can arise, it must be made clear that the legislature of the state intended to repeal, by the act of 1887, the provisions of section 5982 in its application to policies previously issued by companies doing business on the assessment plan, and, in our judgment, the intent to repeal the section in this particular is not made plain. In the first place, the legislature of Missouri has not repealed section 5982. It is still the law of the state that companies engaged in the business of life insurance shall not be permitted to exempt themselves from liability for death by suicide not contemplated when



the application for insurance is made. The contention of the plaintiff in error is that the enactment of the act of 1887, regulating the mode of doing business on the assessment plan, and particularly the last clause of section 10 of the act, to wit, "that nothing herein contained shall subject any corporation doing business under this act to any other provisions or requirements of the general insurance laws of this state, except as distinctly herein set forth," takes the defendant company out from under the binding effect of section 5982. It is, however, not made to appear in any way that the defendant company has ever complied with the provisions of the act of 1887, or that it is doing business in Missouri under the liabilities imposed by that act, and therefore it does not appear that it is entitled to the benefits of the last clause of section 10, which are expressly limited to "corporations doing business under this act,"—that is, the act of 1887. The purpose of the act is made still more clear in this regard by section 13 of the act, which declares that "nothing in this act shall be so construed as to impair or in any manner interfere with any of the rights or privileges of any corporation, association, or organization doing life or casualty insurance business in this state under the laws as they now exist." In our judgment, therefore, the provisions of the act of 1887 cannot be made applicable to this case. The contract of insurance upon the life of John B. Berry was made long before the enactment of that statute. It does not appear that the company has ever complied with the requirements of that act, or has ever transacted business under its provisions, and it cannot be made the criterion for determining the rights of the parties to this action. In our judgment, the court below ruled correctly in holding that the policy sued on was a contract made in Missouri, and, as such, that the provisions of section 5982 are applicable thereto; and therefore the judgment is affirmed, at costs of plaintiff in error.

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RUSSELL v. BRADLEY.

(Circuit Court, S. D. New York. May 28, 1892.)

**MALICIOUS PROSECUTION—PUNITORY DAMAGES—PROVINCE OF JURY.**

In an action for malicious prosecution, the amount of punitive damages is peculiarly a matter for the jury; and a verdict for the sum of \$12,500 will not be set aside or remitted in part, in the absence of prejudice, perverseness, or corruption, merely because the judge thinks it was larger than it should have been.

At Law. Action by Mary E. Russell against James A. Bradley for malicious prosecution. There was a verdict for plaintiff, and defendant moved for a new trial on the ground of excessive damages. Motion denied.

*Thaddeus B. Wakeman*, for plaintiff.

*Chauncey Shaffer*, for defendant.

SHIPMAN, District Judge. This is a motion by the defendant for a new trial in the above-entitled action, for malicious prosecution, upon the grounds that the verdict of \$12,500 for the plaintiff was contrary to the evidence and contrary to law; that the damages were excessive; and that sundry exceptions to the rulings of the court upon objection to the testimony were well taken. A new trial cannot be granted upon the ground that a verdict for the plaintiff was contrary to the evidence. The state of the testimony upon the question whether the defendant instigated the prosecution, and upon the facts which were in dispute upon the question of probable cause, was such as required that the case should be submitted to the jury. They were justified by the testimony in finding for the plaintiff, although there was no positive and affirmative testimony that he personally caused the second prosecution to be instituted, or directed that it should be commenced. I do not understand what is meant by the averment that the verdict was contrary to the law, for no exception was taken to the instructions in regard to the law which were given by the court. Nothing need be said upon the defendant's exceptions to the admission of testimony. So far as my attention has been called by the defendant's brief to these exceptions, they are of slender character, and not important upon a motion for a new trial. The serious and substantial and troublesome point is that the damages are unduly excessive. They were mainly punitive, and were based upon the alleged actual malice of the defendant; and it is true that the defendant had, by his conduct, particularly in the newspaper of which he was the owner, furnished evidence from which the jury were justified in finding the existence of malice. I have recently had occasion to consider the subject of punitive damages in actions for injuries to character, and to say that in actions for libel the amount of damages is peculiarly a matter for the jury, and is almost entirely within their discretion, because there can be no fixed or mathematical rule upon the subject, as in actions upon contract; so that it is laid down that courts will not interfere with verdicts in libel suits upon the ground of excessive damages, unless they are satisfied that the verdict was the result of gross error, prejudice, perverseness, or corruption. The rule in regard to excessive punitive damages in actions for malicious prosecution is substantially the same; for, in each class of actions, the punitive character of the verdict is based upon the malice of the defendant, and the aggravated circumstances which surround or characterize the case. If the magnitude of the verdict clearly shows that the jury acted under undue motives, it will be set aside; but this should not be done merely because the court thinks that it was larger than it ought to have been. There was, in this case, no error upon a matter of principle, and neither perverseness nor corruption. The verdict is so large as to cause me to fear or to think that, during the trial, the jury may have conceived an undue prejudice against the defendant. Notwithstanding this fear, I should not be justified in granting a new trial on account of excessive damages. The court should be satisfied that the verdict was the result of prejudice, and I am not satisfied with that conclusion. I

have queried whether I ought not to grant a new trial unless the plaintiff would remit a specified sum, and thus give her an opportunity, rather than risk another trial, to bring the verdict down to an amount which is more satisfactory to my own mind. But such a result requires the conclusion that there ought to be a new trial, and I am not prepared to say that the amount of the verdict, though larger than it ought to have been, shows to my mind that prejudice had caused the minds of the jury to depart from a true equipoise. The motion is denied.

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*In re* HERMAN.

(District Court, D. Washington, E. D. April 30, 1892.)

**1. ATTORNEY—DISMISSAL BY RECEIVER.**

The receiver of an insolvent bank may at any time dismiss an attorney employed by him, regularly or otherwise, to prosecute claims of the bank, and employ another in his place, whom the court will, by order, substitute in the place of the dismissed attorney, except as to such cases as the latter may have commenced and finished.

**2. SAME—SECURITY FOR SERVICES RENDERED.**

A contract having been entered into between the receiver and the attorney that the latter should receive the attorney's fees provided for in the notes he was employed to collect, the court will not direct the substitution of another attorney in unfinished cases, until the receiver deposits the amount of the attorney's fees reserved in the notes as a security to the dismissed attorney for such services as he may have rendered.

**At Law.** Petition by Herman L. Chase, receiver of the Spokane National Bank, to change attorneys. The application was resisted by Henry M. Herman, the original attorney. Granted in part and denied in part.

*F. T. Post*, for petitioner.

*H. M. Herman*, *in pro. per.*

HANFORD, District Judge. The petitioner, Herman L. Chase, as receiver of the Spokane National Bank, is the plaintiff in a number of actions commenced in this court for the collection of moneys due to said bank, in all of which cases Henry M. Herman appears as the attorney of record for said plaintiff. The court is now asked to exclude him from further appearing in said cases, and to substitute F. T. Post as the attorney for the plaintiff, and also to require said Herman to surrender to the petitioner all the notes and securities and money which he has obtained possession of by means of his position as an attorney of this court assuming to represent the plaintiff in said cases. In his petition the receiver alleges that Herman has not been employed by him, and that he does not desire said attorney to represent him, and sets forth a telegram from Hon. E. S. Lacey, comptroller of the currency of the United States, saying that he (the comptroller) is not willing to recognize Herman as an attorney for the receiver, and that he has not been em-

ployed by the comptroller's authority. As an explanation of the situation, the petition states that Hon. P. H. Winston has been attorney for the receiver in all matters connected with the business of the bank, and that, as he "verily believes, said Herman was employed by said Winston to assist him in some of said litigation." It is not pretended that Judge Herman has been paid for his services in the cases referred to, or that payment has been tendered; and the directions in said telegram from the comptroller, as well as the attitude of the petitioner in this proceeding, evince an intention to contest his right to receive any compensation. It is proposed to deposit in court such reasonable sum as the court may require to cover his claim, and then to frame issues to be thereafter tried for the purpose of testing his right to receive compensation for the services rendered. From the records in the several cases enumerated in the petition I find that in all of them Judge Herman has from the beginning appeared as the only attorney for the plaintiff. In each case there is a complaint signed by him as attorney for the plaintiff, and verified by Mr. Chase. Some of these cases were commenced in the month of May of last year, and the others were commenced in August and September. The list includes 34 cases, and in 25 of them final judgments in favor of the plaintiff were rendered before this proceeding was commenced; one was settled and dismissed, and the other eight are now pending. The receiver shows by his testimony given upon this hearing that he has received the fruits of Judge Herman's labor in these cases. In some of those pending, as well as in several which have proceeded to judgment, payments have been made to him by the respective defendants.

Consideration for the rights of the parties whose interests are represented by this receiver requires me to hold that in all pending cases in which further proceedings or some further action of the court may be necessary, the receiver has the right to dismiss his attorney at pleasure after payment of lawful charges for services rendered, and to employ a new attorney to conduct such further proceedings without assigning any reason for his action; and I hold that whether Judge Herman was or was not regularly employed as the attorney for the receiver, he can be excluded from further appearing in the several cases mentioned which are unfinished, including those in which judgments have been rendered which have not been satisfied, upon payment being made to him for his services, or security given therefor. But as to the cases which are entirely finished, or in which nothing remains to be done except to settle the question at issue between him and the receiver as to his compensation, there is no reason for the further appearance of an attorney, and as to those cases the order for the substitution of attorneys prayed for by the petition will be denied.

In deciding whether to grant or deny the prayer of the petitioner as to pending cases, it is necessary for me to pass upon the question whether security for compensation to Judge Herman for his services as an attorney in said cases by a deposit in the registry of the court, as suggested in the telegram from the comptroller, ought to be exacted. As to this

question I hold that, if the attorney is entitled to compensation, he is also entitled to have his right thereto fully protected by the court before he can be by a compulsory order divested of authority to control the conduct of the cases in which compensation has been earned. Judge Herman is an attorney of this court in good standing. He is well known throughout the United States as an eminent lawyer and as a writer of law text-books. It is not alleged as a reason for dismissing him that he is incompetent or dishonest, or that he has been guilty of negligence, lack of courtesy towards his client, or any kind of misbehavior. He has rendered valuable services in these cases, and the creditors and stockholders of the insolvent bank have received the benefits thereof. Unless he can be regarded as a mere volunteer or intruder into the business of the receivership, or as an employe under an express contract to work without compensation, he is certainly entitled to be paid for the work which he has done. Was he employed by the plaintiff? The testimony upon which the decision of this question depends may be summed up in brief as follows: Judge Herman has not only appeared as the attorney for the plaintiff in this court in the several cases above referred to, but has also appeared as attorney for the plaintiff in a number of cases in the United States circuit court of this district, and in the courts of the state of Idaho, and in the United States circuit court for the district of Oregon; the whole number of cases in which he has so appeared being over 40 in number, and the aggregate amount involved being fully a quarter of a million dollars. All of said litigation has practically terminated without loss to, or sacrifice on the part of, the bank. The receiver has, from time to time, recognized Judge Herman as the attorney having actual management of the cases mentioned, by placing in his hands the promissory notes and securities upon which suits were founded, and by going to his office to verify pleadings in a number of instances, and has frequently counseled with him, and received advice concerning matters involved in the pending litigation. If in fact the attorney by whom these cases have been commenced and conducted thus far, and who has been thus recognized and counseled with, was not employed by the receiver, the question, why has not the fact been brought to the attention of the different courts in which he has so appeared before the termination of the litigation? is very pertinent. And it is not satisfactorily answered by the pretense that his relationship as an attorney for the plaintiff in the several cases was unknown to the receiver, or unknown to the comptroller of the currency, for it is impossible that the ignorance of these officers alleged in the petition could have continued while the receiver was acting in concert with him.

I regard the receiver's testimony on this point and the statements in the comptroller's telegram as simply incredible. The receiver claims, however, to have understood that Judge Herman was simply acting in place of Col. Winston, who was regularly employed as the receiver's attorney, and that, under a contract between the comptroller of the currency and Winston, the latter is obligated for the compensation to be paid him to perform all the duties of an attorney himself, or procure

another attorney to do so, and to bear the entire expense occasioned by the employment of a substitute. That contract, however, is before me as a part of the evidence introduced upon this hearing, and upon its face shows that it will not bear such a construction. It provides for a *per diem* as compensation for services which Col. Winston should render in counseling with the receiver, and in the conduct of suits and actions, and that he should at his own expense engage an attorney to act in his place when absent for the purpose of counseling with the receiver. Part of the contract between Col. Winston and the comptroller is to be found in the correspondence between them, from which it affirmatively appears that the formal written instrument was signed with the distinct understanding that the same was made subject to future modifications. And from the undisputed testimony it appears that, after the affairs of this receivership had progressed for a few months, litigation in which the bank became involved was of such magnitude that Winston was unable to carry it through alone, and it became absolutely necessary to employ another attorney. This was well known to the receiver, and was also communicated directly to the comptroller, and a proposition to employ additional counsel was made to him and assented to. He authorized the employment of a firm chosen by Col. Winston, but for some reason no arrangement was concluded with said firm. Thereafter a definite proposition to employ Judge Herman in certain cases which were mentioned, and to pay him a specified compensation, was made. Owing to delay in receiving a response from the comptroller to this last proposition, which was made by Col. Winston in a letter to the comptroller, and the necessity for prompt action in said cases, Judge Herman, at the request of Col. Winston, undertook these cases, and prosecuted them with the full knowledge and co-operation of the receiver. According to the testimony of both Col. Winston and Judge Herman, it was distinctly understood and agreed to between them and the receiver that the compensation which Judge Herman would claim in the collection cases brought in this court was to be the percentage provided for in the several notes sued upon which the makers promised to pay as attorney fees in case of action brought, in addition to principal and interest. It was distinctly understood that the receiver should have the full amount of all moneys collected as principal and interest, and that the attorney's compensation should be the amount provided for in the notes to be collected in each case from the debtor. The testimony of these two witnesses is opposed only by that of Mr. Chase, who denies that he ever assented to such an arrangement, and he claims that he has always insisted that the attorneys' fees stipulated for in the notes should be collected for the benefit of the bank, the same as the principal and interest. He has, however, participated in the prosecution of suits in this court upon said notes to collect the principal and interest and attorney's fee. His duty as an officer of the government appointed to transact the business of an insolvent bank required of him not only diligence to prevent loss to creditors and stockholders of the bank, but also fair treatment of its other customers, and he could not

consistently with his duty represent to the court that an expense had been incurred for attorneys' fees in proceedings to collect the notes, and thereby induce the court to award him judgments including such expenses, if the same were not actually incurred. This court certainly would not knowingly have allowed the receiver to oppress the debtors of the bank to the extent of making them pay the principal and interest of their notes, and any sum for expenses of collection in addition to the amount of the actual expenses in each case. The amounts awarded for attorney fees in the several judgments rendered belong to the attorney, and if by any arrangement he has precluded himself from lawfully claiming the same the amount should be refunded to the debtors if collected, or credit should be given for the same upon the judgments if remaining uncollected. The testimony of Mr. Chase in this particular is not only contradicted by two witnesses, but it shows that he is endeavoring to act unfairly towards his attorney, or towards the defendants in the several cases mentioned, and because of such attempted unfairness on his part, as well as the number of witnesses against him, I feel constrained to reject his statements, and to find as a fact that the agreement was made as sworn to by the other witnesses.

Upon consideration of all the evidence, I find that Mr. Chase has from the beginning of each of the actions had definite and accurate information as to the relationship of Judge Herman as his attorney in said cases; and, whether there was any definite contract of employment in words or not, the services were rendered under such circumstances as to raise an implied promise to pay reasonable compensation therefor. I cannot in this proceeding adjudge as to the amount due Judge Herman for his services as the plaintiff's attorney, but he is at least entitled to all attorney fees collected or to be collected from the debtors in these collection cases. I will therefore order that as to cases which are still pending Judge Herman surrender to the petitioner the notes and all securities which he has, as soon as the receiver shall deposit in the registry of this court, to await the further action and determination of the court, an amount equal to the attorney fees stipulated for in such notes. As to the money in his hands which he has collected from the bank I will make no order, but will let it remain until a final accounting and settlement between him and his client can be had. The question as to the amount due from either as compensation for services rendered for which the receiver is liable, or on account of moneys collected by the attorney and due to his client, can only be determined by the court in a case regularly commenced and prosecuted by one party against the other, so that an issue can be framed and a judgment rendered in the usual way. I will deny the receiver's application as to all finished cases,—that is to say, those cases in which the record shows the judgments rendered to have been fully paid,—and grant the petition as to the pending causes upon compliance upon the part of the receiver with the conditions imposed as to the deposit into court as above specified.

WAKELEE v. DAVIS *et al.*

(Circuit Court, S. D. New York. May 28, 1892.)

## 1. CONTEMPT—VIOLATION OF INJUNCTION—EVIDENCE.

An injunction prohibiting defendant, in an action to enforce a judgment, from maintaining that the same "was not duly given, made, or entered by a court having competent jurisdiction thereof, is not valid, and does not still stand of record in said court, and is not in full force against said defendant," is not violated by a general denial of an allegation that such judgment was recovered in a named court, the effect of the denial being merely to compel plaintiff to produce legal evidence of the judgment.

## 2. SAME—EVIDENCE.

But the order was violated by a general denial of allegations that the judgment, which was against a nonresident, was duly entered, and that it still stood of record in the district court.

In Equity. Suit by Angelica Wakelee against Erwin Davis. Plaintiff moves for an attachment against defendant and his attorney, T. D. Kenneson, for contempt. Motion granted.

For former reports, see 48 Fed. Rep. 612; 44 Fed. Rep. 532-533; and 37 Fed. Rep. 280-282.

*Anson Maltby*, for plaintiff.

*Thaddeus D. Kenneson*, for defendant.

SHIPMAN, District Judge. This is a motion for attachment for contempt of court by reason of the alleged violation of an injunction order of this court enjoining the defendant Davis and his attorney from claiming or setting up, by answer or in any other manner, in any action or suit, and from maintaining against the plaintiff, that a specified judgment against said Davis, which was rendered by a district court in the state of California, "was not duly given, made, or entered by a court having competent jurisdiction thereof, is not valid, and does not still stand of record in said court, and is not in full force against said defendant." The alleged contempt consists in the manner in which the defendant, by his attorney, Mr. Kenneson, has pleaded to the complainant's amended complaint in an action at law upon said judgment, in which complaint the judgment is declared upon in four counts or separate causes of action. The defendant presents in his answer two classes of defenses, one consisting of general denials of the complainant's allegations, and the other mainly relying upon an alleged discharge in bankruptcy. The general denials are in the form which denies that the defendant has any knowledge or information sufficient to form a belief as to all the allegations contained in specified paragraphs of the complaint. It is not doubted that this statutory form of pleading puts in issue the allegations which are referred to, and creates a material issue which compels the complainant to prove such allegations upon trial. *Livingston v. Hammer*, 7 Bosw. 674, *Flood v. Reynolds*, 13 How. Pr. 112; *Wayland v. Tysen*, 45 N. Y. 281. The question upon this part of the answer is whether the creation or the setting up of these issues by the general denials is in violation of the terms of the injunction. The fourth and tenth paragraphs of the complaint



allege that on November 18, 1873, one Wakelee recovered a described judgment in the district court, by the terms of which it was adjudged that said Wakelee recover of said Davis a sum which is specified. The defendant, in his answer, generally denies these allegations, and thereby an issue of fact is raised, whether such judgment was obtained in said court. Neither the validity of the judgment nor the jurisdiction of the court is denied. The denial compels the plaintiff to produce legal evidence of the judgment, and, although the defendant at one time admitted its existence, he has a right to call upon the plaintiff to establish, by legal proof, the rendition of a judgment, or what purported to be a judgment. The object of the bill in equity, and of the decree, as is truly said by the defendant, was not to relieve the complainant from proof of her cause of action at law. It was to prevent the defendant from using defenses from which he was equitably estopped, and which were, in substance, a denial of the jurisdictional facts which enabled the court to render this judgment. I perceive no violation of the injunction either in this or the other general denials of the truth of the allegations in the first cause of action. But in the eleventh and twenty-third paragraphs the plaintiff alleges that said judgment was duly given, made, and entered by said district court, which, inasmuch as the defendant was shown to be a non-resident, was a proper and apparently necessary averment. *Galpin v. Page*, 18 Wall. 350, (1873;) *Wilbur v. Abbot*, 6 Fed. Rep. 814. *Tenney v. Townsend*, 9 Blatchf. 274, *contra*, was decided in 1871, and the averment that the judgment was duly entered was a sufficient statement of the facts, under the New York practice, to impliedly allege jurisdiction. *Brownell v. Greenwich*, 114 N. Y. 518, 22 N. E. Rep. 24; *Rockwell v. Mervin*, 45 N. Y. 166. The denial by the defendant of this allegation raises an issue of fact in regard to the existence of jurisdictional facts, and, in effect, "sets up" that the judgment was not duly made by a court having competent jurisdiction thereof, which was prohibited by the order of the court in the equity suit. The seventeenth and twenty-seventh paragraphs allege, among other things, that said judgment still stands of record in said district court. The defendant's general denial of this paragraph denies this particular averment. The injunction order in terms enjoined the defendant against setting up that the judgment does not still stand of record in said district court, and therefore I think that there has been a technical violation of the order.

The injunction order also expressly prohibited the defendant from setting up that the judgment is not in full force. My knowledge of the previous history of the litigation leads me to think that this order had reference to the defense of the invalidity of the judgment by reason of the lack of the jurisdiction of the court over the person of the defendant, and not to a discharge of the judgment, or of the debt evidenced thereby, by reason of bankruptcy proceedings. I do not understand that the defendant was in fact enjoined against interposing this defense, and from maintaining that by reason of it the judgment had lost its force. In my opinion, the defendant's general denial of the seventeenth and eighteenth paragraphs of the complaint, which allege that the judgment is in full

force, cannot be considered to have reference to jurisdictional facts, but to the bankruptcy discharge. In the sixth and seventh divisions of the third paragraph of the defendant's special defense, the facts in regard to the jurisdiction of the California court over the person of the defendant Davis, the service by publication, the California statute, and his non-appearance in the suit are set forth at length. These facts are pleaded as a part of the defense of the discharge in bankruptcy, and, as the Code requires that each separate defense should be separately stated, it cannot be supposed that they constitute a double defense. If they are material to the defense in bankruptcy,—and from the fact that they are pleaded it is to be presumed that the pleader deemed them material,—they present and claim, and set up by answer, the invalidity of the judgment as a factor in the defense. This is prohibited by the injunction order, which enjoins the defendant from in any manner or form maintaining that the judgment was not made by a court having competent jurisdiction thereof. In the particulars which have been named, I am of opinion that the defendant's attorney has not complied with the injunction order, and that the violation will be a continuing one until the answer is amended. The complainant suggests only a fine equivalent to the amount of expenses which he has incurred in the preparation of the voluminous motion papers. The question of the amount of the fine will be submitted to the court upon affidavits, and without argument, within one week from the filing of this opinion. The order will be thereafter settled upon hearing.

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*Ex parte* SKILES.

(Circuit Court, D. Minnesota, Third Division. June 3, 1892.)

**HABEAS CORPUS—JURISDICTION OF FEDERAL COURTS—EXTRADITED PRISONER CONVICTED OF DIFFERENT OFFENSE.**

The federal courts have no jurisdiction to review by *habeas corpus* a judgment of conviction in a state court having jurisdiction of the person and the offense, although the prisoner had been extradited from another state to answer an indictment, and was convicted of an offense other than that charged therein. His remedy is by appeal or other appropriate proceedings in the state courts.

At Law. Application of Robert Iron Skiles for writ of *habeas corpus*. Denied.

*Fayette Marsh* and *J. C. Nethaway*, for petitioner.

*Geo. H. Sullivan*, Co. Atty., for the State.

NELSON, District Judge. The prisoner, Skiles, was rendered up to the state of Minnesota on demand of the executive from the state of Texas by proceedings commenced under the constitution and laws of the United States in regard to the delivery of fugitives from justice. He was delivered up and removed to the state of Minnesota, and confined in the jail, February 12, 1892, upon an allegation that an indict-

ment stood against him in the county of Washington, state of Minnesota, found by the grand jury, May 6, A. D. 1890, charging the crime of obtaining by false pretenses a promissory note and chattel mortgage from one John Alfred Roney. On May 5, A. D. 1892, while awaiting trial, an indictment was found against him for the same offense of defrauding Roney, evidently to correct a supposed defect in the first indictment. The grand jury also found an indictment against him for another and different crime from that on which he was extradited. On an arraignment under this indictment the prisoner refused to plead, and on plea of not guilty being entered he was tried May 16, 1892, and convicted, and a motion was made, and is now pending, in the state court in arrest of and to set aside this judgment. The petition for a writ of *habeas corpus* to secure the prisoner's release alleges that he is not detained by reason of any final judgment or decree of any competent tribunal of civil or criminal jurisdiction, or by virtue of an execution issued upon such judgment or decree. It is urged that the district court of Washington county had no jurisdiction, and cannot lawfully put the prisoner upon trial for an offense for which he was not extradited. Upon the face of the petition and answer of the sheriff of Washington county to the "order to show cause why a writ of *habeas corpus* should not issue," it appears clearly that the petitioner is in custody and lawfully held by virtue of criminal proceedings duly instituted under the laws of the state of Minnesota; but while this is conceded, as I understand counsel, yet it is insisted that having been put upon his trial on an indictment charging another and different offense from that for which he was extradited, and judgment of conviction being entered, this court should declare such judgment illegal and void, for the reason that the state of Minnesota had no right to try the petitioner extradited from another state upon a charge other than that contained in the extradition papers. If this position of counsel is sound, the federal courts have supervisory jurisdiction over judgments of the state criminal courts, although such courts had jurisdiction of the person and of the offense, and thus can accomplish by the writ of *habeas corpus* all that otherwise could only be obtained on review by writ of error or appeal to the supreme court of the state, which undoubtedly has plenary jurisdiction to correct errors of the trial court. The circuit courts of the United States, in my opinion, do not possess such supervisory jurisdiction. It would be an affectation of learning, and serve no useful purpose, to do more than cite counsel to the case of *Ex parte Ulrich*, 43 Fed. Rep. 661, for a full and exhaustive exposition of the law involved in this case. Application for a writ of *habeas corpus* is denied.

*Ex parte* YOUNG.

(Circuit Court, E. D. Tennessee, S. D. March 10, 1892.)

## 1. CONTEMPT—HABEAS CORPUS—REMOVAL OF CHILD—JURISDICTION OF STATE COURT.

A father, directed by writ of *habeas corpus* to produce his child before a state judge, caused the child to be removed without the limits of the state, and kept there in the custody of an agent, subject to the control of the father, for the purpose of defeating the jurisdiction of the state judge. *Held*, that the child was constructively in the possession of the father, and that the fact of its being without the state did not affect the jurisdiction of the state judge to fine and imprison the father for contempt in disobeying the writ of *habeas corpus*.

## 2. SAME—DUE PROCESS OF LAW.

In such case, the fine and imprisonment were not "without due process of law," and the circuit court of the United States has no jurisdiction of a petition by the father for a writ of *habeas corpus* on that ground, whether the action of the state court in imposing the punishment was or was not erroneous.

At Law. Petition by J. W. Young for writ of *habeas corpus*. Dismissed.

*Lewis Shepherd* and *W. H. Bogle*, for petitioner.

*Clift & Smith*, for respondent.

KEY, District Judge. The plaintiff files his petition for a writ of *habeas corpus*, alleging that he is unlawfully imprisoned. It appears that he and his wife have separated; that they have a child, who is three years of age; and that proceedings are pending in the chancery court of the state, by which Mrs. Young seeks a divorce from her husband, and the custody of her child. February 26, 1892, the wife sued out a writ of *habeas corpus* against her husband and others from the judge of a circuit court of the state, alleging that her husband had the custody of the child; that in the divorce proceeding her husband had been attached, upon her petition, for contempt because of his disobedience to the injunction of the chancellor, and the chancellor heard the charge of contempt on the 20th day of February, 1892; that on the Friday before this hearing Young had said that he did not know how the court would decide the matter, and that he intended to run the child away, so that they could not get hold of her, provided the court should decide against him; and that in execution of his threat, and while the chancellor was hearing the matter of contempt, Young had the child removed from this state, and beyond the chancellor's jurisdiction. Upon this petition the circuit judge issued a writ requiring Young to appear before him the afternoon following, and to bring the child with him. At the time the writ was returnable the plaintiff in this case, Young, made what may be styled a "partial return," but stated that he had not been allowed sufficient time to make a full and complete return. The judge allowed two days more. At the end of the two days the following order was made:

"STATE OF TENNESSEE, HAMILTON COUNTY.

"*In the Matter of the Petition of May Young vs. J. W. Young et als. Habeas Corpus Proceedings in the Circuit Court of Hamilton Co., Tenn.*

"In this cause the defendant, Young, having failed to comply with the order of the court to produce in court the body of Dorsey Young, as ordered in

the original writ in this cause, and having filed, on 27th February, a partial and incomplete return to the writ, and having again been ordered by the court to make a full return by 4 o'clock P. M., February 29, 1892, and to produce the body of Dorsey Young in court, (he having admitted in court that said child was held by one Armstrong, as his agent, subject to his order,) in pain of the penalties to be inflicted in accordance to law for such disobedience to the writ of *habeas corpus*, and the defendant, Young, now coming and failing to comply with the order of the court, and failing to make the return required by Mill. & V. Code, § 4494, subsecs. 1-3, and again filing an evasive return, contradictory of the previous partial and incomplete return, both under oath, and no satisfactory reason having been given for defendant's failure to bring the child, Dorsey Young, into court, and no effort to produce her having been made, and defendant still willfully refusing to comply with the order of the court in this case, it is adjudged that said Young now stand in contempt of the court, and that he be fined the sum of fifty dollars, and imprisoned in the county jail ten days, or until he purges himself of contempt by producing in court the body of Dorsey Young, or makes a return sufficient in law to relieve him from the duty; and that the further proceedings be continued until the 11th day of March, 1892, for such further order as may be proper in this case. The sheriff will, at the expiration of ten days, hold the defendant until fine is paid or secured, and bring the defendant before the court at nine o'clock A. M., March 11, 1892."

Young is confined in prison under this order, and he insists that he has been fined and imprisoned without due process of law, and therefore in violation of the constitution of the United States. It is urged that the circuit judge had no jurisdiction of the case, because the child, —the subject-matter of the litigation,—at the time Mrs. Young sued out her writ, was, and it has ever since been, outside of the limits of this state. In the determination of this cause we have no right to supervise or review the action or judgment of the state judge. If he had jurisdiction of the cause, we cannot review, reverse, or change his action, no matter how erroneous it may have been. There is no question but that the judge who issued the writ had authority over *habeas corpus* cases, and that Young was and is in the territory over which the judge presides. To this extent, at least, he has jurisdiction. The petition of Mrs. Young shows that the child was not in the state when the application for the writ was made, and that it had been removed therefrom by Young to avoid the execution of such order as the chancellor might make unfavorable to his custody of the child. The order of the circuit court of the state says that Young admitted before him that the child was held by one Armstrong as his agent, and subject to his order. Now, though the child is not in his manual possession, it is in his custody, and under his control, and he is within the jurisdiction. The case referred to, recently decided by the circuit court of appeals for the eighth circuit, in which it was held that the writ could not run to a place outside of the territorial jurisdiction of the court issuing it, is not like this. *In re Boles*, 48 Fed. Rep. 75. In that case the applicant for the writ was in the penitentiary at Columbus, Ohio, in the custody of the officers of that institution. The custodians of the prisoner were not in the jurisdiction of the court, and there was no proper defendant within the jurisdiction. I presume that in the decisions of the supreme court of

the United States there has been no case in which the parties were situated as they are in the *Young Case*. The case most like the one we have, among those referred to, is *In re Jackson*, 15 Mich. 416-442. From that case it appears that the supreme court of Michigan, under the constitution of that state, can issue writs of *habeas corpus*, and application was made in that court for such a writ in a case in which the parties were very much situated as, and the facts like, they are in this case. The court was equally divided in opinion, and the writ failed because a majority of the judges did not agree; but the judges who thought the writ should issue were COOLEY and CHRISTIANCY, so that the case is not authoritative, but the judges who believed the writ should issue are eminent, and respected for the weight of their legal opinions. One controlling reason for the opinion of the two judges who believed the court was without jurisdiction was that the law of Michigan in express terms confined its operations in such cases to persons "detained within the state." Judge COOLEY, in his opinion, says: "What I say on this subject is carefully restricted to a citizen of our own state unlawfully held in custody elsewhere by another person, who is himself within the jurisdiction of this court. If he is here, the wrong is being done here, for the wrong is done wherever the power of control is exercised." *Ex parte Forbes*, 1 Dill. 363-367, would not allow the writ in Young's favor, though all that is insisted upon by petitioner's counsel were true as to the state of the law; but that case can hardly be maintained under the scope and authority of subsequent decisions of the supreme court of the United States. The conclusion reached is that the petitioner's detention and imprisonment are not without due process of law, or in violation of the constitution or law of the United States, and his application for a writ of *habeas corpus* is dismissed.

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### UNITED STATES v. GRIMM.

(District Court, E. D. Missouri, E. D. May 21, 1892.)

No. 3,406.

#### 1. MAILING OBSCENE LETTERS—INDICTMENT.

An indictment under Rev. St. U. S. § 8398, for mailing letters giving information where obscene pictures can be obtained, is not bad because the letters, as set out in the indictment, do not in themselves show that the pictures referred to are obscene, where the indictment further avers that the accused had in his possession a large number of obscene pictures, and that said letters were written and deposited in the mail with intent to give information concerning such pictures, and did in fact convey such information.

#### 2. SAME—EVIDENCE.

In prosecutions under said section, where the letters complained of, to a casual reader, appear to be harmless, the government is entitled to allege and prove by extrinsic evidence that they in fact give information concerning obscene pictures or literature, and were so intended.

#### 3. NAME—INDICTMENT.

The indictment is not bad because it charges that letters addressed respectively to Herman Huntress and William W. Waters were intended to and did convey information to Robert W. McAfee where obscene pictures could be obtained, since it is neither impossible nor improbable that the names Huntress and Waters were assumed names.

## 4. SAME—DECOY LETTERS.

The offense charged does not lose its criminal character though the letters were sent in response to an inquiry made under an assumed name by a government official, with a view of detecting the accused in the commission of an offense, since it does not appear that the accused was solicited to use the mails and thus to commit an offense.

**At Law.** Indictment against William Grimm for mailing lewd, lascivious, and obscene letters, in violation of Rev. St. U. S. § 3893. A demurrer to a former indictment was sustained on the ground of uncertainty in the allegations, (45 Fed. Rep. 558,) whereupon the defendant was reindicted. Verdict of guilty. The case is now heard on motion for new trial and motion in arrest of judgment. Overruled.

The letters as set out in the indictment were as follows:

"WM. GRIMM, PHOTOGRAPH AND ART STUDIO, N. E. COR. OF JEFFERSON AVENUE AND OLIVE STREET.

"ST. LOUIS, July 22, 1890.

"*Mr. Huntress, Richmond*—DEAR SIR: I received your letter this morning. I will let you have them for \$2.00 per doz. & \$12.50 per 100. I have about 200 negatives of actresses.

"Respectfully,

WM. GRIMM."

"WM. GRIMM, PHOTOGRAPH AND ART STUDIO, N. E. COR. OF JEFFERSON AVENUE AND OLIVE STREET.

"ST. LOUIS, July 21, 1890.

"MR. WM. WATERS: Yours at hand, the 21st. I will make them for \$2.00 per doz. and \$12.50 per 100.

"Address: WM. GRIMM, N. E. Cor. Olive and Jefferson, St. Louis, Mo.

"P. S. Different sisses."

It was alleged in the indictment, in substance, that at the time of depositing the letters in the mail the defendant had in his possession a large number of lewd, lascivious, and obscene pictures; that the letters in question were written and deposited in the mail with intent to give information to one Robert McAfee where such pictures could be obtained, and that they did give such information.

*Geo. D. Reynolds*, U. S. Atty.

*D. P. Dyer and Louis A. Steber*, for defendant.

**THAYER**, District Judge. The motions in arrest and for a new trial present three questions.

1. The first is whether the indictment is bad, because the letters set out in the indictment and alleged to be nonmailable do not in themselves show with certainty that the pictures therein referred to are either lewd, lascivious, or obscene. This question was considered to some extent during the trial, and has since been more carefully considered. The court decides the question in the negative. It holds that a letter is non-mailable if it in fact conveys, and was intended to convey, information to any person where obscene pictures or literature may be obtained, even though to a casual reader it may seem harmless. The court further holds that in a prosecution of this character the government is not

confined to the letter itself, but may show by any competent extrinsic testimony that the letter gives information which the statute prohibits being given through the mail, and that it was in fact intended to convey such information. If the character of a letter cannot be thus shown by extrinsic facts, the statute under which this indictment is drawn could be easily evaded and would prove a dead letter.

2. The next question is whether the indictment is bad because it is alleged that the letters addressed to Herman Huntress and William W. Waters conveyed information, and were intended to give information, to one Robert W. McAfee where lewd and obscene pictures could be obtained. This question must be decided in the negative, for the reason that it is not impossible, or even improbable, that a letter addressed to Huntress or Waters may have given and may have been intended to give information to a person whose real name was McAfee. The letters may have been addressed to a person under an assumed name, and the proof adduced at the trial showed that such was the fact. McAfee had written two letters to the defendant under assumed names, and in reply thereto had received the two letters counted upon in the indictment,—the one addressed to Huntress and the other to Waters. It certainly cannot be maintained that the mailing of a letter containing information as to obscene pictures is not an offense because it is sent to a person under an assumed name. *U. S. v. Cottingham*, 2 Blatchf. 470.

3. The next inquiry is whether the act complained of—that is to say, the deposit of nonmailable letters in the mail—loses its criminal character because the letters were sent to a person in the service of the post office department, in response to an inquiry made by that person under an assumed name, and for the purpose of detecting the defendant in the commission of a crime. This question must be decided in the light of authority, and without reference to the other question that has sometimes been discussed, whether a person is ever justified in resorting to artifice or deception for the purpose of discovering crime. In view of what seems to be the weight of authority at the present time, the court is compelled to decide the question last stated in the negative. If a letter gives information where obscene books or pictures can be obtained, it is an offense to deposit such a letter in the mail with intent to give such information, and thereby to aid in the sale and distribution of such books and pictures, even though the party addressed happens to be an official in the service of the government. And, if such act is done voluntarily and intentionally,—that is to say, if the nonmailable letter is deposited in the mail by the accused without solicitation on the part of the officer that the mail be used to convey such intelligence,—the weight of judicial opinion seems to be that the act does not lose its criminal character, though the offense may have been committed in responding to an inquiry from a person in the government service which was made under an assumed name for the purpose of concealing his identity. *Bates v. U. S.*, 10 Fed. Rep. 92, 100; *U. S. v. Bott*, 11 Blatchf. 346; *People v. Noelke*, 94 N. Y. 137, 142; *Excise Com. v. Backus*, 29 How. Pr. 33, 39, 42; *U. S. v. Moore*, 19 Fed. Rep. 39; *U. S. v. Wight*, 38 Fed. Rep.



106, 109, 111; *U. S. v. Dorsey*, 40 Fed. Rep. 752; *U. S. v. Whittier*, 5 Dill. 35, 39; *U. S. v. Foye*, 1 Curt. 364. It cannot be regarded as a valid excuse for a crime that some one has afforded the accused a convenient opportunity to commit it, for the purpose of testing his honesty. Unfortunately it seems to be necessary to apply such tests in order to suppress offenses of a certain class. In the case at bar the evidence did not show that the accused was solicited to commit the offense charged in the indictment. The selection of the public mail as the medium for giving information where the most lewd and indecent pictures could be obtained was the voluntary act of the defendant, and he is criminally responsible therefor. The motions for a new trial and in arrest are therefore overruled.

N. B. The judgment and sentence in the foregoing case was imprisonment in the penitentiary of the state of Missouri for and during the term of one year and one day, to be kept at hard labor during said term.

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### HAFFCKE v. CLARK.

(Circuit Court of Appeals, Fourth Circuit. May 25, 1892.)

No. 4.

#### 1. PATENTS FOR INVENTIONS—NOVELTY—REFRIGERATORS.

Letters patent No. 343,369, issued June 8, 1888, to Charles Haffcke, cover the combination in a refrigerator of an ice bowl or rack in the upper part, with open bottom formed of two sets of slats, the upper convex and the lower concave, so arranged that the latter catch and carry off the drip, the ice bowl being detached from the sides of the refrigerator, so as to allow the free circulation of air, together with thin crates of salt set on edge near the ends and at the back of the chamber of the refrigerator, detached from the walls, and held by slats or woven wire, with open interstices, that allow the air coming directly down from the ice free circulation through the salt, producing an automatic circulation of cold, dry, saline atmosphere, having extraordinary and unprecedented efficacy in preserving meats, etc., in sound condition for unusual periods of time. *Held*, that the invention is novel and patentable.

#### 2. SAME—LICENSE TO PARTNERSHIP—EFFECT OF DISSOLUTION.

A patentee entered into partnership with another for a term of years, unless sooner dissolved by consent, for the purpose of manufacturing the patented article, the patentee contributing the right to manufacture under his letters patent, and the other a sum in cash. *Held*, that on dissolution of the partnership the license expired, and the exclusive right to the patent remained in the patentee.

46 Fed. Rep. 770, reversed.

Appeal from the Circuit Court of Maryland.

In Equity. Suit by Charles Haffcke against Eugene P. Clark for infringement of claims 4, 5, and 6 of letters patent No. 343,369, issued June 8, 1888, to complainant for an improvement in the art of refrigeration. These claims were held invalid for want of patentable novelty, and the bill dismissed. 46 Fed. Rep. 770. Plaintiff appeals. Reversed.

The specification contains the following statements:

"The third part of the said invention relates to means for absorbing moisture from the air in the refrigerating chamber, and diffusing throughout the said

chamber a saline atmosphere, which has antiseptic qualities, and thereby assists in the preservation of meats placed in the chamber."

"E is a hopper, formed of some perforate material, preferably galvanized woven wire, to contain salt; and it may extend partially or entirely around the chamber, as may be preferred. The salt in the hopper, E, absorbs moisture from the air in the chamber, which air becomes strongly saline, and an effective preservative agent. Water resulting from the absorption of moisture by the salt falls to the pan, h, from which it escapes through the pipe, i."

"Further, I am aware that chloride of calcium has been exposed in a frigerating chamber to absorb moisture from the air therein; but this salt will not answer the purpose which I have in view, partly owing to its extreme deliquescece, but principally for the reason that it will not diffuse a saline atmosphere in the chamber. Instead of chloride of calcium, I employ chloride of sodium, which I find is sufficiently deliquescent for all practical purposes; and by its use I am enabled to obtain a saline atmosphere in the chamber, which, in itself, is a preserving agent."

"I disclaim the use of combined ice and salt in a frigerating chamber, as also an exposed body of chloride of calcium."

The claims alleged to be infringed are as follows:

"(4) In combination with a frigerating chamber, an exposed body of chloride of sodium, arranged to absorb moisture from the air in the chamber, and to establish in the said chamber a saline atmosphere, as and for the purpose specified. (5) In combination with a frigerating chamber, a perforate hopper, containing a body of chloride of sodium, arranged to absorb moisture from the air in the chamber, and to establish in the said chamber a saline atmosphere, substantially as and for the purpose specified. (6) In a frigerating chamber, a perforate hopper, containing chloride of sodium, secured to the wall of the said chamber, substantially as and for the purpose specified."

*Price & Stewart, (Arthur Stewart, of counsel,) for appellant.*

*Albert S. J. Owens, for appellee.*

Before GOFF, Circuit Judge, and HUGHES, District Judge.

HUGHES, District Judge. Charles Haffcke, the appellant in this case, devised and constructed a refrigerator upon a pattern differing in material particulars from any before used. What one witness says of its capacity for preserving meat and other articles liable to decay, for a long time, in a high degree of atmospheric temperature, is corroborated by numerous others. This witness says, in substance, that he has seen meat in perfect preservation, which has been preserved in one of these refrigerators for six weeks, in the hottest summer weather, in a place where heat was reflected on the refrigerator from the street, under the rays of the summer sun. He testifies that meat kept in this refrigerator at a temperature (inside of its chamber) of 38 to 50 degrees, for six weeks, remains in sweet condition; and that it could not have been kept in an ordinary refrigerator in like condition for more than four or five days. He adds that this result is accomplished by the consumption of much less ice than is ordinarily required for such a purpose. An undertaker testifies that a refrigerator constructed on the same principle, but in casket form, has kept a human corpse for 35 days in a condition as perfect at the end of the period as at the death, in a temperature of 52

degrees; whereas, by the means ordinarily used such a body could not be kept longer than 10 days, with a larger consumption of ice. Other extraordinary instances of like preservation of substances liable to decay are proved to have been accomplished by the Haffcke refrigerator, by testimony which leaves no doubt of the exceptional utility and value of this contrivance for the important purposes for which it is designed.

The form of the structure by which these results are produced is in several respects novel. In the upper part of it is a bowl or rack, with open bottom, for the reception of ice. The bottom is formed of two sets of slats, the upper set convex, the lower concave, so arranged that the melting of the ice drips from the convex into the concave set of slats, and is carried off by the latter. The lower slats or troughs may or may not be filled with salt, at the pleasure of the user. The ice bowl or rack is made of smaller dimensions than that part of the chamber of the refrigerator in which it is placed, in order that between it and the walls of the chamber space may be allowed for the free circulation of air. The receptacle for ice, thus described, differs from those in common use in the fact that it does not touch the walls of the refrigerator, and that its bottom is open for the free descent of air, directly from contact with the ice above, into the chamber below.

The second distinguishing feature of the Haffcke refrigerator consists of contrivances for holding quantities of chloride of sodium or salt in the chamber below the ice, in such manner as to permit the cooled air which descends from the ice to pervade and permeate, with the least possible obstruction, these salt depositories, as well as the open space of the lower chamber. The salt depositories just mentioned, called improperly "hoppers" in the appellant's specifications for the patent, hold the salt in the form which would be a thin slab if it were solid, set on edge, and placed near the sides and the back of the lower chamber of the refrigerator. These slabs of salt are incased each in a crate or hopper resting on a trough lying some inches above the floor of the chamber, sufficiently inclined to carry away any drippings that may occur by liquefaction. The sides of these crates may be of galvanized woven wire, but in practice are of wooden slats, placed far enough apart to permit a free circulation of air through the salt, and close enough together to hold the salt without wasting. An essential part of the design in respect to the crates holding the salt, as well as of the bowl with open bottom, holding the ice, is that a space is left between each of them and the walls of the refrigerator for the unobstructed circulation of air between them and the walls. These salt crates below, and the ice bowl with open bottom above, all so placed as to allow the air from the cooled ice easy automatic circulation through the salt and throughout the refrigerator, are the particular features and distinguishing characteristics of the Haffcke refrigerator. It is proved that by means of the circulation which is chemically and automatically produced by the contrivances thus described, a cold, dry, saline atmosphere is generated, having extraordinary and probably unprecedented efficacy in preserving meats and other articles liable to decay in sound condition for unusual

periods of time. The fact that the time of preservation is thus extended, and the additional fact that the agent or principal agent by which this is done is the cold, dry, saline atmosphere generated by this refrigerator, are proved by a weight and an accumulation of testimony which the appellee has not succeeded in refuting, and which must be accepted by the court as established to its satisfaction.

There can be no doubt that this is an exceptionally efficacious machine. The several devices of which it is made up may not be novel individually; but, as a whole, the structure is unique in design, and extraordinary in effect. That the receptacle for ice is most efficacious when placed in the upper part of the chamber of a refrigerator has long been well known. But the Haffcke ice bowl differs from others in having an open bottom, and in being so constructed that an air space surrounds it on every side, separating it from the walls of the refrigerator. The use of salt in connection with ice as an absorbent of atmospheric humidity, and as a means of lowering the temperature of air, is not new. It is proved in this case that salt has been used for this purpose by being placed in pans at the bottom of the main chambers of refrigerators. It is also proved that in previous patents—the Eber and the Jolley, for instance—it has been used in the walls of refrigerators, the lining separating it from the main chamber being perforated sheets of zinc, or soft and more or less porous wooden boards. But there is no proof that such use of salt in the walls, where it is but very partially accessible to the air, has been efficacious to any pronounced extent. The impression is left by the evidence that the results of such restricted and confined use of salt for the purpose of adding to the preserving qualities of ice, as is indicated by other patents, have been almost, if not quite, *nil*. The contrivance of Haffcke is as far in advance of these devices in method as it is proved to be in the results attained. His plan is novel, of placing slabs of salt near the ends and at the back of the chamber of the refrigerator, entirely detached from its walls, and held by slats or woven wire, with open interstices, that allow a free circulation of cooled air, coming directly down from contact with the ice, through the salt, and thence into the main preserving chamber itself. No such process has been provided for by any one of the half dozen or more patents that are relied upon on behalf of the appellee as having anticipated the contrivance of Haffcke. There can be no reasonable doubt that the cold, dry, saline atmosphere that is generated in the Haffcke refrigerator is the product of the ice bowl of open slatted bottom, precipitating its cooled air through the slabs of salt standing below, detached from the walls of the chamber, and lined with intersticed slats, which both permit and promote its free circulation.

The question is, whether a contrivance is patentable which is thus novel in the structure of its ice bowl, and thus novel in its means and manner of using chloride of sodium in conjunction with ice to produce a cold, dry, saline atmosphere efficacious for preserving purposes, and surprisingly successful beyond example in accomplishing those purposes. We think that it is. The use of ice as a cooling and of salt as a preserv-



ing agent is as old as human knowledge; but the means and manner of employing them in these functions may be infinite, opening a wide field for experiment and invention; and when a device is fallen upon which produces unprecedented and unequalled results in the use of these familiar agents, that device may possess a very high degree of patentable merit. Moreover, the device itself may be a combination of several elementary devices, each as familiar to the public as the letters of the alphabet; yet the combination of them may, as a whole, possess an extraordinary novelty and utility.

Even if this contrivance of Haffcke be put upon the low plane of a new combination of known mechanical appliances, it falls within the class of patentable machines. In the case of *Harrison v. Foundry Co.*, 1 App. Cas. 574, Lord Chancellor CAIRNS said: "A new combination of old parts to produce a known result in a more useful and beneficial way than before attained" is the proper subject of a patent. Sir JAMES BACON, V. C., held to the same effect in *Murray v. Clayton*, 7 Ch. App. 577, in saying that "a combination of things not in themselves new, but which combination is perfectly new in the form in which the inventor has cast it, and producing new and more beneficial results, may be the subject of a patent." In *Forbush v. Cook*, 2 Fish. Pat. Cas. 668, the court said:

"A new or improved or more economical effect, attributable to the change made by the patentee in the mode of operation of existing machinery, proves that the change has produced a new mode of operation which is the subject-matter of a patent."

And Judge STORY, in *Ryan v. Goodwin*, 3 Sum. 514, said, in respect to a combination of materials:

"Each of these ingredients may have been in the most extensive and common use, and some of them may have been combined with other materials for other purposes. But if they have never been combined together in the manner stated in the patent, but the combination is new, then the invention of the combination is patentable. The combination is apparently very simple, but the simplicity of an invention, so far from being an objection to it, may constitute its great excellence and value. Indeed, to produce a great result by very simple means, before unknown or unthought of, is not unfrequently the peculiar character of the very highest class of minds."

These are but annunciations of an elementary principle of patent law manifestly just and sound. It has never been questioned, and it concludes the case at bar on the main question at issue,—that is to say, on the question of anticipation.

As to the question of license, the record shows that appellant and appellee entered into a partnership for five years, unless sooner dissolved by consent, for the purpose of manufacturing the Haffcke refrigerator; Clark, the appellee, putting in a cash fund of \$2,000, or so much of the sum as the business should require; and Haffcke "contributing all the rights to manufacture under the letters patent" issued to him for his invention. The contribution of each was exclusively for the purposes of the partnership. The contract confers only a license, inasmuch as it

contains no language declaring or implying that the right of manufacturing the refrigerators should belong, or in any contingency inure, to any other than the partnership to which it was "contributed." It is settled law that a license to use a patent is a personal privilege, which terminates with the life of the individual licensee to which it is granted, unless the grant contains words expressly conferring the power to sell or assign. In the absence of such power, if the licensee be a natural person and dies, or an artificial person or partnership and ceases to exist, the license expires equally in either case. *Oliver v. Chemical Co.*, 109 U. S. 75, 3 Sup. Ct. Rep. 61; *Nail Factory v. Corning*, 14 How. 193; *Gayler v. Wilder*, 10 How. 477, 494. When the partnership of Haffcke & Clark was dissolved, the license itself expired, and the exclusive right to the patent remained in the original patentee, unaffected by the temporary license. The subsequent use of it by Clark was an infringement of the patent. The decree of the court below must be reversed, with costs, and the cause remanded to the circuit court of the United States for the district of Maryland, with a direction to enter a decree for the appellant, and for further proceedings in conformity to the opinion of this court.

### BOTHE v. PADDOCK-HAWLEY IRON CO.

(Circuit Court of Appeals, Eighth Circuit. May 16, 1902.)

No. 22.

#### PATENTS FOR INVENTIONS—NOVELTY—ANTICIPATION.

Letters patent No. 815,246, issued October 19, 1886, to Herman H. Bothe, were for a wagon stake pocket consisting of one piece, rectangular in cross section, having a vertical back, and the remaining sides inwardly inclined, whereby the stake may be held as a wedge requiring no other support. The prior Brownell form of pocket, was of similar shape, made of iron, but was not cast in one piece. A pocket with the tapering sides and front, and vertical back, and cast in one piece, was made for use upon steam cars many years prior to the application for the patent. *Held*, that the casting in one piece was the only substantial improvement over prior wagon pockets, and this feature was anticipated by those used on steam cars.

Appeal from the Circuit Court of the United States for the Eastern District of Missouri.

In Equity. Bill by Herman H. Bothe against the Paddock-Hawley Iron Company for infringement of letters patent No. 815,246, issued to complainant October 19, 1886, for an improvement in wagon stake pockets. Decree dismissing the bill. Complainant appeals. Affirmed.

*Geo. H. Knight* and *Wm. M. Eccles*, for appellant.

*W. B. Homer*, for appellee.

Before CALDWELL and SANBORN, Circuit Judges, and SHIRAS, District Judge.

SHIRAS, District Judge. Under date of October 19, 1886, letters patent were issued to Herman H. Bothe, the appellant herein, for an improvement in wagon stake pockets, and the bill in the present cause was

filed in the circuit court for the eastern district of Missouri for the purpose of restraining the defendant company, the Paddock-Hawley Iron Company, from making, using, or selling stake pockets of the form of those covered by the patent issued to appellant. The answer to the bill denies the validity of the patent for want of novelty, and because the patented article was in public use and on sale by appellant more than two years before the application for the patent was filed. Upon the hearing before the circuit court the defense of want of novelty was sustained, and a decree was entered dismissing the bill, to reverse which the cause was duly appealed to this court.

The first claim in the patent describes the invention as follows:

"A pocket for wagon stakes, rectangular in cross section, having a vertical back, with extensions affording means of attachment to the wagon body, and having its remaining portion—i. e., the front and sides—inclined inwardly, and tending to one common point, by which construction the stake may be held by wedging therein, it having no other support or supports, substantially as set forth."

The stake used with pockets thus constructed is without a shoulder, has a straight back, with tapering sides and front. The pocket is made or cast in a single piece, and it cannot be denied that through compactness of form, ease of attachment to the wagon sill, and the firmness with which the stake is held therein, this form of pocket seems to be superior to the other forms exhibited in the record. On the other hand, no new feature is found therein. In the Brownell form of pocket, which antedates the application for a patent by complainant, are found the tapering sides and front, with a vertical back, all made of iron, but not made in one piece, and in this particular the Bothe form unquestionably is a great improvement over the Brownell pocket. It appears, however, from the testimony of Hoyt H. Green, that pockets having a straight back with tapering sides and front were cast in one piece for use upon steam cars many years before Bothe applied for his patent, so that it does not appear that there is novelty in this feature of the Bothe pocket, and yet this is the special feature which gives it superiority over the Brownell form. Under these circumstances it cannot be said that there was patentable novelty in applying the idea of casting the pocket in one piece. From the statements found in the specifications accompanying the application filed by complainant, it does not appear that he relied on this feature as the novel one in his combination, and yet, if that is eliminated, it does not appear that there is any substantial difference between the Bothe and Brownell pockets. In our judgment, it is the fact that the Bothe pocket is cast in one piece that gives it superiority over the Brownell pocket; but, this not being a novel feature in the manufacture of stake pockets, the patent to Bothe cannot be sustained because that element is found therein. The finding and decree of the circuit court are therefore affirmed at costs of appellant.

CLEMENT MANUF'G CO. *et al.* v. UPSON & HART CO. *et al.*

(Circuit Court, D. Connecticut. May 26, 1892.)

No. 681.

## PATENTS FOR INVENTIONS—INVENTION—TUBULAR HANDLED TOOLS.

Letters patent No. 241,471, issued May 17, 1881, to James Beecher, for an improvement in the manufacture of cutlery and tools, consisting in simultaneously welding a tubular handle to a blade, and closing up the opposite end of the handle by forging between dies, possesses patentable invention.

## SAME—INFRINGEMENT.

In the Beecher patent the handle was formed of a rectangular plate, which was formed into a cylinder, the joint being welded. This was then raised to a welding heat, and placed between dies, so that the blow of the hammer produced a lap weld at the end of the handle. Defendant used a plate having lobes or projections at the ends, and, after being formed into a cylinder, these lobes were bent inwards, and the dies were so constructed that in operating upon this formation they produced a butt weld. *Held*, that the processes were radically different, and there was no infringement.

In Equity. Bill for infringement of patents. Dismissed.

For prior opinions respecting the patents in litigation, see 40 Fed. Rep. 471; 42 Fed. Rep. 530; 43 Fed. Rep. 670.

*Edward F. Beach* and *J. E. Maynard*, for plaintiffs.

*John P. Bartlett*, for defendants.

SHIPMAN. Circuit Judge. This is a bill in equity, which is based upon the alleged infringement of letters patent No. 241,471, dated May 17, 1881, to James Beecher, for an improvement in the manufacture of cutlery and tools, and of letters patent No. 368,051, dated August 9, 1887, to Henry A. Brognard, for improvements in the manufacture of hardware having hollow handles. Before the date of the Beecher invention,—which was at least as early as May, 1879,—the butt ends of the hollow handles of cutlery had been closed up or welded by striking the ends with a cupping die; the blade being welded to the other end of the tubular handle at a prior or subsequent operation. Hollow-handled cutlery had not been formed by simultaneously welding a tubular handle to a blade and closing up the opposite or butt end of the handle, the simultaneous operation being performed by forging between dies. The general object of the Beecher invention was to do this thing. The invention is described by the patentee in his specification as follows, omitting the references to the drawings:

"I provide a rectangular blank of sheet iron, which I form over a mandrel, and weld up into an open-ended tube corresponding substantially in cross section with that desired for the handle. The blank is of sufficient size to make one handle only. \* \* \* The steel blade is of the ordinary construction, and is provided with a short longitudinal projection or tang at its end nearest the handle, by which it is united thereto, as presently to be described. The tubular handle and blade, having been raised to a proper welding heat in a furnace, are then removed therefrom. The tang of the blade is inserted into one of the open ends of the handle, and the handle and blade are placed between a pair of forming dies, the conformation of which corresponds with that desired for the handle, and the concavity of which is of slightly less length than the partially formed handle. The application of the impact of a drop hammer to the dies and the contained blade and handle is then made,



with the result of simultaneously welding together the handle and blade, and closing up the open end of the handle furthest from the blade."

The two claims of the patent are as follows:

"(1) The improvement in the art of manufacturing cutlery and tools which consists in simultaneously welding a tubular handle to a blade or head, and closing up the opposite end of the handle by forging between dies, substantially as set forth. (2) As a new article of manufacture, a knife or other piece of cutlery or tool having a hollow handle united by welding to its blade or head, and having its ends closed simultaneously by forging between forming dies, substantially as set forth."

The object which Beecher desired was something more than merely a simultaneous welding of both handle and blade and the closing of the butt end of the handle at one blow. The hollow-handled knives which had been previously made were, as a rule, defective by reason of imperfect welding at the butt end of the handle, and consequent leakage. The acids which were used in the plating process penetrated the interior of the handle, and afterwards leaked out, and this tendency to leakage had been the great obstacle to the manufacture of such knives. Hollow-handled knives which would not leak, either in plating or in use, were a desideratum. It was a matter of common knowledge that if an article was raised throughout its entire extent to proper forging heat, and put in suitable dies, they would act simultaneously upon both ends of the article so placed in them. There was no difficulty in simultaneously welding the blade and handle, and crushing together the edges of the opposite end of the handle. The material part of the simultaneous process was such a construction of the blank and dies as to cause, by a blow upon the sides of the tube, in addition to the welding of the blade and handle, a closing of the open end of the tube in such manner as to produce a complete union of its edges. The shape of Beecher's dies is vaguely shown in the drawings, but it appears both from the specification and the drawings that the partially formed tube was to extend slightly beyond the length of the concavity of the dies, and that consequently a portion of the metal must be drawn out between their flat surfaces, and would be welded together as a lap weld. After knives began to be manufactured under this patent as a commercial article, it was ascertained that, under the requirements of manufacturers who plated and thereafter sold the knives, they could not be made at much profit at the price at which they were obliged to be sold. The action of the dies in drawing out between the flat surface a portion of the metal left "that portion of the edges of the end of the tube, which were covered within the die form insecurely welded, and not of good strength," after the fin was removed. A good many imperfectly welded handles leaked, and must be rejected, which seriously diminished the profit. It became apparent that the Beecher form of dies would result in an undue number of insecurely welded handles, and that a new blank and new die were required. In this condition of the practical manufacture of hollow-handled knives, the patent of Horatio Jordan, dated July 5, 1887, was issued, which described a method of butt welding the end

of the tube, which consisted in shaping the end so as to form lobes or projections adapted to be bent inwardly towards each other, in subsequently bending them towards each other, and in drop forging. The complainants also owned this patent, and brought a suit in equity in this court against the defendants for its infringement. The history of the art so far as it relates to butt welding is given in the opinions in 42 Fed. Rep. 530, and 43 Fed. Rep. 670. The defendants use a Jordan blank,—that is to say, a blank for the handle, with lobes at the end. These projections, before the blank is put into the forging die, are inclined towards each other, so as to substantially cover the butt end of the blank. The handle and blade are assembled and simultaneously forged in the die. The handle blank is inclosed in the die cavity, instead of resting on the face of the die block beyond its cavity. The weld which is created at the butt end of the handle is a butt weld.

I entertain no question that the Beecher invention was patentable. Its history before and since the date of the application satisfies me that it was the product of an inventive mind. It was vaguely disclosed in the patent, but I make no adverse finding upon that point. The important question in the case relates to the infringement of the patent. The first claim is for a process. The second is for the product of the process. The invention consisted in the described method by which the simultaneous welding, between dies, of handle and blade, and the closing of the butt end of the handle, was performed, in contradistinction from the former method, which took two operations by different set of dies, one of which closed the butt end, and the other which welded the blade and handle. The complainants claim, in substance, that whenever there is a simultaneous welding of the tubular handle blank to the stub, and a closing up of the opposite end of the handle by forging between dies, the patent is infringed. Such a proposition substitutes the result of the process for the various steps which led to the result. The process consists in the various steps by which the result is attained, and the question of infringement is to be answered by ascertaining whether the alleged infringer has used in substance the same series of acts which the patentee described in his patent. The difficulty in the satisfactory solution of this question consists in the fact that the Beecher invention was rudimentary, and the mind is called upon to compare a crude and commercially unprofitable process with a successful one, and see whether the radical characteristics are the same, and whether the differences are mere improvements, or are substantial differences in the two series of acts. It is also to be borne in mind that the mere noncommercial success of the earlier invention is a fact which is not to have weight in discriminating between the two processes. The first act in the Beecher process is to cut out a rectangular blank. The corresponding act in the defendants' process is to cut out a blank with lobes or projections at one end, which are adapted to be bent inwardly. The second step of Beecher is to form his blank over a mandrel and weld it "up into an open-ended tube." This welding was undoubtedly not to be done by the aid of dies, but the language shows that the tube was to be closed longitudinally. The defendants roll their blank over a man-

drel, and do not close or weld the sides of the tube. This difference is one merely of form, and not of substance. Beecher then placed the assembled handle blank and implement blank, after they had been raised to a welding heat, in forming dies. The result of the impact of a hammer upon the dies was the welding of blade and handle, and the closing of the opposite end of the handle by a lap weld. The defendants closed the lobe end of the handle by hammering, or in some other way, before it and the blade blank were heated and placed in dies. This preparatory formation of the end of the handle permitted the use of dies of different shape from that of Beecher, which formed a butt weld. The initial difference between the two processes was the shape of the blanks, which made the subsequent difference in the shape of the dies and in the result of the process attainable. The Beecher process commences with a squarely cut tube, and next inserts the tube in dies so shaped that the result of a lap weld is inevitable, while the defendants subject a tube having lobe-like projections to the operation of dies which will make a butt weld. Was this difference—which is one of shape or form, as presented to the eye—a difference which belongs “to the substance of the process.” “A process is a mode of treatment of certain materials to produce a given result.” *Cochrane v. Deener*, 94 U. S. 780,—which was simultaneous welding of the various parts of a hollow-handled knife, so as to securely close the edges of the butt end of the handle. To accomplish the object, Beecher started with a squarely cut blank, and a pair of dies which must make a lap weld. The defendants started with a lobed blank, which was subsequently known as a “Jeralds & Lawton Blank,” and inserted that blank in a pair of dies which led to a butt weld. The difference in the two processes was radical, not because the latter process made a better commercial result than the other, but because the metal was treated and manipulated in a different way, which made a different kind of welding as the result of the process.

The Brognard invention is explained by the inventor, in his testimony, as follows:

“The thing set forth is a compound blank, made up by assembling a tubular handle-forming blank and a stub having a bolster already formed thereon, so that the portions of the tube and stub or blade forming piece at the point of weld will constitute the portion of the device on which the neck is to be formed.”

The claims are as follows:

“(1) The tube or hollow cylinder, and the solid head or blade piece having a bolster formed thereon, assembled together so that the portions of the tube and blade piece at the point of weld will constitute the portion of the device on which the neck is to be formed, substantially as described. (2) The method of manufacturing hollow-handled cutlery, consisting in welding the head or blade piece, having a bolster formed thereon, to the handle by means of dies, and effecting that welding by that part of the dies designed to form the neck of the finished handle, substantially as described.”

A bolster in a knife was long ago a well-known part of the article, and could be produced by shaping the dies accordingly. In the Beecher patent it is said:

"Bolsters of any required size or design can be produced simultaneously with the uniting of the blade and handle and the closing of the handle end by correspondingly shaping the dies at the point where the bolster is to be located."

It is claimed that the bolster of Brognard has a special character in this: that it has a shoulder, which defines its exact position in the tube, so that the line of weld connecting the two pieces will take place in the hollow part or neck of the handle, where it will be entirely hidden when the article is finished. I do not perceive anything of a patentable character in this particular bolster, and, if it is patentable, the defendants' bolster and method of assembling and manufacturing the compound blank, which are claimed to be an infringement, preceded the date of the invention.

The bill is dismissed.

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ROBBINS *et al.* v. ILLINOIS WATCH CO. *et al.*

(Circuit Court, N. D. Illinois, N. D. January 4, 1892.)

1. PATENTS FOR INVENTIONS—STEM-WINDING WATCH—NOVELTY.

Reissued letters patent No. 10,631, granted August 4, 1885, to Royal E. Robbins and others for a "stem-winding watch," having a device whereby the shifts from the winding and hands-setting engagements to each other are not effected by the direct force of the push and pull upon the stem arbor, but are brought about by longitudinal movements of the stem arbor, which bring into action light springs arranged to swing the yoke, which carries the winding and setting trains, are not void for want of novelty. *Robbins v. Aurora Watch Co.*, 43 Fed. Rep. 521, followed.

2. SAME—INFRINGEMENT.

Such patent is infringed by a device in which, as in the patented watch, a pivoted yoke is used to effect the engagement of the winding and setting wheels, which yoke is acted upon by two opposing springs, one stronger than the other, the stronger spring being restrained when the winding engagement is to be effected, and being held out of action by pressing the stem arbor inward, and looking it at the innermost position.

3. SAME—SUIT TO RESTRAIN INFRINGEMENT—REISSUE.

Where an infringing device is constructed in accordance with a junior patent, a reissue of the junior patent, pending a suit to restrain the infringement, does not affect the suit, where no new claims are introduced by the reissue.

In Equity. Bill by Royal E. Robbins and others against the Illinois Watch Company and others, to restrain an alleged infringement of certain patents.

*Hill & Dixon*, for complainants.

*West & Bond*, for defendants.

BLODGETT, District Judge. This is a bill in equity, charging defendant with the infringement of reissued patent No. 10,631, issued to complainants August 4, 1885, as assignees of original patent No. 280,709, granted to Duane H. Church July 3, 1883, for a "stem-winding watch, and patent No. 287,001, granted October 23, 1883, to Caleb K. Colby, for an "improvement in stem-winding watch pendants," and praying an

injunction and accounting. Both these patents were before this court, and considered in the light of the prior art as then shown, in *Same Complainants v. Aurora Watch Co.*, 43 Fed. Rep. 521, in which case the Church reissued patent was held valid, and the case dismissed as to the Colby patent, on the ground of noninfringement.

Infringement is charged in this case as to the first, third, fourth, fifth, and sixth claims of the Church reissue, which claims are:

"(1) As an improvement in stem winding and setting watches, a winding and hands-setting train, which is adapted to be placed in engagement with the winding wheel or the dial wheel by the longitudinal movement of a stem arbor that has no positive connection with said train, substantially as and for the purpose specified."

"(3) As an improvement in stem winding and setting watches, a winding and hands-setting train, which is adapted to be placed in engagement with the winding wheel or the dial wheels by the longitudinal movement of a stem arbor, and is normally in engagement with said dial wheels, substantially as and for the purpose set forth.

"(4) As an improvement in stem winding and setting watches, a winding and hands-setting train, which is normally in engagement with the dial wheels, in combination with a rotatable stem arbor that has no positive connection with said train, and is adapted to be moved longitudinally within the case stem, to cause said winding and hands-setting train to engage with the winding wheel, and to be simultaneously disengaged from said dial wheels, substantially as and for the purpose shown and described.

"(5) As an improvement in stem winding and setting watches, a winding and hands-setting train, which is normally in engagement with the dial wheels, in combination with a rotatable longitudinally movable stem arbor that has no positive connection with the watch movement, and when moved longitudinally to the inner limit of its motion will cause said winding and setting train to be disengaged from said dial wheels and engaged with the winding wheel, and when moved longitudinally to the outer limit of its motion will permit said train to be disengaged from said winding wheel and engaged with said dial wheels, substantially as and for the purpose specified.

"(6) As an improvement in stem winding and setting watches, the combination of a winding and hands-setting train, which is normally in engagement with the dial wheels, a stem arbor, having no positive connection with said train, and an intermediate device, which is adapted to communicate the longitudinal inward movement of said stem arbor to said winding train, and cause the same to engage with the winding wheel, substantially as and for the purpose shown and described."

As to the Colby patent, it is sufficient to say that the same defenses are made against it in the record in this case that were urged against it in the *Aurora Company Case*, and the complainants did not press the consideration of that patent in this case.

The scope and operation of the Church invention was so fully explained in the opinion in the *Aurora Company Case* that I do not deem it necessary to repeat here what I there said. The defendants in this case challenge the Church patent for want of novelty, and also deny the infringement, as in the *Aurora Company Case*, and have put in all the testimony upon the question of novelty which was heard in that case, and, in addition to the evidence submitted in that case on the issue of want of novelty, defendants have put into this case other Amer-

ican and English patents, as follows: McNaughton & Fitzgerald patent of September, 1874; Leforte patent of April 6, 1880; Mueller patent of January 28, 1881; Hoyt patent of August 7, 1878; Hillick patent of March 9, 1880; Jacot patent of September 27, 1864; Norden patent of August 17, 1869; Montandon patent of January 28, 1873; Whitaker patent of November 13, 1877; Powell English patent, 1871; Whitaker English patent of 1875; Mitchell & Gartner patent of 1856. A careful study of these additional patents, as well as a re-examination of those considered in the former case, has failed to change the conclusion announced in that case as to the novelty and validity of the device covered by the Church patent as reissued. There is therefore no question left in this case but that of infringement.

A comparison of the Church patent with the defendants' watches, shown in evidence, and a consideration of the expert testimony in the case, satisfies me that the defendants' watches embody all the essential elements of the Church watch, as covered by this reissued patent. Both use a pivoted yoke to effect the engagement of the winding and setting wheels. In each case this yoke is acted upon by two opposing springs, one to obtain the winding, and the other the setting, engagement. In both the spring producing the setting engagement is the stronger of the two; hence, when they are equally free to act, this stronger spring controls the action of the train, and automatically puts it into setting engagement. In other words, the watch would normally be in setting engagement if these two springs were left to the operation of their respective forces. In each watch the winding engagement is effected by restraining the action of the stronger spring, and allowing the weaker one only to act without restraint. In both watches this stronger spring is held out of action by pressing the stem arbor inward, and locking it at the innermost position. In both the restraining force upon the stronger spring is applied by means of a short pin or nib upon the sliding stem arbor, and in each the inward movement of the stem arbor bends and holds the strong spring from its normal work, and the withdrawal of the stem arbor releases this spring, so that it at once brings the train into setting engagement. It is true that in defendants' watch there are some slight changes in the shape and location of the operative parts, and by reason of these changes intermediate levers and pins are interposed at some points, and dispensed with at others, to effect the connections and movements of the operative parts, which, as I think, is quite tersely stated by the complainants in their brief: "The operative parts of each watch receive power from the same source, under the same conditions, transmit it to the same destination for the same purpose, and with the same result."

The defendants' watch, so far as the features in question are concerned, is constructed in accordance with a patent granted to T. F. Sheridan, January 3, 1888. Since this suit was brought, a reissue of this patent has been applied for and obtained. No new claims are introduced by the reissue, and the only object of the reissue seems to have been to change the description and object of the devices shown.

I do not see how this reissue can affect the issues in this suit, or protect the defendant in the manufacture or sale of such watches as are shown in evidence to be the product of the defendant company. The specifications, as amended by the reissue, show how a lever-set watch may be constructed as one form of the Sheridan device, but, as defendants' right to make a lever-set watch is not in question here, it does not seem necessary to consider or pass upon this feature of the case.

A decree may therefore be entered, finding that defendant the Illinois Watch Company has infringed the claims of the Church patent, as charged, and that complainant is entitled to an injunction and accounting, and that the bill be dismissed for want of equity as to the Colby patent, on the ground of non-infringement, and also dismissing the bill for want of equity as to the individual defendants Jacob Bunn, George A. Bates, and George C. Gubbins.

### ROBBINS *et al.* v. COLUMBUS WATCH CO. *et al.*

(Circuit Court, S. D. Ohio, E. D. May 7, 1892.)

No. 503.

#### 1. PATENTS FOR INVENTIONS—REISSUE—EXPANSTION OF CLAIMS—WATCHES.

In reissued patent No. 10,681, granted August 4, 1885, to Robbins and Avery, claim 1 was as follows: "As an improvement in stem winding and setting watches, a winding and hands-setting train, which is adapted to be placed in engagement with the winding wheel or the dial wheels by the longitudinal movement of a stem arbor that has no positive connection with said train, substantially as and for the purposes specified." The first claim of the original patent was for the same, with the additional condition that the train is normally in gear with the setting wheels. *Held*, that the objection that the claims of the reissue are broader and more comprehensive than the original is obviated by the clause "substantially as and for the purpose specified," which relates back to the original specifications and drawings, and brings them into the claims. *Robbins v. Aurora Watch Co.*, 43 Fed. Rep. 526, followed.

#### 2. SAME.

And hence claim 3, which is for "a winding and hands-setting train, which is adapted to be placed in engagement with the winding wheel or the dial wheels by the longitudinal movement of a stem arbor, and is normally in engagement with such dial wheels, substantially as and for the purpose set forth," is not objectionable for expansion on the ground that the corresponding claim of the original adds the condition that the winding arbor is without positive connection. *Robbins v. Aurora Watch Co.*, 43 Fed. Rep. 526, followed.

#### 3. SAME—CLAIMS FOR RESULTS.

These claims are not objectionable as being claims for results or functions rather than for devices, for the concluding phrase relates back and includes in them the devices shown by the specifications and drawings of the original patent. *Robbins v. Aurora Watch Co.*, 43 Fed. Rep. 526, followed.

#### 4. SAME—ANTICIPATION—WATCH WINDING AND SETTING MECHANISM.

Reissued patent No. 10,681, granted August 4, 1885, to Robbins and Avery, trustees, under mesne assignments from the inventor, Church, for an improvement in stem winding and setting watches, embodied the following elements: A winding and setting train, mechanically unconnected to a short stem arbor, capable of winding and setting the watch by its rotation; also adapted to be pushed into winding engagement by the inward movement of the stem arbor, and automatically shifting to the setting engagement whenever the stem arbor is withdrawn from its winding position. *Held*, that this was not anticipated by a patent to one Wheeler for a lever set movement, with a train shifted by means of a lever or finger bar from the winding to the setting engagement, which train, however, cannot be shifted by a longitudinal movement by the stem arbor, for its arbor has no such movement, and no relation to the train by which such a movement could produce the desired result.

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**5. SAME—INFRINGEMENT—MECHANICAL EQUIVALENT.**

This reissue to Robbins and Avery, being valid, and covering a patentable novelty, is infringed by a stem setting and winding movement used by defendant the Columbus Watch Company, whose elements are either the same or the mechanical equivalents of those of the patent.

**6. SAME—LICENSE.**

Though defendants sold their infringing movements for use in a watch case of which plaintiffs owned the patent, it did not thereby become an infringer of the case, where the sales were made to persons licensed by plaintiffs to manufacture such case.

**In Equity.** Bill by Royal E. Robbins and Thomas M. Avery, trustees, against the Columbus Watch Company, David Green, and William J. Savage, for infringement of patents. Decree for complainants as to one patent, and for defendants as to the other.

*Lysander Hill and Prindle & Russell*, for complainants.

*M. D. Leggett and Watson, Burr & Livesey*, for defendants.

SAGE, District Judge. This suit is for the infringement of two patents, as follows: (1) Reissued patent No. 10,631, for stem-winding watch, issued August 4, 1885, on application filed March 14, 1885, to Royal E. Robbins and Thomas M. Avery, trustees, under mesne assignments from D. H. Church, the inventor. (2) Patent No. 287,001, to C. K. Colby, for watch pendant, issued October 23, 1883, upon application filed February 1, 1883.

Reissued patent No. 10,631, is for certain devices used in stem-winding watches, and relates more particularly to structures in which the winding and hands-setting mechanism is operated by means of a stem arbor. It is set forth in the specification that prior to the improvement described the winding and hands-setting train had been normally in engagement with the winding wheel, and disconnected from the dial wheels, so that an outward movement of the stem arbor was necessary in order to change the engagement of the train, and adapt it for setting the hands. In that construction a positive connection between the stem arbor and the winding and hands-setting train was requisite, else the arbor when drawn outwardly would not effect the change in the engagement of the train from winding to setting; and this positive connection made the stem arbor virtually a part of the movement. It resulted that it was difficult and expensive to change the movement from one case to another. One object of the improvement is, as it is set forth in the specification, to render watch movements interchangeable. The drawings show a winding wheel, C, and a hands-setting wheel, D. An oscillating yoke, pivoted on the axis of a cogwheel, F, and having at each end a cogwheel, one designated as G and the other as H, when swung in one direction, brings the wheel G into engagement with the winding wheel, C, and, swung in the opposite direction, brings the wheel, H, into engagement with the dial or hands-setting wheel, D. L is a crown wheel, always in engagement with the middle wheel, F, of the yoke train. It is mounted on a hollow arbor, which presents at the edge of the watch movement an open end, squared, so as to be rotated by the square end of the stem arbor, M. The hole in the hollow arbor of the crown wheel extends



through the wheel, and in the inner portion of this wheel is located a longitudinally movable stud or block, N. A rotatable arbor, I, carries two lateral arms,  $i^1$  and  $i^2$ , in position to bear on opposite ends of the yoke, E, and is provided with two arms,  $i$  and  $i^2$ , beneath the front plate of the movement, but indicated in the drawings by dotted lines. A spring, K, bears against the arm  $i$ , and through said arm rotates the arbor, and causes the arm  $i^1$  to bear against the adjacent end of the yoke, E, thereby bringing the wheel, H, into engagement with the dial wheel, D. The stem arbor is not attached to—that is to say, has no positive connection with—the winding and hands-setting train. When “moved longitudinally to the inner limit of its motion,” or, in other words, pushed in, it causes the train to be disengaged from the dial wheel and engaged with the winding wheel; and when pulled out, or, in the phrase of the specification, “moved longitudinally to the outer limit of its motion,” it is drawn away from the train, which thereupon automatically assumes the position which brings the wheel, H, into engagement with the dial wheel, D. This is the normal engagement of the train, and it is actuated by the spring, K. The arm,  $i^2$ , extends in the path of the movable block or stud, N, so that, when N is pushed inward, the arbor, I, is turned in the opposite direction, thereby causing the arm,  $i^2$ , to bear against the opposite end of the yoke, and bring the wheel into engagement with the winding wheel, C, at the same time withdrawing the wheel H from engagement with the dial wheel, D. In other words, the pushing in of the stem arbor, M, and thereby also the stud or block, N, and the arm,  $i^2$ , shifts, by the means above described, the train from its normal engagement with the hands-setting wheel into the forced engagement with the winding wheel.

All the parts above mentioned, excepting the stem arbor, M, belong entirely to the watch movement or “works.” The stem arbor is mounted in the stem or pendant, which is a part of the case, and it is held in its different positions by yielding springs, which it is not necessary to particularly describe. The squared inner end of the stem arbor projects inwardly a short distance beyond the circle of the case, and is inserted in the outer end of the hollow arbor of the crown wheel, L. The method of winding and setting when the engagements have been properly made is substantially as in other stem-winding watches.

The movement or works may be removed from the case by turning the retaining screws to their proper positions for that purpose, then tilting the movement out at the side opposite the stem, drawing it away from the stem, and lifting it out. To insert it into the same or another similar case, the edge of the movement at which is located the open crown wheel arbor is lowered to a position opposite the stem arbor, and the movement is then pushed along towards the stem, so as to insert the stem arbor into the hollow hub of the crown wheel, L. The opposite edge of the movement is then lowered into position in the case, and the retaining screws so turned as to hold it.

It is contended for the complainants that spring arm,  $i^2$ , which extends from the upper end of the arbor, I, to or near the end of the yoke, which

carries the wheel, G, so modifies the pushing effect of the arbor upon the train yoke as to prevent undue violence or injury to the gears, the spring being so light and flexible as by its yielding to render impossible any contact of the teeth violent enough to cause injury.

The claims are as follows:

"(1) As an improvement in stem winding and setting watches, a winding and hands-setting train, which is adapted to be placed in engagement with the winding wheel or the dial wheels by the longitudinal movement of a stem arbor that has no positive connection with said train, substantially as and for the purpose specified.

"(2) As an improvement in stem winding and setting watches, a winding and hands-setting train, which is adapted to be placed in engagement with the winding wheel or the dial wheels, and is normally in engagement with said dial wheels, substantially as and for the purpose shown.

"(3) As an improvement in stem winding and setting watches, a winding and hands-setting train, which is adapted to be placed in engagement with the winding wheel or the dial wheels by the longitudinal movement of a stem arbor, and is normally in engagement with said dial wheels, substantially as and for the purpose set forth.

"(4) As an improvement in stem winding and setting watches, a winding and hands-setting train which is normally in engagement with the dial wheels, in combination with a rotatable stem arbor that has no positive connection with said train, and is adapted to be moved longitudinally within the case stem, to cause said winding and hands-setting train to engage with the winding wheel, and to be simultaneously disengaged from said dial wheels, substantially as and for the purpose shown and described.

"(5) As an improvement in stem winding and setting watches, a winding and hands-setting train, which is normally in engagement with the dial wheels, in combination with a rotatable longitudinally movable stem arbor that has no positive connection with the watch movement, and when moved longitudinally to the inner limit of its motion will cause said winding and setting train to be disengaged from said dial wheels and engaged with the winding wheel, and when moved longitudinally to the outer limit of its motion will permit said train to be disengaged from said winding wheel and engaged with said dial wheels, substantially as and for the purpose specified.

"(6) As an improvement in stem winding and setting watches, the combination of a winding and hands-setting train, which is normally in engagement with the dial wheels, a stem arbor, having no positive connection with said train, and an intermediate device, which is adapted to communicate the longitudinal inward movement of said stem arbor to said winding train, and cause the same to engage with the winding wheel, substantially as and for the purpose shown and described."

It is conceded that the second claim is not in issue in this cause, and it need not be further considered.

The Colby invention relates to devices for the retention of stem arbors in the stems or pendants of watch cases, and at the same time allowing the arbors to be rotated and longitudinally moved in the stem. The first claim of the patent, which sets forth the essential features of the invention, is as follows:

"The combination in a stem-winding watch, of the tubular stem, a key mounted to rotate in said stem, and to project into the movement and engage the winding arbor, as shown, a spring attached to one of these parts, and ar-

ranged to engage the other part to form a latch device, as shown, and the said winding arbor, all arranged substantially as and for the purposes set forth."

The key referred to in the claim is the stem arbor. The winding arbor is that part of the watch movement with which the stem arbor by its rotation directly engages in winding the watch. The special feature of improvement set forth in this patent is the location of a spring for engaging the key or stem arbor with and within the stem. The spring latch device permits the rotation of the stem arbor for winding or setting the watch, and also permits it to be partly withdrawn, longitudinally, from the winding arbor. The patent also provides for two sets of grooves or corresponding projections, forming, to quote from claim 3, "an elastic device, whereby the key may be held in either of two positions in the stem."

It is not necessary to set forth the second and third claims of this patent, nor to enter more particularly into the details of the construction of the patented device.

The defenses as to the Church reissue, No. 10,631, are, stating them in the order in which they will be considered, as follows:

That the reissue was improperly granted, in that the original letters patent were not inoperative or invalid by reason of such defective or insufficient specification as could be corrected by reissue; that they were not surrendered to correct any error which had arisen by inadvertence, accident, or mistake; that new matter, not constituting any substantial part of the alleged invention for which the original letters patent were granted, was introduced into the specification and claims of the reissue; that between the date of the original letters and the date of the application for the reissue certain inventions were made and devices brought into use that were not covered by the claims of the original, but were sought to be covered by and subordinated to the claims of the reissue; that the claims of the reissue do not particularly point out and distinctly claim the part improvement or combination which Church claimed as his invention, but merely specify results or functions, and not devices. The original patent has but four claims; the reissued patent has six. Referring to the testimony of the defendant's expert, it appears that the objection that the first, second, and third claims of the reissued patent are additional to, and broader and more comprehensive than, any claim of the original patent, is founded upon a verbal criticism of the language of the claims which is altogether too narrow and technical; as, for illustration, that the first claim in the reissued patent specifies as new a winding and hands-setting train, shifted by the longitudinal movement of the winding arbor without positive connection, whereas the claim in the original patent was for the same, only coupled with the additional condition that the train is normally in gear with the setting wheels; and passing by what is said of the second claim, because that claim is not involved in this suit, that the third claim in the reissued patent specifies as new a winding and setting train, shifted by the longitudinal movement of the winding arbor, and normally in gear with the setting wheels, whereas the original patent

claims the same only when coupled with the additional condition that the winding arbor is without positive connection.

As to these objections, and the further objection that the claims of the reissued patent specify results or functions, and not devices, it is only necessary to refer to the decision by Judge BLODGETT sustaining the patent sued on in this case, in *Robbins v. Aurora Watch Co.*, 43 Fed. Rep., at page 526, where he calls attention to the rule that claims must be so construed as, if possible, to uphold a patent; and that in the light of this rule the first claim of the reissued patent cannot be held to refer to any kind of a winding or hands-setting train, but must be limited to such a one as is shown in the specification and drawings of the patent. As Judge BLODGETT well says:

"This explanation applies to all the claims, if they are to be read in the broadest sense in which their language is capable of being understood. Then they are obnoxious to the criticism that they are claims for results, and not for devices. But the words 'substantially as and for the purpose shown' take us back to the specification and drawings, and bring the device there shown into the claims, and I construe the claim as for the device there shown. Therefore, while these claims are broad, I think they can be sustained as for the devices which are described. *Corn Planter Patent*, 23 Wall, 218."

Judge BLODGETT, in the same paragraph, says that—

"If the claim is held to mean any winding and setting train adapted to be put into winding and setting engagement by a longitudinal movement of the stem arbor, which has no positive connection with the train, then it would manifestly be anticipated by the Woerd and Carnahan patents, and perhaps other inventors, who show winding and setting trains adapted to be placed in winding and setting engagements by endwise movement of the stem arbors, that have no positive connection with such trains."

But, under the construction and limitations which he properly applies, the alleged anticipations fail, as do also the Varney patent, applied for January 12, 1885, and dated August 11, 1885, and the Corliss patent, applied for June 18, 1885, and dated September 1, 1885, which are the inventions claimed to have been made and devices brought into use between the date of the original and the date of the application for the reissued patent, and not covered by the claims of the original, but sought to be covered by and subordinated to the claims of the reissue.

The testimony of the defendants' expert is sufficient to establish that the fourth and sixth claims of the reissue are not void for expansion, and that the fifth claim of the reissued patent is not broader than the first in the original patent, which appears as the fourth in the reissue. Construing the claims with the limitations above specified, they are not anticipated by those patents, nor by the Vent patent, No. 318,329, dated May 19, 1885, or the Galentine patent, No. 314,283, dated March 24, 1885. The objections to the validity of the reissue are not well founded, and they are overruled.

This brings us to the defenses that the patent is void for want of novelty, the claims being anticipated by various patents; that it does not disclose any patentable invention, the alleged improvements being

the product of mere mechanical skill; and that the combinations shown in the various claims are mere aggregations of mechanical features, which perform only the functions they performed in older combinations.

In considering the defense of anticipation, the limited construction given to the claims in *Robbins v. Aurora Watch Co.* will be followed.

Of the patents cited on behalf of defendants in support of the defenses above specified, the following were considered in *Robbins v. Aurora Watch Co.*, the English patent to Nicole, and the United States patents to Lehman, Carnahan, Woerd, Brez, Fitch, and Eisen.

In the opinion in *Robbins v. Aurora Watch Co.* it was pointed out that in the Nicole patent, the Lehman patent, the Carnahan patent, and the Woerd patent the stem arbor had a positive connection with the winding and the setting trains, and that the winding and hands-setting engagements were effected by the pull and push of a longitudinally moving stem arbor; while Church was the first in the art to interpose springs which by their yielding pressure would bring about the engagements without the possibility of such collision of the teeth of the wheels as to cause injury.

The Church patent, as set forth in the specification and claims, contains the following elements: A winding and setting train, mechanically unconnected to a short stem arbor, capable of winding and setting the watch by its rotation; also adapted to be pushed into winding engagement by the inward movement of the stem arbor, and automatically shifting to the setting engagement whenever the stem arbor is withdrawn from its winding position. To sustain the defense of anticipation, therefore, there must be found in the prior art some one patent or watch containing all these elements. The defendants' expert, upon cross-examination, admits that they are all to be found in the complainants' patent, and that the combination above set forth is not to be found in any one prior watch. Several patents are shown, exhibiting a stem arbor, sliding to shift the engagements, and rotating to wind or set the watch; but of the entire list only two, the Woerd and the Eisen, have short stem arbors unattached to any portion of the watch movement. Both these patents, however, have the normal winding engagement.

The Wheeler patent, upon which much stress was laid by counsel for the defendants, and which was not referred to in the opinion in *Robbins v. Aurora Watch Co.*, although in evidence in that case as illustrating the prior art, is for a lever set movement. It shows an oscillating yoke, at one end of which is a spring, N, and at the other a pivoted pawl, against which, when the lever is drawn out, a spring, H, by its pressure forces the opposite end, E, of the yoke in, and brings the movement into hands-setting engagement, which is the normal engagement. There is in evidence also an exhibit, showing the Wheeler and Colby patents combined, by removing the lever, and adapting the movement to the Colby arbor, thus furnishing an excellent illustration of how easily what the inventor did could have been done earlier, if only the light which first dawned on him had come to those who preceded, but did not an-

ticipate, him. The Wheeler movement, being for a lever-set watch, does not contain the features of construction which distinguish a stem-set watch. When placed in a case suitable for it, its train cannot be shifted by a longitudinal movement of the stem arbor, because the stem arbor has no longitudinal movement for this purpose, and no relation to the train by which such a movement could produce this result. Spring, N, bears against the end, D, of the yoke, and by its pressure, when the lever is pushed in, brings the yoke train into winding engagement and holds it there. The withdrawal or out-pull of the lever releases the pivoted pawl or dog, G, which is thereupon swung to the left by the pressure of spring, H, which is stronger than and overcomes the opposite pressure of spring, N, and by a cam action of the pawl, G, on the end, E, of the yoke, swings the yoke into hands-setting engagement, the spring, N, not perceptibly limiting or retarding, but in fact cushioning, this movement. The lever, or, as it is termed in the Wheeler patent, the "finger bar," is not a stem arbor, nor has it the movement or function of a stem arbor. Its office is, exclusively, to shift the train. Without the conception embodied in the Church patent, the Wheeler movement never could have been adapted to a stem-set watch. To reorganize or make a new adaptation of an old device by the aid or in the light of the conception of a subsequent patented invention, and then insist that it is an anticipation, is, in effect, to attempt to appropriate, as common property, the conception, which is always—excepting, possibly, in some cases of unlooked for or accidental discovery—the genesis of the invention, and is within the protection of the patent as completely as the embodiment itself. If it were not so, there would be but little left of the law of equivalents.

Of the other patents cited as anticipations it is not necessary to speak in detail. The defendants' expert testifies that the closest approximation to the Church watch is to be found in the Woerd watch, which was held in *Robbins v. Aurora Watch Co.* not to be an anticipation. Independently of the rule of judicial comity,—to which, however, I give full and hearty recognition,—I am not in the least disposed to dissent or depart from that holding.

The three important advantages claimed for the complainants' patent are—*First*, the winding and setting, and the winding and setting engagements, both effected through a stem arbor; *second*, a watch movement removable from the case, and interchangeable, without taking it apart; *third*, effecting and shifting the engagements without disturbing the hands or injuring the wheel gears.

Winding and setting, and winding and setting engagements, effected through a stem arbor, are shown in patents prior to Church's, as are also movements which may be taken out entire from the watch case. But the defendants insist that the advantage of effecting and shifting the engagements without disturbing the hands or injuring the hands-setting gears is neither claimed nor mentioned in the letters patent, and that, as a matter of fact, there is not the slightest danger of any injury to the wheels, and that there is therefore no need of protection, and none af-

forded by Church's device. In support of this statement of fact defendants refer to the depositions of a number of experienced watch makers and repairers, who concur in testimony that they have never known of the dial wheels of a lever set watch being injured in effecting the setting engagement, and that there is practically no danger of causing such injury in effecting such engagement in the pendant set watch, with a positive connection, because of the necessary loose placing of all the stem-winding wheels, and because the teeth or cogs are rounded on both sides to a point, and the spaces between them wider than the thickness of a tooth; and for the further reasons that the wheels must have some play to make the operation of setting and winding possible and easy, and that the distance of the pull of the stem arbor is so limited that the train cannot be moved any further than is necessary for proper gearing; also, that if the wheels should not mesh properly or fully the teeth would collide upon the rounded parts, and, as the wheels are loose, there would be a giving away, so as to allow them to slip into place every time. One of the witnesses, however, testified that the small gears of the setting wheels were sometimes injured, but he gave an explanation referring it to another cause. There is no direct testimony in conflict with that cited above, but there is evidence in the record which is relied upon to break its force. It is now more than eight and a half years since the granting of the original patent to Church's assignee, and more than six and a half since the reissue. It appears from the testimony for the complainants that the Elgin Watch Company makes 98 per cent. of its open-faced watches pendant set, with the Church improvement, and the Waltham Watch Company makes its entire open face product pendant set, with the Church improvement. These are two of the largest watch manufacturing companies in the United States. Most of the witnesses called by the defendants who testified as above also expressed the opinion that the complainants' movement is no better than the old-fashioned lever set movement, which has been almost superseded. It would hardly follow, if the court should adopt their view, that it must, to be consistent, hold all patents for pendant sets invalid. As to the testimony of the witnesses, skilled and credible though they may be, that there is no practical advantage in the spring attachments of the complainants' patent, it is more than counterbalanced by the testimony relating to the manufacture and sales.

The general recognition by manufacturers, including the defendants, and by the trade, of the value of the springs, dating back to the days of the lever set watches, justifies the conclusion that the daily shifting of the yoke train by the push and pull of the stem arbor, with no spring to modify or limit its force, even if it would not bend or break the teeth of the gearing wheels, must, by the constant succession of shocks or jars, or by some other means, tend to injure or wear, or shorten the life or impair the accuracy of, the delicate mechanism of the works; whereas, by the interposition of the springs, every movement of the train is so graduated and cushioned that no shock or injury is possible, and the wear is reduced to the minimum. The objection that none of these

advantages are either claimed or mentioned in the letters patent is not tenable. The construction is shown and claimed, and that the patentee is entitled to all the advantages which that construction affords, although not specified, or even known to the inventor, is too well settled to need verification or to be disputed. The complainants' device is by no means a mere aggregation. It is a combination, in which the elements are in new relation to each other, and so co-operate as to practically perfect the pendant set watch, by removing the disadvantages before then attendant upon the use of the stem arbor to shift the engagements. The objections made to the claims *seriatim* need not be considered in detail. They rest largely upon the broad construction of their language, which counsel for the defendants seek to apply, but they fail, under the construction of the claims given by Judge BLODGETT in *Robbins v. Aurora Watch Co.*, hereinbefore approved and followed, and in the later case of *Robbins v. Illinois Watch Co.*, 50 Fed. Rep. 542, in which his opinion was filed January 4, 1892.

We come now to the question of infringement. The movements made and sold by the defendants are adapted to the Colby Case. The winding and setting train shows two intermeshing wheels, mounted on a vibrating yoke, the axis of vibration being the axis of one of said wheels, which is in constant engagement with the wheel or pinion which is engaged by the stem arbor. The second wheel is swung by the movements of the yoke either into engagement with the winding wheel or into engagement with the setting wheel. The form of the yoke plate differs, but not essentially, from that of the Church patent. For the purpose of swinging the yoke train into hands-setting engagement, a spring is employed at the right hand of the movement,—the side at which the spring, K, is located in the Church movement,—and bearing at its free end against a smaller plate at the right hand of the yoke. This plate vibrates on a pivot, and acts as a cam lever upon a projection of the yoke plate. The yoke plate is also acted upon by a less powerful spring at its left-hand side, tending to swing it into winding engagement, but, when both are free to act, it is overcome by the spring at the right, and the yoke train is swung into its normal or hands-setting engagement.

The movement also contains a lever pivoted between its ends and provided at one end with a stud, which projects loosely into the hollow of the initial train wheel corresponding to crown wheel, L, in the Church patent, said stud corresponding functionally to block or stud, N. This lever vibrates under the inward movement of the stem arbor, and causes the cam plate to vibrate against the force of the spring corresponding to spring K, and so turns the cam plate that the yoke is free to swing into winding engagement under the pressure of the weaker spring at the left, which performs the office of spring,  $\tau^3$ , in the Church patent. The withdrawal of the stem arbor leaves the springs free to act, with the result of bringing the train into hands-setting engagement, as already stated. In all these particulars the mode of operation is the same as that of the Church movement. The engagement springs are, it



is true, differently arranged, but there is no material difference. The movements are substantially alike. The mechanical combinations correspond, element for element, and, comparing the elements, they are, in every instance, either the same in both, or the mechanical equivalents of each other. It must be held, therefore, that the defendants' movement is an infringement of the 1st, 3d, 4th, 5th, and 6th claims of the Church patent.

The only remaining question is whether the defendants infringe the Colby patent. That their watch movements were made and sold for use in connection with watch cases and pendants and winding stems, which have been licensed by complainants under the Colby patent, is a fact stipulated in this cause, as are also the facts that the defendant company makes only watch movements, and that it has not, nor have either of the individual defendants, ever made or sold watch cases, nor stem or pendants. Counsel for complainants argue that the fact that the watch cases are made under licenses, and are everywhere on sale, cuts no figure, for the reason that the license only releases the cases manufactured under it from the control of the patent, and makes them free to the public, just as the hammock and ropes were in *Travers v. Beyer*, 26 Fed. Rep. 450, the lamp chimney in *Wallace v. Holmes*, 9 Blatchf. 65, and the syrups and mineral waters in *Bowker v. Dows*, 3 Ban. & A. 518. The distinction between those cases and this case was clearly pointed out by Judge SHEPLEY in *Saxe v. Hammond*, Holmes, 458, where he said that, if all the other conditions were on the side of infringement, there must be the additional element of a sale for use by an unlicensed manufacturer, which was not proven in that case, and is negatived by the stipulation in this case. The true rule was stated in that case as follows:

"Different parties may all infringe by respectively making or selling, each of them, one of the elements of a patented combination, provided those separate elements are made for the purpose and with the intent of their being combined by a party having no right to combine them."

In *Alabastine Co. v. Payne*, 27 Fed. Rep. 559, it was held that the sale of a compound which could not be practically applied without making the user an infringer, and therefore trespasser, rendered the defendant an accessory to the infringement. But here the principal is the licensee of the Colby patent, and no trespasser, and there is no infringement of that patent to which defendants could be parties, or, as the court expressed it in that case, accessories. It might as well be claimed that the defendants, by selling their movements to the complainants themselves, the owners of the Colby patent, were guilty of the infringement of that patent.

The decree will be for the complainants upon the Church patent, and for the defendants upon the Colby patent.

## THE ANNIE R. LEWIS.

HALL *et al.* v. SHEPPARD *et al.*

(District Court, D. Massachusetts. May 30, 1892.)

No. 81.

**WHARVES AND WHARFINGERS—OBSTRUCTION—LIABILITY OF WHARFINGER.**

A schooner drawing 11 feet 8 inches, loaded with coal owned by and consigned to the respondents under a bill of lading guarantying to her generally 12 feet of water, arrived at respondents' dock. One of the respondents was present at the schooner's arrival, but said nothing to the master. The latter was unacquainted with the obstructions and the tides at the place. The schooner struck a ledge of rock on which at average tides the water was 12 feet deep. Respondents did not own the bed of the river, but dredged it, and occupied and used the wharf to berth vessels. *Held*, that the master had a right to rely on the respondent who was present, and his silence amounted to an express invitation to enter. *Held*, therefore, that respondents were liable.

In Admiralty. Libel by Samuel P. Hall and others against Joel F. Sheppard and others for damages occasioned by stranding at respondents' wharf. Decree for libelants.

*Edward S. Dodge*, for libelants.

*Frederick Cunningham*, for respondents.

NELSON, District Judge. This is a libel *in personam* by the owners of the schooner Annie R. Lewis for injuries sustained by the schooner in entering the respondents' dock. The respondents are coal dealers, and own a private wharf on Monatiquot river, in East Braintree, at the head of navigation, where they receive the delivery of cargoes of coal from vessels. On the early morning of June 22, 1886, the Annie R. Lewis, from Port Johnson, arrived in the river below the wharf, in charge of a pilot and a towboat, having on board a cargo of 355 tons of coal consigned to and owned by the respondents, to be unloaded on the wharf. The bill of lading guaranteed 12 feet of water. The draft of the schooner was 11 feet 8 inches aft. In the bottom of the river a ledge of rocks extended from the lower end of the wharf, across the channel, to the opposite bank. On average tides the depth of water on the rock was 12 feet, but when the tides run low the depth was not sufficient to float vessels drawing 11 feet 8 inches. This was known to the respondents. The master of the schooner was unacquainted with the obstructions in the channel, and also with the run of the tides in the river. The tide on this morning was lower than the average. One of the respondents was present on the wharf, at the time, observing what was going on. The channel was about 50 feet wide. While the tug was attempting to haul the schooner into her berth alongside the wharf, where the coal was to be unloaded, the tide being then at its full height, she grounded on the ledge, and sustained injury. The respondents claim that the attempt to enter was made after the tide had ebbed considerably; also that the guaranty in the bill of lading extended only to average tides. Reference was made to the tide tables at Boston, to show that the tide was on the ebb. But tides in this narrow and crooked river, so far above the sea, must vary



from the tides at Boston, and must also be affected by the flow of the current from above. The guaranty, in terms, extends to all tides, and is not limited to average tides. The master, being ignorant of the channel, had the right to rely on the judgment of the respondent who was present, and, receiving no warning of the danger from him, to assume that the water was sufficient for his vessel. The silence of the respondent, under the circumstances, was equivalent to an assurance that the depth of water was sufficient, and amounted to an express invitation to enter. The circumstance that the respondents did not own the title to the bed of the river is immaterial, since they dredged it out, and occupied it, and used it as a berth for vessels unloading coal. The case of *The Calliope*, (1891,) App. Cas. 11, cited by the respondents, is not in point. In that case there was no guaranty of depth of water, and no invitation to enter, and the court expressly found that the grounding of the vessel was caused by the negligence of the master and pilot, and exonerated the wharfinger on that account. Upon the facts as found, the respondents are responsible for the injury to the schooner. *The John A. Berkman*, 6 Fed. Rep. 535; *Higgins v. Gaslight Co.*, 33 Fed. Rep. 295.

Decree for libelants.

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#### THE STROMA.

NAPIER SHIPPING Co., Limited, v. PANAMA R. Co.

(Circuit Court of Appeals, Second Circuit. February 16, 1892.)

No. 13.

#### WHARVES AND WHARFINGERS—OBSTRUCTION—KNOWLEDGE—LIABILITY.

Libelant's steamer was berthed at respondent's wharf, alongside of which lay a sunken wreck. The presence of the wreck was known both to respondent's agent and to the agent of libelant, who applied for the berth. There was no understanding, express or implied, relieving the respondent from the ordinary obligations of a wharfinger, except the implied obligation on the steamer to go to the particular berth assigned. Respondent's agent saw the steamer at the wharf discharging, but made no objection to the berth. The steamer was afterwards injured by the sunken wreck, and sank in the slip. Held, that the steamer's agent was justified in assuming that respondent's agent had better information than he had as to the condition of respondent's premises, and in relying and acting upon such assumption; and that as a wharfinger, in offering accommodations for hire, the respondent impliedly agreed that the steamer would not be exposed to danger arising from concealed obstructions known to its agent, and which the steamer was not required to anticipate; that respondent therefore was liable for the injury done the steamer. 43 Fed. Rep. 923, reversed.

In Admiralty. Appeal from the circuit court of the United States for the southern district of New York, affirming *pro forma* a decree of the district court of the United States for the said district, dismissing the libel. Reversed.

*Butler, Stillman & Hubbard*, (*Wilhelmus Mynderse*, of counsel,) for appellant.

*Coudert Bros.*, (*Frederick R. Coudert*, of counsel,) for appellee.  
Before WALLACE and LACOMBE, Circuit Judges.

WALLACE, Circuit Judge. This is a suit by the Napier Shipping Company, the owner of the steamer Stroma, to recover of the respondent, the Panama Railroad Company, as a wharfinger, for injuries sustained by the steamer in consequence of the negligence of the respondent in assigning her to an unsafe berth. The respondent was the proprietor of piers No. 1 and No. 2, and the slip between these piers, in the harbor of Colon, Isthmus of Panama. It had been engaged in dredging in the slip, and had used for this purpose a steam dredge consisting of a shallow scow, upon which was a boiler, and near one end a crane. During a violent storm the dredge foundered, and sank in the slip. The respondent employed a wrecking vessel to raise the dredge and remove it, and operations in this behalf had been progressing for about three weeks prior to the time of the injuries to the libellant's steamer. The diver of the respondent had found the wreck lying in broken fragments, the scow diagonally at a little distance from the northerly side of pier 2, and the crane and boiler detached, and lying on the bottom of the slip, some distance further from the pier. Attached to the scow, and an integral part of it, was a spindle, the pivot of the crane, which was an upright timber capped with iron, about 9 feet long, and located in the middle of the forward end of the scow. He reported the scow as having 22 feet of water above her. Subsequently to the accident the spindle was found to be projecting from the scow at a point only about 21 feet away from the northerly side of pier 2. The diver had not observed it. About three weeks after the sinking of the dredge, and on December 29, 1888, the agent of the libellant's steamer at Colon, in expectation of her arrival at that port within the next day or two, applied to the agent of the respondent for a berth. The Stroma was a steel steamer, 210 feet in length, and her draught, when loaded with cargo, was about 13 feet aft and between 10 and 11 feet forward. Her agent knew that the respondent's dredge had sunk in the slip somewhere between the two piers, and in fact he saw her sink; but he did not know precisely where she had sunk. The piers were about 150 feet apart, and about 400 feet long. He supposed that the Stroma could make her berth, and discharge safely at the north side of pier 2, at the seaward end; and he suggested to the respondent's agent that she be given a berth at that place. The respondent's agent assented to this suggestion. According to the course of business between the respondent and vessel agents at Colon it was customary, upon a berth being assigned to a vessel, to leave the putting her at berth entirely under the management of her agent; the agent to report to the respondent after the berthing of the vessel. The Stroma arrived early on the morning of December 31, 1888. Her agent was present, and by his instructions she made her berth on the north side of pier 2 at the seaward end. The respondent's agent, whose office was but a short distance away, saw the steamer as she was making her berth, and when she was made fast, and throughout the day while she was discharging. Some of the employes of the respondent were present while the steamer was being berthed. No intimation was given by the respondent's agent, or by any one on behalf of the respondent, to any one connected with the



steamer, that she was moored at a place to which she had not been assigned, or that she was in an unsafe place. The steamer continued there unloading until about 6 o'clock P. M.; when it was found that she had been forced upon the spindle, apparently in consequence of the lowering of the tide and the swell caused by a light wind. The spindle pierced the steamer's bottom, and injured her so badly that she soon filled and sank. When it was discovered that her bottom had been pierced, her master sent for the agent of the respondent, and the latter, together with one of the managers of the respondent, visited the steamer, and at that time expressed themselves as unable to account for the injury. Later in the evening the master of the steamer formally notified the respondent that he would hold it liable for the injury to his vessel; whereupon the respondent's agent replied that the steamer had been hauled to the pier without authority from the respondent, and the respondent would look to her owner for any damages which might arise by her sinking at a berth to which she had not been assigned.

We are unable to agree with the learned district judge who decided this cause in the court below that the respondent's agent merely consented to permit the steamer's agent to berth her at the pier at a place beyond the sunken wreck, or that the latter was aware of the risk, and took the chances of avoiding it. We think the respondent's agent supposed, as did the steamer's agent, that there was sufficient room for a small steamer like the Stroma to make her berth and be discharged with safety at the place where she was subsequently berthed; that he supposed that the wreck lay far enough from that end of the pier, and there was so much water above the scow that the Stroma would be safe there, although it would not be a safe place in which to berth a large vessel; and that he overlooked the fact that the spindle was attached to the scow. His conduct is very convincing that the steamer was berthed at the place where he expected she would be, and does not square with his testimony that he consented to her being berthed at the end of the pier, but not at the side. His conduct also denotes very persuasively that he believed she was in a safe place where she lay. He would have expostulated when he saw where she was being berthed and discharged if she had not been rightfully there, or if he had supposed she was incurring danger of injury from the wreck. He knew that she would not have been placed where she was if those in charge of her were aware that she was in danger there, and that his principal, as a wharfinger for compensation, was at least morally bound to notify them of a peril of which they were ignorant. Good faith and common courtesy would have prompted him to give warning, even though he considered the respondent under no legal liability, if he had not supposed she was in a safe place. Even after she was injured he did not think of the sunken wreck as the cause. His subsequent conduct, when he found that a claim for damages was to be made against the respondent, was not consistent with the theory that he had given permission to her agent to berth her at his own risk. If that had been the understanding between him and her agent, he would have said so; but, instead of taking that

position, he insisted that she was there without right, and that her owner was therefore answerable to the respondent for impeding access to the pier by his disabled steamer.

Upon the facts, as we find them to be, we think the respondent is liable. Although the respondent's agent assigned the berth to the steamer at the request of the steamer's agent, and with the knowledge of the latter that there was a sunken wreck somewhere in the vicinity of the berth, there was no agreement or understanding, express or implied, relieving the respondent from the ordinary obligations of a wharfinger, except that by designating the particular place at which she was to have a berth it was implied that she would not attempt to make a berth at any other place on the respondent's premises. It is not necessary to discuss considerations which would be pertinent if the steamer's agent had been aware of the existence of the dangerous obstacle in the berth, or even of the precise location of the wreck. Under the circumstances, and when the respondent's agent consented to assign the berth, without any suggestion that it was unsafe, the steamer's agent was justified in assuming that the respondent had better information than he had of the condition of its own premises, and in relying and acting upon the presumption. As a wharfinger, offering accommodations to the libelant's vessel for compensation, the respondent impliedly undertook that the steamer would not be exposed to unnecessary hazard in using the part of the premises to which she was assigned, arising in consequence of any concealed obstruction or danger, known to the respondent, or of which it ought to have knowledge, the existence of which those in charge of the steamer were not required to anticipate, and there was a breach of this obligation if such an obstruction existed. *Mersey Dock Trustees v. Gibbs*, 11 H. L. Cas. 686; *Wendell v. Baxter*, 12 Gray, 494; *Nickerson v. Tirrell*, 127 Mass. 236; *Smith v. Havemeyer*, 86 Fed. Rep. 927. Very likely the respondent's agent believed from the report of the diver that the only part of the wreck near the berth assigned the steamer was the scow, which, with 22 feet of water above her, at a place where the fall of the tide is only 18 inches, would not endanger a vessel of the Stroma's draught, even if she were moored over the scow; and undoubtedly he overlooked the probability of danger from the spindle. But he should not have permitted the steamer to be berthed where she was until there had been a sufficiently careful examination of the condition of the wreck to demonstrate that she could be berthed there with safety. The respondent cannot be excused from responsibility for the consequences of its own remissness. The libelant is entitled to a decree for the amount of its loss. The decree is reversed, and the cause remanded with instructions to ascertain the libelant's loss, and to decree for the libelant, with costs of the district court and of this court.

## THE IOWA.

## MONROE v. THE IOWA.

*(District Court, D. Massachusetts. May 26, 1892.)***1. CARRIERS BY SEA—STIPULATION EXEMPTING FROM NEGLIGENCE.**

It is the settled law of the federal courts that an express stipulation exempting a common carrier, whether foreign or domestic, from liability for losses caused by the negligence of himself or his servants, is contrary to public policy, and cannot be enforced against the shipper.

**2. SAME—CONTRACT OF CARRIAGE—DISPUTES TO BE SETTLED ACCORDING TO BRITISH LAW.**

A clause in the contract providing that all questions arising under the contract shall be settled according to British law is a nullity, as an attempt to impress upon the contract a construction which our law rejects as contrary to public policy.

**3. SAME—TRANSPORTATION OF CATTLE—NEGLIGENT FITTING.**

Cattle were shipped on a British steamship under a contract which provided that the ship was to furnish the fittings for the cattle, but the shipper was to assume all risks of the fittings, the ship not to be responsible for any injury to the cattle arising from any cause, and all controversies to be decided according to British law. By the negligence of the employes of the ship, part of the fittings were not sufficiently secured, which fact was unknown to the shipper, and in an ordinary gale they gave way, and some of the cattle were killed. *Held*, that the ship was liable.

In Admiralty. Libel for damage to cattle. Decree for libelant.

*Proctor & Tappan and Payson E. Tucker*, for libelant.

*J. D. Ball*, for claimant.

NELSON, District Judge. This is a libel in admiralty filed by Albert N. Monroe, an exporter of cattle, against the British steamship *Iowa*, of the Warren line of transatlantic steamers, to recover for damage to cattle on a voyage from Boston to Liverpool. The cattle were shipped under a special contract in writing between the steamship company and one Hathaway, made in Boston, and assigned in part by Hathaway to Monroe, the provisions of which were expressly assented to by Monroe by a memorandum indorsed on the instrument signed by his agent. The material clauses in the contract relative to the questions now before the court are the following:

"Ship to furnish fittings." "The fittings to be such as are used on board the steamships of our line, and you [the shipper] are to assume all risks connected with said fittings. It is understood that you approve the fittings and ventilation of the steamship herein referred to, and that you will not require any change in or addition to said fittings and ventilation. Neither the steamship, her agents nor her owners, are to be accountable for the dangers of the seas, or accidents to fittings, water tanks, machinery, or condensing apparatus; nor for any other accidents; nor for any action which the authorities in Europe or America may take concerning the animals, no matter what may be the cause or consequence of such action; nor for any mortality of or injury to the animals for any cause; nor for delay in sailing caused by long passage, necessary repairs, or any circumstances beyond our control." "All questions arising on this contract shall be decided according to British law."

The contract also prescribed a form of bill of lading to be issued for the cattle, containing similar exemptions from liability on account of the fittings. The steamship sailed from Boston on the afternoon of Tuesday.  
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day, April 12, 1887, having on board in all 347 head of cattle, 232 of which were the property of the libellant, and 115 belonged to Hathaway. Of the libellant's cattle, 164 were stowed on the forward main deck. The rest of his cattle, and all of Hathaway's, were stowed on the spar deck. The cattle on the main deck were confined in pens on each side of a passageway running fore and aft, each pen holding four animals, with cleats nailed to the deck to prevent their slipping.

On Wednesday morning the ship encountered a gale from N. E., with a beam sea on the port side, which caused the ship to lurch heavily to starboard. A part of the cargo was grain in bulk, and during the gale this appears to have shifted to starboard, causing a considerable list on that side, and increasing the lurching. The consequence was that some of the pens on the starboard side of the main deck gave way, the stanchions and head boards came apart, the cleats on the deck were torn off by the struggles of the animals, and the cattle in these pens were thrown together in heaps. Twenty-two of them were killed outright, before they could be extricated; others were so badly injured that they had to be slaughtered on the spot; others suffered from being bruised and maimed. During this time the ship was steering E. S. E. and S. E. by E.  $\frac{1}{4}$  E. At 10:30 P. M. on Wednesday, being then well past George's bank, her course was altered to S. E. by S., bringing the sea astern, and from that time the roll of the ship to starboard ceased, and no more trouble was experienced, although the gale continued until the next day.

The defense is that the loss was caused by the perils of the sea, without any negligence on the part of the master or officers, and that the owners are exempted from liability by the terms of the special contract.

There can be no doubt, upon the evidence, that the proximate cause of the loss in this case was not the perils of the sea, but was the insufficiency of the cattle fittings. The storm was of no unusual violence, but was such as is likely to be met with in any transatlantic voyage. It was entered on the ship's log as a "moderate gale." In regard to the fittings this appeared: The ship had carried no cattle on the main deck for seven months prior to this voyage. In the mean time the fittings had been taken down and laid away. They were put up again at Boston just before the ship sailed. Most of the pens seem to have been put together in a proper manner, and held together; but the pens that broke away, the evidence shows, were not sufficiently secured, and that this was the fault of the carpenters in doing the work. The defective condition of the pens was not known to the libellant or his agents when the ship sailed. It was the duty of the officers of the ship to see that this work was well done, and everything made secure and safe for the protection of the cattle. Their failure to do this was negligence for which the ship and owners are responsible, unless they are protected by the exemption clauses in the contract. Since the decision of the supreme court in *Liverpool & G. W. Steam Co. v. Phenix Ins. Co.*, 129 U. S. 397, 9 Sup. Ct. Rep. 469, the law of this country upon this subject, as administered in the federal courts, is settled. It was there decided that a contract made in this country for the carriage of goods in



a foreign ship to a foreign port, under circumstances similar to those in this case, is to be construed in the courts of the United States by the law of this country; and by that law an express stipulation by a common carrier for hire, whether foreign or domestic, that he shall be exempt from liability for losses caused by the negligence of himself or his servants, is unreasonable, and contrary to public policy, and cannot be enforced against the shipper. So far, then, as the exemption clauses in the contract in this case were intended to exempt the ship and owners from liability for the negligence of her officers, they must be held void, and the ship liable for the losses incurred.

The libellant is entitled to recover in spite of the clause providing that all questions arising under the contract shall be decided according to British law. This seems to be an attempt, in an indirect way, to stipulate that the shipowner shall be exempt from responsibility for the negligence of his servants, since the British law is supposed to uphold such exemptions. The form of the stipulation is immaterial, and as its purpose is plainly to impose, upon a contract made here, a construction which our law rejects as contrary to public policy, it must be held to be as much a nullity as the other clauses, which in express terms limit the liability of the owner. *The Brantford City*, 29 Fed. Rep. 373, 396.

One contention of the libellant was that the master of the ship was negligent in not earlier heading the ship to the southward, to avoid the cross seas. In justice to Capt. Walters, it is proper to say that it appears that this could not have been done sooner, without passing over George's bank, which is out of the course of steamships of the class of the Iowa, and where such vessels never go, unless driven out of their course by stress of weather. These shoals are known to be dangerous on many accounts, and he was entirely justified in refusing to change the course of the ship until well past them. Decree for the libellant. Case referred to an assessor for the assessment of damages.

## THE OLIVE MOUNT.

(District Court, D. Massachusetts. May 27, 1892.)

1. SALVAGE—DISTRIBUTION AMONG SALVORS—WHEN OBJECTION TO WILL NOT LIE.  
Seamen, who authorized the owner of their vessel to make settlement in their behalf of all claims for salvage, cannot, after the settlement, collect against the property saved, if dissatisfied with the share of the award allowed them by such owner.
2. SAME—REMEDY—PROPER PARTY TO SUE.  
In such case, their remedy is by libel in admiralty against the owner of their own vessel to recover their share of the award.

In Admiralty. Libel for salvage. Dismissed.  
*Bordman Hall*, for libellants.  
*Frederic Cunningham*, for claimant.

NELSON, District Judge. This is a libel by four seamen, being part of the crew of the steam tug William Sprague, owned by the Boston Towboat Company, against the bark Olive Mount, for salvage. As the tug was lying at Scituate on the evening of July 19, 1891, the attention of the men in charge was attracted by a bright light on the eastern horizon, and, proceeding out, they found the bark Olive Mount on fire, and abandoned by her crew. By the exertions of the officers and men of the tug, and by the use of her steam pump, the fire was extinguished, and the vessel was then towed into Boston, and turned over to the towboat company. The owners of the vessel afterwards paid to the towboat company as salvage \$2,500, or one half of the value of the property saved, and the vessel was then delivered into the possession of her owners. This sum was paid and receipted for as full compensation for the salvage services of all concerned, and it is agreed by the libelants to be a proper and sufficient compensation for the services rendered. The libelants afterwards made demand upon the company for their share of the reward, and, the company refusing to pay them as much as they claimed, they brought this suit against the vessel.

There are two sufficient reasons why this libel cannot be maintained:

1. The evidence shows conclusively that the libelants expected and authorized the company to make the settlement in their behalf of all claims against the vessel for salvage. Three of them testify that they expected the company to collect the salvage. The fourth does not quite admit this, but he hardly denies it. They all had knowledge of the negotiations going on between the owners of the vessel and the company for the settlement; but they made no objections, set up no separate claim, nor asked or expected to be consulted. The vessel, also, was delivered up to the owners without objections from them. They claimed their share after the money was paid, and it was only after their failure to come to an agreement with the company that they brought this suit. Their demand on the company ratified the settlement, even if no previous authority had been given.

2. Their remedy is against the towboat company, and not against the vessel. Two cases were cited in support of this suit, (*The Britain*, 1 W. Rob. 40, and *The Sarah Jane*, 2 W. Rob. 110,) in which Dr. LUSHINGTON awarded salvage to seamen, although full salvage had been paid to the owners. These cases can be accounted for upon the ground that the limited jurisdiction of the admiralty courts in England at that time did not afford any remedy to seamen by suit against the owners, and the law courts not being open to them, there was no way to protect their rights but by a suit against the vessel. But that is not the case here. When the owners of a vessel which has performed a salvage service make a settlement with the owners of the property saved, and receive the salvage, the crew may recover from them a due share of the reward by a libel in admiralty. *Studley v. Baker*, 2 Low. 205. The settlement was a just one, and was authorized by the libelants, and, if they are entitled to salvage by the terms of their employment, they can bring their suit against the towboat company which collected it, and is entirely responsible, and they should have done so. Libel dismissed, with costs.



SMITH v. HARRISON *et al.*<sup>1</sup>

(Owens Court, E. D. Pennsylvania. May 31, 1892.)

**1. DEMURRAGE—"CUSTOMARY QUICK DISPATCH."**

Customary quick dispatch at the port of Philadelphia, in unloading a cargo of sugar, requires the use of platform scales to weigh the sugar, when the cargo is to be weighed as delivered.

**2. SAME—DUTY OF CHARTERER.**

The duty to furnish scales adequate to give the degree of dispatch contracted for in the charter is incumbent on the charterer, although the weighing is done by the government.

Libel by George Smith, master of the vessel, against Harrison, Frazier & Co. to recover demurrage from unloading the cargo with "customary quick dispatch" according to the terms of the charter. Demurrage allowed.

*Curtis Tilton*, for libelant.

*Richard C. McMurtrie*, for respondents.

BUTLER, District Judge. The suit is brought to recover demurrage for delay in receiving a cargo of sugar at this port, under charter dated December 10, 1889, which provides that "the vessel shall be discharged with customary quick dispatch," and that "for every day's detention by respondents' fault £35 sterling shall be paid." It further provides that the discharge shall be at such wharf as the charterers designate. The vessel reached Philadelphia on Saturday, March 8, 1890, and after entry at the customhouse, reported readiness to discharge. On the following Monday the respondents ordered her to pier No. 38 South wharves, where she docked in the evening of that day. The stevedore (provided by respondents under the charter) was promptly ready, with gear erected to discharge from two hatches. There are no platform scales at this pier, and the sugar was consequently weighed on temporary scales set up, which required each bag to be separately put on and taken off. This method of weighing is inconvenient, awkward, and so slow that the sugar could not be taken as fast as put off from a single hatch, and consequently but one was used. The government requires such cargoes to be weighed before leaving the wharf; and they are usually weighed as taken from the vessel; though occasionally permission is obtained to deposit them on the wharf, in advance of weighing. This permission may always be had where the wharf is suitable for such deposit. The government is only interested to see that they are not removed from the wharf until the weight is ascertained. To authorize or justify such deposit, the wharf must be covered, (as this was,) and strong enough to support the weight. Formerly the usual method of weighing was that adopted in this instance. Within a few years past the large refineries have erected platform scales upon which carts and drays may be driven, and the sugar weighed as rapidly as it can be taken from two or more

<sup>1</sup> Reported by Mark Wilks Collet, Esq., of the Philadelphia bar.

hatches of the vessel. The principal part of the sugar brought to this port of recent years has been weighed on these scales,—whether unloaded there or at other wharves where such facilities do not exist. Brokers and others discharging elsewhere generally convey the sugar to these scales to avoid delay. In the two years preceding the arrival of this cargo the respondents weighed 395 cargoes received by them on such scales, as against 22 cargoes weighed by the old method. The proofs justify a conclusion that of the cargoes brought here by others within the same period, about 700 were so weighed as against 18 weighed by the old method. It is, I think, justifiable to say that 19 out of 20 of the large cargoes coming here are weighed on platform scales. The government sets up temporary scales where no other method of weighing is provided by the importer. When platform scales are provided at the wharf where the sugar is unloaded, or at another to which it is conveyed for weighing, the government prefers to use them, as it thus saves much time to itself as well as to others.

In the view I entertain of the case, a more minute statement of the facts is unnecessary. As already seen, the charter requires "customary quick dispatch" in unloading. The signification of this language is well settled. It is the usual quick dispatch of the port where delivery is to be made, as distinguished from the common or usual dispatch employed there. It requires haste,—the ordinary haste of quick dispatch. The subject has been much discussed, and the following cases may be cited: *Carsanego v. Wheeler*, 16 Fed. Rep. 248; *Davis v. Pendergast*, 16 Blatchf. 567; *Keen v. Audenried*, 5 Ben. 535; *Williams v. Theobald*, 15 Fed. Rep. 469; *Lindsay v. Cusimano*, 10 Fed. Rep. 303; *Bjorquist v. Steel Rail Cross Ends*, 3 Fed. Rep. 718; *Davis v. Wallace*, 3 Cliff. 123; *Kearon v. Pearson*, 31 Law J. Exch. 1; *Dahl v. Nelson*, L. R. 6 App. Cas. 59; *Pyman v. Dreyfus*, 24 Q. B. Div. 157.

What customary dispatch in discharging cargoes of sugar requires—whether the use of modern conveniences for weighing—need not be considered. That customary *quick* dispatch does require the use of such conveniences, I cannot doubt. It is difficult to see how the dispatch can be hastened in any other way. Possibly it might by setting up several temporary scales, but this would require a large force of men, would occupy considerable space, and tend to embarrassment and confusion. It is not probable that the government would resort to this means for hastening the work. The only reasonably practicable method of securing haste is, as the expert witnesses say, by the employment of platform scales.

The dispatch stipulated for in the charter largely influences the freight-rate. "Customary quick dispatch" gives the charterer a lower rate than "customary dispatch," and I cannot doubt that when the respondents agreed to give the libellant such quick dispatch it was contemplated that the modern facilities for weighing should be employed. The specific governing object in providing such facilities is to save time, and thus discharge vessels speedily. Why then should not a vessel which has given the charterer the benefit of quick dispatch rates have the benefit of such

facilities? It may be said that it is the government's duty to furnish scales; that the charterer has nothing to do with the weighing. To a limited extent this is true; but his obligation requires him to take the cargo, as delivered from the ship, and if it is to be weighed as received, (to ascertain his obligations to the government,) instead of being deposited (wholly or in part) on the wharf, his duty requires him to see that such facilities for weighing are provided as will enable him to afford the dispatch which he has bound himself to give. The subject does not require extended discussion and I will not pursue it. I hold that the "customary quick dispatch" of this port, in the discharge of sugar, is such dispatch as can only be afforded by the use of platform scales in weighing, where the cargo is to be weighed as delivered; that the usual customary method of weighing, under the circumstances stated, is by the use of such scales, wherever haste is required. It follows that the libellant is entitled to demurrage. I will not undertake to determine how much; but will refer the question to a commissioner if the parties do not agree about it.

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THE CALEDONIA.

GOLDSMITH *v.* HENDERSON *et al.*

(District Court, D. Massachusetts. August 15, 1883.)

1. SHIPPING—UNSEAWORTHY VESSEL—WEAK SHAFT.

Where a steamer's propeller shaft, which had been long in use, broke in fair weather, when the ship was under ordinary full speed, and no wreckage lay about or rock that could have been struck, and the shaft showed no flaw on subsequent examination, the court found that the shaft was weak before the vessel left port, and *held*, that this constituted such a defect as to render the ship unseaworthy at the commencement of her voyage, and her owner liable for damages arising out of such condition.

2. SAME—DAMAGES—DELAY—LOSS OF WEIGHT.

When a shipper of cattle furnished sufficient provisions to last during an ordinary voyage, but, owing to the unseaworthiness of the ship, the voyage was unduly prolonged, *held*, that the ship was liable for the shrinkage in the weight of the cattle occasioned by lack of provisions.

3. SAME—FALL IN MARKET PRICE.

In the usual course of the business of shipping cattle abroad, they are sold immediately on arrival, which fact was known to the ship agent when the contract for transportation was signed. Owing to the unseaworthiness of a ship, the voyage was prolonged 20 days, during which the market price of the cattle fell. *Held*, that the ship was liable for the shipper's loss caused by the fall in the market price.

In Admiralty. Libel by shipper of cattle for damages arising out of the breaking of the shaft of the steamship Caledonia. Decree for libellant. Affirmed on appeal, 43 Fed. Rep. 681.

*Henry M. Rogers* and *Warren K. Blodgett*, for libellant.

*William G. Russell* and *George Putnam*, for claimants.

NELSON, District Judge. The Caledonia sailed from Boston, June 15, 1885, and on June 24, when nine days out, her propeller shaft broke in the stern tube, and the machinery was disabled. The rest of the

voyage was performed under sail, and she arrived at Deptford, July 20th, being 20 days beyond her usual passage. The cattle were put on short allowance, and were landed in an emaciated condition. It appeared that the ship experienced no rough weather on her passage previous to the accident, and that the breaking of the shaft occurred in fine weather; that, at the time of the accident, she was under ordinary full speed; that there was no wreckage floating about to indicate that the ship struck any submerged bulk, and no reef or rock could have been struck. It also appeared that the propeller shaft had been 14 years in use. On her previous trip out, the ship had encountered severe gales. Upon examination of the breakage in England, no flaw was discovered. Upon these facts I find that the shaft must have become weakened from long use, and broke from that cause, and that this weakness existed at the time the ship left Boston, and constituted such a defect as to render the ship unseaworthy at the commencement of her voyage; and that the exception in the bill of lading of perils of the sea, and damage by delays and defects of machinery, was no limitation on the warranty of the seaworthiness of the ship, at the commencement of the voyage. I find that there was no fault on the part of the ship in not accepting assistance from other vessels spoken after the accident. Upon the question of damages, it appeared by the agreement of the parties, in lieu of a reference to an assessor to assess the damages, that the whole amount of damages suffered by the libelant arose from two sources of loss,—shrinkage in weight from the protracted voyage, and fall in the market value of the cattle during the delay in arrival; and that these two causes together made the loss \$7,850, and that one half thereof, \$3,925, was to be attributed to each cause.

The steamship company claimed that the shrinkage in weight was caused by the failure of the libelant to provide sufficient provisions for the cattle during the voyage. Upon this point I find that the libelant provided sufficient provisions for a voyage of the usual length, and that was all which, by the usage of the business, he was bound to provide, and that the shrinkage in weight was owing to the giving out of the provisions in consequence of the delay in arrival, for which the steamship company is responsible.

The steamship company also claimed that, as a matter of law, it should not be held responsible for the fall in market value. But as it appeared in evidence that the cattle were not to be sold until their arrival at Deptford, and were to be sold immediately upon their arrival, and that this was the usual course of the business of shipping live cattle by steamship line from Boston to Deptford for the London market, and that this was known to the agents of the steamship line at the time the contract between the parties was executed and the bill of lading was signed, I am of opinion the steamship company is responsible for the loss by the fall in the market, as well as by shrinkage in weight, and is liable for the whole amount of the libelant's damage from both causes. Decree for the libelant for \$7,850, and interest from the filing of the libel, and for costs.

## THE FAVORITE.

BRAND *et al.* v. THE FAVORITE.

(District Court, D. Washington, W. D. May 11, 1892.)

## TUGS AND TOWS—NEGLIGENCE—UNSEAWORTHY TOW.

When a scow in tow of a tug careened and lost overboard her deck load of brick, and the court found that the leaky and unseaworthy condition of the scow was the cause of the accident, but also that the master of the tug had not made the usual examination to ascertain her condition before undertaking to tow her, it was held that both tug and tow were in fault, and the owner of the scow should recover against the tug but half his loss.

In Admiralty. Libel to recover damages for negligent towage.

*A. J. Hanlon*, for libellant.

*Crowley & Sullivan*, for claimant.

HANFORD, District Judge. This is a suit brought to recover damages for the loss of a scow load of brick, on the ground of negligence and unskillfulness on the part of the master of the steamer in towing the scow, causing said loss. The libelants were owners of the scow and cargo. They employed the steamer to tow the scow, loaded with brick, a distance of 16 or 17 miles, from the brickyard to Tacoma. In order to take advantage of the tides the steamer went for the tow, and started with the same on the trip to Tacoma, in the night. After making a distance of about seven miles, as the scow appeared to be filling with water, the master attempted to run her upon the beach to save her, but before he could accomplish his purpose the scow careened so that the brick which were loaded upon her deck were dumped into the water and entirely lost. The mishap occurred in fine weather and in smooth water. The leaky and unseaworthy condition of the scow was the sole cause of it, and for this the libelants, who loaded her and sent her upon the venture, must be held to be primarily responsible. But the loss could not have occurred if the steamer had left her moored as she was at the brickyard. The master relied upon an assurance given by an employe of the libelants that he had on the day previous let the water out of the scow, and that she was all right, and towed her away without making the usual examination to ascertain her actual condition. Had he acted with ordinary care and prudence the loss would not have occurred while the property was in his charge, and for his neglect in this respect he is in part responsible for the consequent damage. According to the rule in admiralty the loss must be shared by all who were contributors towards producing it. I find from the evidence that 83,000 brick were lost, the market value of which at Tacoma was \$9 per 1,000. The cost of transportation would have been 40 cents per 1,000. Deduct this expense from the value of the brick, and the difference will be the whole loss. A decree will be entered in favor of the libellant for one half of said amount, and costs.

SCOWS 3, 16, AND 17.

LUCKENBACH v. SCOWS 3 AND 16.

SAME v. SCOW 17.

(District Court, S. D. New York. April 30, 1892.)

**SALVAGE—SCOWS ADRIFT IN GALE—TOWAGE TO PORT.**

Four scows, employed in carrying refuse from New York to the dumping grounds outside of Sandy Hook, were blown out to sea in a violent gale. Two men were aboard each scow. Tugs went out to search for them, but were unable to find them, and could not have brought them in if they had been found, so heavy was the weather. Libellant's tug Luckenbach, a powerful seagoing vessel, worth \$60,000, and carrying a crew of 11 men, then put out from New York, and, on one trip, discovered two of the scows 60 miles from Sandy Hook, and, on a second attempt, found a third 70 miles at sea. These were brought safely into port; the fourth scow was never recovered. The three scows would in all probability have been lost but for the Luckenbach. The latter was the only boat, save one, capable of rendering the service, and that one was unsuccessful. The work was of unusual difficulty, and was attended with danger to the tug. Held, that the libellant should receive, as salvage, one third of \$26,000, the value of the scows.

In Admiralty. Libel by Lewis Luckenbach against certain scows.  
Decree for libellant for salvage.

*Peter S. Carter*, for libellant.

*Carpenter & Mosher*, for claimants.

BROWN, District Judge. On the morning of Tuesday, January 26, 1892, four scows known as Nos. 3, 5, 16, and 17, employed in carrying refuse from New York to the dumping grounds outside of Sandy Hook, got adrift in a violent gale from the northwest. The tug Webster which had in charge Nos. 5 and 17, had fouled her propeller with the hawser leading astern, and had become disabled; and the tug Nichols, having charge of scows Nos. 3 and 16, after vainly endeavoring to assist the Webster and her tow, was obliged to leave her own scows at anchor in order to get water. In the increasing gale of the morning, the anchors dragged and all the scows were carried out to sea. When this became known in the harbor, some tugs soon after noon went out to rescue them, but after going a few miles outside of Sandy Hook found the weather so heavy that their efforts would be useless, even if the scows should be found, and accordingly returned without having seen them. On Tuesday night the libellant's tug, the Edgar F. Luckenbach, with 11 men, officers and crew, a large and powerful seagoing boat, fitted for such emergencies, and of the value of \$60,000, was got in readiness and left Atlantic Basin at about midnight. The weather was extremely heavy; but at about 9 o'clock A. M. on the 27th, scows Nos. 3 and 16 were found about 60 miles outside of Sandy Hook, and brought into the Atlantic Basin a little before midnight of the 27th. Neither of the other two scows having in the mean time been discovered by the three other tugs that had put out for them, the Luckenbach about midnight of the 27th started out again, and at about 10 o'clock of the following



morning discovered No. 17 about 70 miles from Sandy Hook, and succeeded in bringing her into Atlantic Basin, where she arrived about 1 o'clock on Friday morning.

Towards midnight of the 27th the wrecking tug Chapman, well equipped for such service, also went out in search of No. 5 and No. 17, at about the same hour that the Luckenbach left the second time. She saw nothing of either scow, turned about some 10 or 15 miles short of the distance the Luckenbach went, and returned unsuccessful. The owner of the Luckenbach sent out another tug to find No. 5. She was not found, but was carried far out to sea; and on the morning of February 1st, a week after she had got adrift, she was sighted about 100 miles to the eastward of Cape Henlopen, and the two men on board of her were taken off by a steamer bound for Philadelphia. No attempt was made to tow the scow into port. A week later, being still afloat and coming near causing a collision with a sailing vessel, she was set on fire by the latter and presumably destroyed. *The River Mersey*, 48 Fed. Rep. 686.

In the *Case of Scows Nos. 9, 16, and 24*, 45 Fed. Rep. 901, this court in a somewhat analogous case allowed a salvage award of 25 per cent. upon \$20,000, the value of the scows recovered, the salving tug being worth \$15,000. The case was regarded as an extraordinary one, both as respects the peril of the scows and of the persons on board, and the heroism of the salvors. In the present case scows Nos. 3 and 16 were worth \$16,000; and scow 17, \$10,000. The claimants tendered 25 per cent. of those amounts, which the libellant declined to accept. The only question litigated is whether the circumstances are such as to entitle the libellant to a larger award.

A fair consideration of all the circumstances seems to me to justify the conclusion that the Luckenbach is entitled to a somewhat larger award than was made even in the case cited. The value of the tug employed was four times as great in this case as in that; the service was three times as long; and the difficulties were prolonged in proportion. To the fury of the seas was added extreme cold, which covered with ice both the tug and scows. The seas washed over the tug at stem and stern. One sea nearly carried overboard the mate; and the ice rendered extremely difficult and dangerous the handling of hawsers and the necessary movements upon deck in the rolling and pitching of the tug. Towing in such cold weather exposed the Luckenbach to peril; and in case of any mishap through the breaking of the machinery or the fouling of the hawser, or the unavoidable racing of the engines, or in manœuvring with the scows, the peril of the Luckenbach would have been extreme.

For the claimants it is insisted that these dangers are more fanciful than real; that the Luckenbach was built and equipped for precisely such service, and was able to render it without danger or risk other than such as was incident to her ordinary movements; that neither the crew of the tug, nor the men on the scows, suffered any hardship; that no skill was shown or required in taking the scows into port; that the tug

lost little time that would in fact have been otherwise employed; that the scows were not derelict, but had each two men on board; and that without their assistance the scows could not have been saved, because no line or hawser could have been got on board of them; that the scows could not have foundered, or capsized, or been swamped; and that the danger of collision with other vessels was too slight for consideration.

While these objections have been forcibly urged with a view to reduce the libellant's claim, they seem to me not sufficient to detract from the very high merit of the service. The fact that the Luckenbach was one of a very few harbor boats suitably equipped and able to render this service, rather adds to her merit than detracts from it, (*Coast Wrecking Co. v. Phoenix Ins. Co.*, 20 Blatchf. 557, 568, 13 Fed. Rep. 127;) for without such boats and the expense of maintaining them, the property must in such cases be lost altogether. The only other boat shown to have been available and really fitted for the service was the Chapman, and her efforts were unsuccessful. Three other tugs made attempts and abandoned them, though from the recent *Case of Scows No. 9, etc.*, above cited, the hope of a very considerable award was held out to them if they were successful. That the Luckenbach should have found all three of these boats and all the other tugs have found none, is, moreover, the strongest evidence of her skill. No. 5 was not found by any of the other tugs; and a fortnight afterwards, though observed by three different vessels far out at sea, she was not deemed worth saving, and was finally destroyed. The evidence leaves no reason to suppose that any better fortune would have attended the other three scows, and probably all would have been lost, had they not been found by the Luckenbach. She brought them in unharmed.

That the Luckenbach escaped mishap and injury, does not prove the difficulties to be exaggerated or the dangers fanciful; but shows rather excellence in her equipment, and skill in her management. The whole trouble originated in the fouling of the Webster's hawser in a much milder sea. While towing in such heavy weather, the danger of fouling the hawser and of breaking the shaft from racing, are well recognized. *The Loveland*, 5 Fed. Rep. 107. The scows would not indeed sink unless they first sprang a leak; but upon any sudden leak on one side, they would be speedily capsized, with a loss of the lives of the men on board.

On the whole the case appears to be one in which the Luckenbach rendered a service which no other boat was able to perform. When the enterprise of the whole port was challenged, she alone displayed the skill, equipment, fortitude and perseverance necessary to success. Her work was attended by unusual difficulty; it was conducted with a skill and persistence which no other vessel evinced; and besides saving the lives of those on board, she rescued three of the four scows from what would in all probability have proved a total loss. One third of the value of the scows saved will, I think, be a proper and well-deserved allowance, amounting in one case to \$5,333.33; and in the other to \$3,333.33, for which decrees may be entered, with costs. Of the

amounts awarded one third in each case will go to the captain and crew, and two thirds to the owners of the boat; of the one third, \$200 in the first case and \$100 in the second, are awarded to the master, and the rest distributed among the master, officers, and crew in proportion to their wages.

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CAR FLOAT No. 5.

JONES *et al.* v. CAR FLOAT No. 5.

(District Court, S. D. New York. April 23, 1892.)

**SALVAGE—BEACHING LEAKY FLOAT—EXCESSIVE SECURITY—COSTS.**

A float with loaded cars, while in tow of a large tug, got on rocks. After floating, she was found to be leaking badly, and the tug started to beach her. Two smaller tugs were employed for some 10 or 15 minutes in keeping the float straight, and in landing her in shallow water, where the large tug could not go. The owners of the float settled with the second tug to arrive for \$125. *Held*, that the tug first to assist should receive \$200; but as no demand had been made, and as security had been exacted in the sum of \$5,000, costs were refused.

In Admiralty. Libel by Richard Jones and another against Car Float No. 5. Decree for libelants for salvage.

*Alexander & Ash*, for libelants.

*Wing, Shoudy & Putnam* and *Mr. Burlingham*, for claimant.

BROWN, District Judge. On September 17, 1891, about 7 o'clock A. M., while the tug *Intrepid* was towing car float No. 5 with loaded cars from Wilson's Point to New York, the float, through the parting of the hawser, got aground on the rocks at Pot Cove in Hell Gate. When floated off she was found to be leaking so much that the tug deemed it prudent to take her as speedily as possible to the flats to the eastward of the Brothers islands. On approaching North Brother the float was yawing badly through partly filling, and signals were sounded by the *Intrepid*, calling for assistance, to which the tugs *Curtis* and *Spray* responded immediately. The *Spray* having previously passed the float and observed her condition, recognized the necessity of beaching her at once, and of keeping her straight while passing the North Brother; and she accordingly went alongside the float at once, without stopping for any prior interview with the master of the *Intrepid*, which was ahead on a hawser. The *Curtis* not knowing the condition of the float, went alongside the *Intrepid* and bargained with the master to assist the float "around the point" for \$10; and thereupon took hold. The float was soon beached upon the flats by the aid of the two tugs in shallow water, where the *Intrepid* could not go; and afterwards the master offered to audit the bills of each, which was declined. On the same day the owners of the *Spray* filed this libel for salvage.

I do not credit the evidence of the claimants that the pilot of the *Spray* was told that he was not wanted before he went to the float, or was or-

dered off after he got there. The master of the *Intrepid*, who, it is said, gave those orders, has not been called as a witness, nor is any sufficient reason given for not producing him. His supposed order to the *Spray* to go away is sufficiently accounted for by his order to cast off the hawser; and the weight of evidence is clear that the *Spray* did not go alongside the *Intrepid* at all, but went at once to the float and took charge of her management. Nor is it probable that if the master had ordered him away from the first, he would have offered to audit his bill after the service.

The assistance desired was, however, comparatively slight; namely, some 10 or 15 minutes' service in keeping the float straight and beaching her upon the flats a little to the eastward. If the *Spray's* services had not been expected by the master of the *Intrepid*, his bargain with the pilot of the *Curtis* would evidently be a piece of cunning approaching imposition; if so, it was voluntarily compensated for by the owners afterwards, by the allowance to the *Curtis* of \$125, for her services. It seems to me probable, however, that the master of the *Intrepid*, seeing that the *Spray* was going alongside the float, bargained with the *Curtis* for \$10 as for a merely additional service besides that of the *Spray*; for the weight of testimony shows that the *Spray* came up to the float first. The services of either boat alone would probably have been sufficient; but the circumstances were such that the master might well have thought best to avail himself of the offer of both. The *Spray* having arrived a little earlier, and having in reality acted as principal as between the two, should be allowed more than the *Curtis*. Two hundred dollars will, I think, be a sufficient and appropriate compensation, (*The Jas. Rumsey*, 40 Fed. Rep. 909;) but as the libel was filed immediately, and without demand, and as security in the sum of \$5,000 was required, the decree must be without costs.

#### THE ROANOKE.

#### LEATHEM *et al.* v. THE ROANOKE.

(District Court, E. D. Wisconsin. May 16, 1892.)

##### 1. SALVAGE—CONTRACT.

A contract to pay for salvage service a fixed price absolutely, without respect to success or failure, does not change the character of the service. It remains a salvage service, but the measure of compensation is gauged by the contract, and not by the danger encountered, or the value of the property saved.

##### 2. SALVAGE—JURISDICTION—LIEN.

A contract to pay a fixed price for a salvage service, in any event, does not affect the admiralty jurisdiction, nor the lien granted by the maritime law for salvage service.

##### 3. SALVAGE—FRAUDULENT CONTRACT.

A contract between the salvors and the owner of the ship, for a fixed sum payable in respect of the ship, and for a larger sum payable in respect of the underwriters, is tainted with fraud, and will not be enforced.

##### 4. SALVAGE—MASTER'S CERTIFICATE—FRAUD.

Settlements by the master, deliberately and fairly made, are upheld. But such settlements, made pursuant to and in furtherance of a contract to defraud underwriters, will not be sustained.

**5. SALVAGE—INEFFICIENCY OF WRECKING OUTFIT—HIRING BY THE DAY.**

Compensation cannot be abated for inefficiency of wrecking material hired at a fixed price by the day, and subject to discharge at the will of the master. Retaining the service, the contract compensation must be paid.

*(Syllabus by the Court.)*

In Admiralty. Libel by John Leathem and others against the propeller Roanoke for salvage. Decree for libelants.

*M. C. Krause*, for libelants.

*F. M. Hoyt*, for respondent.

JENKINS, District Judge. The propeller Roanoke, laden with lumber, on the evening of the 8th day of August, 1891, set out on a voyage from the port of Menominee, Mich., to the port of Chicago, Ill. Leaving her dock, and in winding to go out, she struck upon a sunken ledge of rocks, owing to the displacement of a buoy; stove a hole 26x20 inches in her bottom, on the starboard side near the keel, and some 30 feet forward of her stern; and sank in 12 feet of water. The deck load was removed upon lighters and taken ashore. The master thereupon, on the 9th day of August, hired of the libelants a steam pump, which was placed upon the vessel, the libellant Leathem accompanying it and superintending its operation. The vessel was floated, towed alongside the dock, when, in consequence of an obstruction in the hole getting free, she again filled and sank in 10 feet of water. The one pump being insufficient, a second and smaller pump of the libelants was engaged, and, on the 10th of August, placed in position on the vessel. Both pumps proving inadequate to the task of raising the vessel, a third pump was procured of other parties on the 13th of August, and, by the combined action of the three, the vessel was raised on the 14th day of August. The cargo was removed, and the hole battened up with bags filled with sawdust, and planks braced against the deck. The vessel then, on the 15th August, proceeded for repairs to Milwaukee, having the two pumps of the libelants aboard, and at work to keep her free. At midnight, on the 15th August, when some three miles off Sheboygan, the water was found to be gaining, coming up nearly to the fire-hole door. The libellant Leathem was aroused from sleep, took charge of the operation of the pumps, working them beyond their ordinary capacity, and succeeded in lowering the water in the hold, and keeping it from the fires. The vessel was headed for Sheboygan, and reached that port at 3 A. M. on the 16th August. She made fast to the dock, and about 10 A. M. listed to starboard, and sank in 12 feet of water. This was caused by the plugging in some way escaping from the hole in the vessel. Various attempts between the 17th and 26th August were made to right the vessel. She was raised several times, but would at once list to one side and sink. Another pump was procured from Milwaukee, and placed on the vessel on the 26th August, and on the 28th of August the vessel was raised, but, while the dry dock was being made ready to receive her, she listed to the port side and sank, throwing the boiler of one of the pumps into the river and breaking connections. The boiler

was recovered, the connections repaired, the three pumps again put in operation, and the boat was finally raised and placed in dry dock on the 5th day of September.

The libel was filed *in rem*, in a cause of salvage, to recover the reasonable worth of the service. At the hearing it was amended to comprehend a contract in the nature of salvage, and to assert a specific contract for the use of two pumps at an agreed rate of \$45 and \$35 per day, respectively. The libel also asserted an accounting with the master and the owner, and certification of the libelants' claim by the master with the consent of the owner. The answer, *inter alia*, asserts that at Sheboygan the libelants and claimant agreed upon compensation for the pumps at the rate of \$45 and \$35 per day, respectively, less 40 per centum; and that the certification of libelants' claim was upon the express agreement that a deduction of 40 per centum should be made from the charges for the use of the pumps, and that, prior to the filing of the libel, the proper amount under such agreement had been offered to and refused by the libelants. The answer also asserts unnecessary delay and misconduct on the part of the libelants, and that the pumps were inefficient and in bad order and condition, and unfit for the service contemplated. The claimant also insists that the contract service alleged in the amendment to the libel is not a proper salvage claim, and not cognizable in the admiralty as a maritime lien; and also that the libelants and claimant are residents of the state of Wisconsin; that the contract for the services rendered was made at Sturgeon Bay, in the state of Wisconsin, and credit is therefore presumed to have been given the owner, and not the vessel; that a lien for such services can arise only when the debt is created within a state jurisdiction other than that in which the owner resides or to which the vessel belongs.

The proofs show that the contract was absolute to pay for the service of the pumps in any event. The right to compensation here is consequently not affected by success or failure, nor is the amount thereof measured by the dangers incurred. This is not, therefore, a case of salvage, pure and simple; for that is a service rendered spontaneously by a volunteer adventurer in the recovery of property from loss or damage at sea, under responsibility of restitution, and with a lien for his reward. *The Neptune*, 1 Hagg. Adm. 227, 236; *The Thetis*, 3 Hagg. Adm. 14, 48. The volunteer salvor has, in case his efforts are unsuccessful, no recourse against the owner. There must be not only the attempt, but an actual rescue. The principle is that, without benefit, salvage is not payable. If the property be saved and restored to the owner, he may be held *in personam*, because by the restoration he has received the benefit of the salvor's services. *The Sabine*, 101 U. S. 384. The services here were not those of a volunteer, but were rendered under contract; the right to compensation was not contingent upon success; the amount of compensation was absolute, a *per diem* remuneration payable in any event; the service could be ended at any time at the will of the master. Within the rule stated in *The Camanche*, 8 Wall. 448, 477, that a binding engagement to pay at all events, whether successful or unsuccessful in the enterprise, will

bar a claim for salvage, the demand cannot be considered a salvage claim pure and simple, for which compensation is to be awarded upon the considerations by which courts of the admiralty are in such cases governed. But, because the compensation was not contingent upon success, the character of the service rendered is not changed. *The Emulous*, 1 Sum. 210; *The Camanche*, *supra*. The service rendered was a salvage service, but compensation is measured by another rule,—not by the danger encountered, or by the value of the property saved, but by the term of the contract, subject to the scrutiny of the court in prevention of fraud or undue advantage. *Steamship Co. v. Anderson*, 13 Q. B. Div. 651, 662. That is the only change wrought by the right to compensation being made absolute, and not contingent upon success.

The jurisdiction of the court of admiralty is not thereby affected. It is not open to discussion that the admiralty jurisdiction comprehends all marine contracts relating to the navigation business or commerce of the sea. *Insurance Co. v. Durnham*, 11 Wall. 1. So those rendering services in the nature of salvage services, under contract, may proceed in the admiralty *in personam* against their employers for compensation, although unsuccessful in saving property, if by the contract the right to compensation is not made contingent upon success. *The Sabine*, *supra*.

It is nevertheless insisted that, however it may be as to proceedings *in personam*, no proceeding *in rem* will lie upon such a contract, upon the ground that, where a service, which would otherwise be a salvage service, is performed by contract, the salvor has no right to retain the property, and so cannot proceed against it. The contract here was maritime in its nature. The service rendered was a salvage service, and meritorious. But for the fact that the compensation was not contingent upon success, there could be no question that a maritime lien existed upon the vessel for the service rendered. But for the fact that the measure of compensation is limited by the contract, it would be gauged by the liberal standard adopted in the admiralty, having regard to the risks assumed and the value of the property saved. These circumstances do not impress me as availing to deny the lien. The contract was one within the scope of the master's authority. His action was essential to the preservation of vessel and of cargo from a peril of the sea. *Kemp v. Halliday*, 34 Law J. Q. B. 246. Such a contract binds the vessel. Every maritime contract made by the master within the scope of his authority under the maritime law hypothecates the ship, giving the creditor a lien thereon for his security. *The Undaunted*, 1 Lush. 90; *The Paragon*, 1 Ware, 322; *The Williams*, Brown, Adm. 208; *The Louisa Jane*, 2 Low. 295. It is true the salvor under a contract has no right to retain the property, but the right of retainer is one thing, and a lien another and different thing. Possession is not essential to the validity of a lien, and for salvage service there is a lien by the maritime law. *Cutler v. Rae*, 7 How. 729.

This conclusion renders it unnecessary to consider the further contention of the claimant that the contract for the service was made within the state of the owner's domicile, and therefore that no lien arises. The

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lien here exists, as I conceive, by the maritime law, irrespective of any credit to the owner, or of the position asserted that every port in the state of the owner's domicile is to be deemed the home port of the ship.

Coming, now, to the questions of the fact involved, the first one for consideration is the compensation contracted to be paid for the use of the two pumps. The contention of the libelants is that the agreed price was \$45 and \$35 a day, respectively; of the claimant, \$35 and \$25. Without stopping to discuss the evidence in detail, I am satisfied that the claimant's contention is supported by the proofs; that the libel originally filed proceeded upon a *quantum meruit*, for the service is of persuasive force in the conflict of evidence. I find, however, that the contract did not include the services of an engineer to operate the pumps. I do not find that any agreement was reached between the parties in that regard. Leathem accompanied the pumps, as was his custom, and, as he asserts, "to see that they were used right," the master undertaking to furnish an engineer. Afterwards Leathem operated the large pump, and claims for his services \$10 a day for each pump, although, as matter of fact, the smaller one was operated by the engineer of the ship. Leathem was not a licensed engineer. He had some knowledge of operating engines in mills, but was manifestly not an expert at the business. He did, however, with the consent of the master and of the owner, operate the larger pump, and should receive a fair compensation for that service. I see no reason to allow him more than the usual rate shown to be paid for such service, \$5 a day, and that compensation should be limited to the days he so actually operated that pump as engineer. So nearly as I can estimate the time from the evidence, which is quite uncertain upon the proof, I determine the number of days he was so employed at 18 and the libelants are allowed \$90 for that service.

It is asserted by the claimant that at Sheboygan while the attempts to raise the ship were in progress, and some eight days before she was placed in dry dock, it was agreed between the owner and Leathem, one of the libelants, that the bill for the service of the pumps should be rendered at the rate of \$45 and \$35 per day, respectively, and that there should be allowed the owner a deduction of 40 per cent. from such charge. The vessel was valued at \$30,000, and was not insured; the cargo at \$3,800 or \$3,900, and was insured. In other words, that there was a secret arrangement, and the cargo was to be charged in general average with the prices stated, but the owner was in fact to pay only 60 per cent. of the amount charged. It was testified by the claimant that at the time of the alleged agreement he had become discouraged at the repeated failures to keep the ship afloat, and was negotiating with others to raise her; that this fact coming to the knowledge of Leathem, one of the libelants, he suggested that there was no need to pay the demanded price of \$1,000 to raise the ship; that it should not cost over \$250 more to raise her; that it was "an insurance job," and "we have got to get these bills up as high as we can;" and that the cargo would pay 9½ per cent. of the cost. In this there is corroboration by the master, except



as to the amount of the rebate, he leaving the room before the close of the negotiations. On the 7th September the master certified to the bill at the rates specified, without any rebate mentioned therein. He asserts that at that time he spoke to Leathem concerning it, who replied "that will be an after consideration." In this he is corroborated by his letter to the owner inclosing the bill, and asking authority to certify it, in which he states the remark of Leathem as to rebate as given in his testimony. Leathem denies this arrangement *in toto*, asserting that no such conversation ever occurred; that the terms of the original contract, as he claimed it to be, viz., \$45 and \$35 per day for the pumps, were never questioned or disputed by the master; that the subject of rebate was never mentioned, and that the master certified to the bill without reserve and without suggestion of rebate; that he knew the ship was not insured and that the cargo was insured; and that he understood at Menominee from the agent of the insurers of the cargo that 9 per cent. of the expense of raising the vessel would fall upon the insurers. The claimant asserts that he assented to the arrangement without any design to defraud the underwriters of the cargo, and without intention to present other than the actual bill of expenditure, and solely because he discovered that, with the rebate offered, the *per diem* cost of the pumps to him would be \$12 less than the contract price as claimed by the master. He insists that Leathem in proposing this arrangement overreached himself, failing to perceive that thereby he would receive less than entitled to by the contract as claimed by the master.

I am persuaded by the proofs that there was an agreement for a rebate. Whether or not the rate agreed upon was 40 per cent. may admit of doubt. It would seem unnatural for Leathem to assent to a deduction which would abate his compensation for the use of the pumps, to that date, as conceded by the libelants, by some \$256, exclusive of all compensation as engineer; and this without any resulting benefit to himself, and solely to enable the claimant to recover a lesser amount from the underwriters. If that was the rate agreed upon, it indicates either a lack of discernment and inattention to self-interest not apparent from the appearance of Leathem in the witness box, or a generous impulse growing out of the "hard luck" attending the raising of the ship. The latter seems the only probable motive for such an agreement by him. It is not necessary to determine the fact. It suffices that there was an agreement for a rebate, whatever the rate. This agreement was suggested by Leathem to the claimant with a view to the latter obtaining from the underwriters of the cargo a larger salvage than he ought. I think it was accepted with like intent and purpose on the part of the claimant. His avowed reasons for acceptance impress me as uncandid. Leathem suggested, "It is an insurance job; we have got to get these bills as high as we can." The claimant demurred to the price stated, asserting they were not according to the contract. Leathem said, "What is the matter with a rebate?" The claimant answered, "I listened to that readily, and said, 'All right.'" The master's version is that the owner replied, "Oh, that is different." All this occurred before

any rate of rebate was suggested. Such an offer is susceptible of but one interpretation. It was a bald suggestion to defraud the underwriters. The claimant's ready assent compels the conviction that he was quick to entertain the offer. Honesty does not listen to suggestions of fraud with such easy complacency, or yield with such ready assent. Honesty is more robust. I am satisfied that both parties conspired to perpetrate a fraud upon the underwriters. Indeed, it was asserted by counsel, at the bar, without dissent, that such agreements are not infrequent in cases of salvage, and that marine underwriters well understood that they were thus imposed upon. If insurance companies submit to such imposition, they are culpable, in a sense condoning the offense. Such contracts will not be tolerated in courts of justice. They will not consider them nor enforce them against either party. They will only deal with them in the way of relieving innocent victims of the fraud, or of punishing the guilty participants therein.

It is suggested that the owner could not have contemplated a fraud, because the cargo could not be subjected to any part of the expense accruing subsequently to its removal from the ship. Ordinarily such subsequent expense is incurred to save the ship, and not for the benefit of the cargo. There may, however, be cases where such subsequent expense would constitute a claim to general average. It may be that here the cargo is not liable in general average for any portion of the expense of raising the ship, whether before or after its removal. It may be that it may legally be charged for a proper share of the subsequent expense. That depends upon facts not disclosed by this record, and is a question not in controversy here. See *McAndrews v. Thatcher*, 8 Wall. 347; *Kemp v. Halliday*, 6 Best & S. 723, 34 Law J. Q. B. 233, 243; *Job v. Langton*, 6 El. & Bl. 779, 26 Law J. Q. B. 97; *Moran v. Jones*, 7 El. & Bl. 523, 26 Law J. Q. B. 187; *Walkew v. Mavrojani*, L. R. 5 Exch. 116.

However that may be, it is clear that both parties supposed that the cargo was liable in general average, and acted upon that presumption. Counsel for claimant suggested that the claimant knew otherwise. There is nothing to support the suggestion. To the contrary, from the occupations of the parties, the libelant would be in better position to know the facts and the law applicable in such case than the claimant. If both knew the cargo was not liable, there is no possible motive shown for any such agreement for rebate.

It is urged by the libelants that the bill certified by the master should be held conclusive of the contract of hiring. Settlements by the master, when deliberately and fairly made, are upheld. *The Senator*, Brown, Adm. 545. This bill was, however, presented and certified pursuant to and in furtherance of the corrupt agreement considered. It is tainted with fraud, and cannot be sustained. It does not speak the agreement of the parties. It declares the fraudulent contract sought to be imposed upon the underwriters.

With respect to the claim to abatement of the amount due because of alleged want of good faith and skill on the part of the libelants, unreasonable delay in the work, and inefficiency of the pumps, but little

need be said. There was incompetency somewhere with respect to this work. It cannot otherwise be accounted for that so much time should have been consumed in raising the ship within a harbor and in smooth and shallow water. That incompetency, I think, rests with the master and owner, not upon the libelants. The latter were not engaged as wreckers, and were not in control of the work. They hired to the master their pumps, and operating service for one of them, at a *per diem* compensation. They were subject to discharge at any time at the will of the master. He, not they, controlled the operations. If the pumps were inefficient, or Leatham unreasonably prolonged the work, the master had the remedy in his own hands. He could put an end to the employment at will. Retaining the service, the claimant cannot refuse compensation, or claim abatement of the contract price. *Starks v. Crilley*, 59 Wis. 208, 18 N. W. Rep. 6. I pronounce for the libelants upon the basis stated, with interest from the date of filing the libel, and for costs.

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THE BRINTON.

THE WILKESBARRE.

ULRICH v. THE BRINTON AND THE WILKESBARRE.

(District Court, S. D. New York. May 4, 1892.)

1. COLLISION—NARROW CHANNEL—SWINGING TOW—FAILURE TO REVERSE IN TIME.

A tug and tow and a steamboat attempted to pass each other in the Kill von Kull, in a channel 1,000 to 1,100 feet wide, and exchanged a signal of one whistle. The evidence showed that the tail of the tow, which was going with the tide, had swung at the time of collision nearly three fourths of the distance across the channel; also that the steamboat did not reverse, because not thought necessary, although the swinging of the tow was apparent. *Held*, that the collision was due to the fault of both steamers.

2. SAME—DAMAGES—PERSONAL INJURY—NOT PROXIMATE RESULT.

A boatman, who is not struck or thrown into the water by the blow of a collision, but of his own volition remains aboard the disabled boat after collision, his health suffering in consequence of the exposure, cannot charge his personal injury as an item of the damages occasioned by the collision.

In Admiralty. Libel by Napoleon B. Ulrich against the steamtug Brinton and the steamer Wilkesbarre for collision. Decree for libellant against both vessels.

*Hyland & Zabriskie*, for libellant.

*Robinson, Bright, Biddle & Ward*, for the Brinton.

*Wing, Shoudy & Putnam*, for the Wilkesbarre.

BROWN, District Judge. On the 15th of December, 1891, about day-break, as the steamtug Brinton was taking a tow of light canal boats, consisting of four tiers, with four boats in each tier, on a hawser of 20 fathoms, to the westward through the Kill von Kull in a strong flood tide, the tail of the tow, when in the vicinity of the plaster works at New

Brighton, came in collision with the steamer Wilkesbarre, loaded with 2,000 tons of coal, bound eastward out of the Kills. The libelant's boat was so much damaged as to become a total loss.

The width of the channel way at the point of collision was between 1,000 and 1,100 feet. The witnesses for the Wilkesbarre testify that at the time of the collision she was close to the Staten island shore, and as near as it was possible for her to go; while the witnesses for the Brinton testify that the tug was within 50 feet of the Bayonne oil dock opposite, and that the end of the tow did not extend more than 250 or 300 feet from the New Jersey shore. If the latter contention were even approximately correct, the sole responsibility of the Wilkesbarre would be clear; for the two boats exchanged a signal of one whistle when about 3,000 feet apart, and it was the duty of each to go to the right; and there was nothing to prevent the Wilkesbarre from keeping well on her own side of the channel.

1. In the conflict of testimony on this point, not only the evidence of the libelant, a disinterested witness, but the drift of his boat after collision, satisfies me that the contention of the Wilkesbarre is substantially correct; and that she and the tail of the tow at the time of the collision were nearly three fourths of the distance towards the Staten island shore, and within 300 feet of it. For the libelant's boat, having been broken loose by the collision, drifted up with the flood tide so as to go not more than 100 or 200 feet off from the dock at Sailors Snug Harbor. A line was got out in order to make her fast there; but she drifted on beyond. The evidence shows that the set of the flood tide there was nearly true, not setting inwards more than 50 feet between the place of collision and the Snug Harbor dock; so that the tail of the tow at collision must have been about three quarters of the distance towards the Staten island side. It is not contended that this was necessary for the navigation of the tow, and it manifestly was not. For this I must hold the Brinton in fault.

2. The Wilkesbarre is in fault for not reversing as she might and ought to have done. The approach of the tow was seen in ample time. No circumstances are mentioned by the master that are sufficient to excuse this omission. The steamer was perfectly manageable; and the only reason finally stated by her master for not reversing is, that until just before the moment of collision he thought the tow would go clear without his reversing. But it was palpable from the position and movement of the tow that the tow was on a swing through the effect of the wind, the tide, and the tug's port helm. The rules of navigation required the steamer to reverse; the master relied upon the calculation of a close shave, instead of obeying the rule, and he must abide by the consequences of his miscalculation.

3. The claim for personal injuries should, I think, be disallowed, as not resulting directly and naturally from the collision itself, but from the libelant's own volition, as a new agency, in remaining upon his boat some two hours or more after the collision. *Railroad Co. v. Reeves*, 10 Wall. 176; *Railroad Co. v. Kellogg*, 94 U. S. 469. During this in-

terval he was more or less in water, moving around upon his boat in December weather; and, as he claims, he suffered considerable injury to his health in consequence. From the collision itself, the libellant received no personal injury; that is, he was not touched by the blow, nor thrown into the water. *The Queen*, 40 Fed. Rep. 694. He had the opportunity of going ashore, if he wished, in a small boat which came alongside. He remained on board his own boat, by his own choice. This was for the purpose, no doubt, of looking after his property; but it was none the less by his own volition, as a new agency, and not by any constraint of the other vessels. His health suffered from his own voluntary exposure. Of the propriety of this exposure he alone had the means of judging.

Whether this exposure was in fact more or less than that to which boatmen are accustomed, does not appear. It was his risk, and not the steamer's. While it is the duty of an owner to take reasonable care of his property to prevent its becoming a total loss, he is not under any legal obligation to endanger his life or health for that purpose. The evidence, moreover, does not show the particulars as to the extent of the exposure, or the necessity of it. What the libellant did was apparently of no service to the boat. He might as well have gone ashore at Sailors Snug Harbor, where he at first proposed to take the boat, but where he afterwards told the men to cast off the lines. Whatever he voluntarily did in this way, places him, I think, in no different relation to the steamers from that of any employe whom he might have obtained to render the same service. Each is the judge of what he may properly undertake; and if the result be unfortunate, he cannot go back to the original wrongdoer for indemnity. Such a consequence is too remote and uncertain, and is dependent upon too many intervening circumstances, to be regarded as the direct, or necessary, or natural result of the original wrong.

Decree for the libellant against both vessels, with costs, with an order of reference to compute the damages, if not agreed upon.

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THE JESSE SPAULDING.

HAMILTON & MERRYMAN Co. v. SMITH *et al.*

(District Court, E. D. Wisconsin. May 16, 1892.)

1. COLLISION—OVERTAKING VESSEL.

A leading vessel is entitled to keep her course, and the overtaking vessel must keep out of the way until she has completely passed the other.

2. SAME.

Two tugs were proceeding abreast at full speed for a tow. Swinging to port to come alongside the tow they came in collision, the colliding tug changing the course of the other, and driving her into the tow. *Held*, the tug to starboard of the other, being the overtaking vessel, so remained until she had completely passed the other, and could safely cross her course, or safely intervene between her and the tow.

**2. SAME—EXCESSIVE SPEED—CONTRIBUTING CAUSE.**

A high rate of speed will not be condemned as fault unless it contributed to cause the collision.

(*Syllabus by the Court.*)

**In Admiralty.** Libel *in personam* by the Hamilton & Merryman Company, owners of the schooner Butcher Boy, against Thomas H. Smith and others, owners of the tug George Nelson, the tug Jesse Spaulding being summoned as co-respondent under admiralty rule 59. Decree for libelant as to the Nelson; the Spaulding dismissed.

*F. M. Hoyt*, for libelant.

*M. C. Krause*, for respondents.

JENKINS, District Judge. This is a libel *in personam* by the owners of the schooner Butcher Boy against the owners of the tug George Nelson in a cause of collision. Upon the petition of the respondents the tug Jesse Spaulding was summoned as co-respondent under the fifty-ninth rule in admiralty, her owner intervening for his interest. The case was this: Early in the morning of September 29, 1889, the schooner Butcher Boy was proceeding up Lake Michigan, at about four knots an hour, on a voyage from Chicago, Ill., to Marinette, Wis., the wind being south, and the weather fair, and was some three miles to the southward of the east entrance of the Sturgeon Bay canal, intending to pass through the canal. The tugs Jesse Spaulding and George Nelson were lying moored to the dock near the east mouth of the canal, the Nelson being some 30 feet astern of the Spaulding. The tugs were of equal speed, the Nelson making steam somewhat quicker than the Spaulding. The Butcher Boy was observed by the tugs simultaneously, and both started in pursuit of the tow. The Spaulding got away first, immediately followed by the Nelson. Within a half mile the gap between the tugs was closed, and they proceeded abreast, at a speed of 12 miles an hour, within 50 feet of each other, the Nelson being on the starboard side of the Spaulding. They thus proceeded at full speed until they arrived abreast of or a little to the southward of the Butcher Boy, on her port side; the Spaulding being about 1,000 feet away, the Nelson 50 feet further away, and a half length in the lead. At this point, and almost simultaneously, the wheels of both tugs were put hard astarboard, swinging their bows to port, in order to round to alongside the Butcher Boy. The Spaulding, having a shorter turn to make, forged ahead of the Nelson about a quarter of her length, and had come around so that her bow was headed about north east to the forward quarter of the schooner, and was still swinging with her wheel hard astarboard, and but for the collision would have swung clear of the Butcher Boy. The Nelson swung in towards the Spaulding, was caught in her suction, and they collided; the Nelson striking the Spaulding on her after starboard quarter, abreast of her engine room door. Both tugs at this time were under full speed. The blow caused the Spaulding to list over on her port side, changing her course to easterly and heading her directly towards the schooner. They were at this time about 300 feet away from the schooner. Both tugs reversed their engines, but

were unable to stop their headway in time. The bow of the Spaulding was driven violently against the schooner, striking her on the port side about amidships, causing damage.

The Nelson was at fault. She was the overtaking vessel, and was bound to keep out of the way of the Spaulding. Rev. St. § 4283, Sailing Rule 22. It is a mistaken idea that, because at the moment of turning the Nelson was in the lead by half a length, she ceased to be the overtaking vessel. She retained that character until she had completely passed the Spaulding. The object of the rule is to avoid collision. Here both vessels had a common object, to attain which on the part of the Nelson it was necessary for her, being to starboard, to cross the course of the Spaulding to her port side in order to first reach the schooner. The Spaulding, as the leading vessel, was entitled to hold her course. The Nelson remained the overtaking vessel until she had so far passed the Spaulding that she could safely cross the latter's course, or safely intervene between her and the schooner. The Nelson had full knowledge of the position and course of the Spaulding. Attempting to pass, or to cross her course, or to intervene between her and the schooner, the Nelson must assume the peril, and is responsible for the consequences. *The Rhode Island*, Olcott, 505; *Kennedy v. Steamboat Co.*, 12 R. I. 23; *The Bay Queen*, 27 Fed. Rep. 813; *The City of Brockton*, 37 Fed. Rep. 897. The Spaulding was not at fault. She had the right, if she could, to maintain the lead, so long as she did not improperly interfere with the Nelson. Each had the right to move at full speed, navigating properly to avoid collision. *Sturgis v. Clough*, 21 How. 451, 453. The Spaulding in no way interfered with the course of the Nelson. Her speed was in no proper sense the cause of collision. But for the Nelson's faulty management, the Spaulding would have cleared the schooner. She had no reason to anticipate the wrongful act of the Nelson. Immediately upon the collision she reversed her engine and took all possible action to avoid striking the schooner. She did no act that in any legal view contributed to the injury. Decree for libelants as to the Nelson, and dismissing the Spaulding, with costs against the owner of the Nelson.

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### THE NELLIE CLARK.

#### FINLEY v. THE NELLIE CLARK.

(District Court, D. Massachusetts. May 30, 1892.)

#### **COLLISION—VESSELS AT REST—NEGLIGENT LOOKOUT.**

On the evidence in this case, the court found that libellant's boat, which claimant averred was closehauled on the port tack at the time of collision, while his boat, the N. C., was closehauled on the starboard tack, was in reality at rest, attached to a trawl, and in plain sight of the N. C., which admittedly had no lookout. Held, that the N. C. was liable for the collision.

In Admiralty. Libel for collision. Decree for libelant.  
*C. T. & T. H. Russell*, for the Freddie.  
*Carver & Blodgett*, for The Nellie Clark.

NELSON, District Judge. This is a libel filed by John R. Finley, owner of the lobster boat Freddie, against the schooner Nellie Clark for collision. The collision occurred in Broad sound, in Boston harbor, on the afternoon of June 21, 1891. By the collision the Freddie was completely destroyed, with her outfit. The weather was fine, and the wind light. The Nellie Clark was bound out, and was sailing closehauled on the starboard tack. Her contention is that the Freddie was under way, closehauled, on the port tack, and that she therefore had the right of way, and the Freddie was bound to keep clear of her. The claim of the libelant is that his boat was at rest, attached to a trawl anchored to the bottom. This is the only issue in the case, and I find it in favor of the libelant. That his boat was fast to the trawl is sworn to by the libelant, and by the man who was with him in the boat, and they are confirmed by a witness who was in a boat a short distance away. It is admitted that there was no lookout on the Nellie Clark, and I am convinced that the accident happened through the failure of the men in charge of her to see the boat in season to avoid her. The boat was in plain sight, and there was no excuse for not seeing her. The value of the boat and fittings was proved to be \$200, and the libelant is entitled to a decree for that amount. Decree for the libelant for \$200 and costs.

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### THE ESSEX.

(District Court, D. Massachusetts. May 26, 1892.)

#### COLLISION—SAIL VESSELS BEATING—STARBOARD AND PORT TACKS.

Two schooners, the B. and the E., were close hauled on the starboard tack. The time was night, the weather clear, and lights could be seen plainly. The E. went about on the port tack, and afterwards collided with the B. Her claim was that the B. had run across her bow before she had recovered headway after tacking. Held, on the evidence, that the E. had recovered her headway, and, being on the port tack, was bound to avoid the B. on the starboard tack, and hence was liable for the collision.

In Admiralty. Libel for collision. Decree for libelant.  
*C. T. & T. H. Russell*, for libelant.  
*Edward S. Dodge*, for claimant.

NELSON, District Judge. This is a libel filed by the master of the schooner Edward Blake of Lockport, Nova Scotia, in behalf of the owners of the vessel and cargo, against the fishing schooner Essex, of Gloucester, in this district, in a cause of collision. The collision occurred on the 12th of October, 1890, at about 8 o'clock P. M., near the entrance of Shelburn harbor, in Nova Scotia. Both vessels were beating



into the harbor against a head wind, for shelter, the weather outside being squally and threatening. As they entered the channel leading up to Shelburn, both were close hauled on the starboard tack, the Essex being the following vessel, and her position being to the leeward of the Blake. The Essex, being the faster vessel, passed the Blake, and when near the western shore of the channel came about on the port tack, and soon afterwards ran into the Blake, striking her on the port side at about a right angle, the latter having kept on her course, and not having as yet changed her tack. It is claimed on the part of the Essex that the Blake ran across her bow before she had gathered headway after tacking. This is disproved, not only by the testimony of the men on the Blake, but also by the extent of the injury inflicted on the Blake. She was cut down to below the water line, and her whole side broken in, so that she filled rapidly, and was beached to save her from sinking. The preponderance of the evidence is strongly in favor of the contention of the Blake that the collision occurred near the mid-channel, and after the Essex had recovered her headway and was going at a considerable speed. The Blake, being on the starboard tack, then had the right of way, and it was incumbent on the Essex, being close hauled on the port tack, to avoid her. The weather was clear, and the lights of the Blake could be seen plainly, and her presence was in fact known to those in charge of the Essex. No excuse for the collision is shown on the part of the Essex. Decree for the libellant.

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THE SARAH THORP.

THE AMERICA.

THAMES TOWBOAT CO. *v.* THE SARAH THORP.

• ALLEN *et al.* *v.* THE AMERICA.

(Circuit Court of Appeals, Second Circuit. February 16, 1892.)

COLLISION—STEAM VESSELS MEETING—LIGHTS—HELM.

The steamer S. T. and the tug A. met at night in Long Island Sound. The A. alleged that she saw all the lights of the steamer about a mile away, and ported; that, not losing the steamer's green light, she blew one whistle, and again ported; that, hearing thereafter two whistles from the steamer, she blew alarm whistles, and reversed. The steamer alleged that she saw only the green light of the tug; that she starboarded to pass under the stern of a sailing vessel; that thereafter she heard two whistles from the tug, and further starboarded, and her two whistles were repeated; that, though she shortly afterwards saw that the A. was coming to port, she kept on at full speed, her only chance to avoid collision, by that time, being to get across the bows of the tug. The latter hit the steamer on her starboard side about amidships. The court finding, on the evidence, that the vessels were meeting end on, or nearly so, *held*, that the failure of the steamer to appreciate the relative positions of the vessels, and her consequent starboarding, were the causes of the collision, for which, therefore, the steamer was in fault. 44 Fed. Rep. 637, affirmed.

In Admiralty. Appeals from decrees of the district court of the United States for the district of Connecticut, sustaining the libel of the owners.

of the America against the Sarah Thorp, and dismissing the libel of the owners of the Sarah Thorp against the America. 44 Fed. Rep. 637. The owners of the Sarah Thorp appealed from both decrees to this court. Affirmed.

*James Parker*, for the Sarah Thorp.

*Samuel Park*, for the America.

Before WALLACE and LACOMBE, Circuit Judges.

PER CURIAM. We agree with the conclusions of the district judge that the vessels were meeting end on, or nearly so, and that the Thorp failed to appreciate the situation by reason of her effort to avoid the sailing vessel, a maneuver which placed her in danger of collision with the America. The new testimony as to the usual courses of boats such as the America, when coming up the Sound under like conditions of wind and tide, does not seem to us to warrant the rejection of her positive testimony that she passed near Stratford point. The course sworn to by her master is not unreasonable, harmonizes with subsequent events, and would bring the vessels into view of each other, end on or nearly so; moreover, the testimony from the America is corroborated by the independent witness from the barge in tow. The decree of the district court is affirmed, with costs.

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### THE SOUTH BROOKLYN.

#### CASTLE v. THE SOUTH BROOKLYN.

(*District Court, S. D. New York. April 25, 1892.*)

#### **COLLISION—VESSELS AT PIERS—OBSTRUCTING FERRY SLIP—SAGGING.**

Where the evidence indicated that libellant's canal boat was projecting some 80 feet across the mouth of a ferry slip, contrary to the city ordinances, and the lights of the canal boat were hidden by a tug until the ferryboat was within 100 feet, and that the approach of the ferryboat was careful, and, after the lights of the canal boat were seen, the best that the ferryboat could do, in view of the locality and the tide, was to go ahead, and not stop and back outside of the slip, it was held that the ferryboat was not in fault for entering her slip, nor for the collision which ensued by the sagging of her quarter against the encroaching boats.

In Admiralty. Libel for collision.

*Hyland & Zabriskie*, for libellant.

*Burrill, Zabriskie & Burrill*, for claimants.

BROWN, District Judge. After dark on the 29th of October, 1891, a little before 7 o'clock P. M., as the ferryboat South Brooklyn was going into her slip between piers 2 and 3, East river, her stern was carried by the strong flood tide against a tier of five canal boats which had made a landing a few minutes before at the end of pier 3, whereby the stem of the libellant's boat, which was the outer boat in the head tier, was damaged by the braces of the ferryboat beneath her guards. The above libel was filed to recover the damage.

The libelant contends that the damage was not done by the first contact with the ferryboat, but by her backing after the contact and then going ahead, without giving time for the canal boats to be moved away by the two tugs which were outside of the canal boats. All the witnesses upon the ferryboat, however, testify that she did not back at all; and that the damage arose from the first contact, through the sagging of the ferryboat in the tide, and her continued motion forward until stopped, the braces crashing across the stem of the libelant's boat. Such I find to be the weight of proof. The case, therefore, turns on the question whether the canal boats were in a proper place, or were wrongfully encroaching upon the entrance of the slip; and if so, whether the ferryboat was, notwithstanding that fact, chargeable with negligence and fault in not avoiding them.

The libelant contends that the canal boats did not encroach upon the entrance to the slip, nor extend beyond the westerly line of pier 3. Several of his witnesses, however, give uncertain testimony on this point; while Deats and Harris, who were most positive in his favor, also testified that the ferryboat struck the piles at the corner of pier 3. This is so conclusively disproved as to show that those two witnesses are not to be relied on. The witnesses from the ferryboat and other disinterested witnesses testified that the canal boats did extend to the westward of the line of pier 3 a considerable distance, variously estimated at from 20 to 60 feet. The circumstances of the situation are sufficient to demonstrate the incorrectness of the libelant's theory in this particular, and to show that the canal boats did encroach considerably upon the entrance to the slip.

Measurements show that the slip is about 144 feet wide; that pier 2 projected but 10 feet beyond pier 3; that the ferryboat was 184 feet long, and her extreme width 62 feet; and that the brace next aft of the ferryboat's paddle box, which was the first point of contact with the stem of the libelant's boat, was 122 feet aft of her stem and 62 feet forward of her stern. In entering the slip the ferryboat grazed the piles at the corner of pier 2 along the bluff of her port bow, and then continued moving ahead, being five or ten feet from the side of pier 2 at the time of collision. Now, if models be placed upon a plot of the slip drawn to scale, it will be seen to be impossible that the collision could have happened between the brace aft of the paddle box and the stem of the libelant's boat, had not the libelant's boat encroached considerably upon the slip. The tug Berwind was inside of the five canal boats; so that the stem of the libelant's boat must have been at least 95 feet outside of the end of pier 3, and with the port bow of the ferryboat near the rack along pier 2, the stem could not have struck that brace 122 feet aft of the stem of the ferryboat, unless the canal boat had run at least 30 feet to the westward of the line of pier 3, and by so much encroached on the entrance to the slip. The canal boats had no right to take such a position. It is prohibited by the city ordinances (Rev. Ord. 1866, p. 293) and was an unlawful obstruction to the slip. This I am quite satisfied is the primary cause of the collision.

The circumstances are not, I think, sufficient to charge the ferryboat with fault in attempting to enter her slip instead of waiting outside until the canal boats should have been withdrawn. Until the ferryboat had approached within 100 feet of the slip, she had no reason to suppose that there was any material obstruction to her entrance. Coming around from the west side of Governor's island, the ferryboat had seen the lights of the tug moving in the slip, had sounded an alarm signal, and slowed when at a considerable distance; and then the tug was observed to back out of the way. The position and height of the bows of the tug were such as to hide the much lower lights of the canal boats in front of the pier until the ferryboat was within 100 feet of the slip; and even had those lights been visible and seen before, their position would not have been such as to show clearly in the nighttime that the canal boats were encroaching upon the entrance to the slip. The tug herself was able to go further back at any moment. When the canal boats' lights were seen, I am satisfied that a worse collision would have happened had the ferryboat reversed. Under the circumstances I think she did what was wisest and safest; namely, to go on under a jingle bell to make the straightest possible entrance into the slip.

Even had the canal boats been seen earlier projecting some 30 feet across the mouth of the slip, but leaving about 112 feet space for the ferryboat's entrance, I am not prepared to hold that the ferryboat would be bound to wait outside until the canal boats should be withdrawn. In such cases, where a reasonable space is left, and where the danger from collision is only such comparatively small injuries as may arise from the sagging of boats against each other in the entrance of slips, it might, I think, well be held that boats which unlawfully obstruct the entrance take all the risks of the sagging arising from variable currents, provided the ferryboat so entering uses reasonable skill; and that where so much space is still left, the ferry boat should not be held chargeable with either negligence or fault for attempting to enter at all. See *The Express*, 1 U. S. App. 109, 49 Fed. Rep. 764. Without passing, however, upon the latter point, I am satisfied that the libel should be dismissed upon the grounds previously stated, with costs.

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THE T. B. VAN HOUTEN.

CENTRAL RAILROAD OF NEW JERSEY v. THE T. B. VAN HOUTEN.

(District Court, S. D. New York. April 25, 1892.)

1. COLLISION—STEAM VESSELS CROSSING—STARBOARD HAND—SIGNALS—REVERSING.

A steam tug was going up the North river with a car float alongside. A ferryboat started from New York to Communipaw, the courses of the vessels thus being crosswise courses, with the ferryboat on the starboard hand of the tug. The ferryboat slowed about one third of the way across the river to allow a raft to pass. She then started up, and a half minute after gave one whistle to the tug, when the

latter was 500 or 600 feet below her in the river. The tug gave no signal, and the float shortly afterwards struck the ferryboat. *Held*, both in fault,—the tug, (1) for not going to the right, (2) for not signaling her direction to the ferryboat, (3) for not reversing in a situation that involved risk of collision; the ferryboat, for not giving the signal indicating her intention to pass ahead of the tow until it was too late to be of any use.

2. SAME—TIMELY SIGNALS—INSPECTOR'S RULES.

"The giving of timely signals, in obedience to the inspector's rules, is among the cumulative means provided by law for avoiding collisions, is necessary in harbor navigation, and the failure to observe this rule is one of the most prolific causes of disaster."

In Admiralty. Libel for collision.

*Carpenter & Mosher*, for libellant.

*Wilcox, Adams & Green*, for claimants.

BROWN, District Judge. Before light on the morning of January 28, 1891, as the ferryboat *Elizabeth* was making one of her regular trips from Liberty street, New York, to Communipaw ferry, Jersey City, she was run into in about mid river by a car float going up river in tow on the starboard side of the steam tug T. B. Van Houten, and received damages to her wheelhouse and machinery, to recover which the above libel was filed.

The tide was ebb; the weather clear, but dark, and good for seeing lights. The Van Houten had come around the Battery and was bound for the Pavonia ferry, Jersey City, and was heading about N. N. W. The ferryboat, after getting about a third of the way across from the New York shore, had been obliged to stop her engines to allow a steam tug with a raft of logs, in all about 300 to 400 feet long, to pass down ahead of her with the tide. The ferryboat did not, however, wholly lose her headway; and as soon as the raft was clear, she started her engines ahead, her course being directed nearly straight across the river, but a little upwards. The Van Houten was then probably about 100 or 150 yards further out in the river than the *Elizabeth*. Soon after starting up, probably about a half a minute after, the *Elizabeth* gave one whistle, and heard a whistle from the Van Houten, which, as several witnesses testify, was understood as a reply. The pilot of the Van Houten testifies that he heard no whistle from the *Elizabeth* and gave none to her; but that he gave an answer of one whistle about the same time to a signal of one whistle that was received from another tug, the *Beach*, which was going down river to the westward of both. The pilot of the *Elizabeth* and other witnesses testify that when the *Elizabeth* started up after the raft had cleared, the Van Houten was a quarter of a mile below him. Several witnesses for the Van Houten, including the pilot, make the Van Houten at that time only from 500 to 600 feet below; and such I think is the weight of the testimony and of the circumstantial evidence.

I have no doubt that the primary fault in this collision was the Van Houten's. She had the ferryboat on her starboard hand; she saw and recognized the *Elizabeth* at an abundant distance, and knew that the checking of her speed for the raft was but temporary, and that the *Elizabeth* had the right of way. When she started up on clearing the raft,

that was plainly visible, had a proper lookout been maintained. Yet according to the pilot's own story, he continued on across her course without giving her any signal whatsoever, and without reversing until the Beach's whistle was heard, a half minute after the ferryboat had started up, when it was too late to be of any use. He thus violated three of the express rules; namely, (1) in not going to the right in that situation; (2) in not signaling the Elizabeth to indicate the direction he intended to take; (3) in not reversing in time in a situation that involved evident risk of collision.

I think the ferryboat is also in fault for not giving a timely signal to the Van Houten. The two boats were on crossing courses, and risk of collision was plain, if both kept on. The time when the raft cleared and the ferryboat started up, was the extreme limit at which she could be excused for delaying her signal. When she gave her signal about half a minute afterwards, it was too late. The Van Houten, being incumbered, could not then go astern; and she reversed at once, but could not avoid collision. It is probable that this signal was given at the same time the signal of the Beach was given, as only one signal was heard by the Van Houten, and the Elizabeth did not hear the signal of the Beach. In my judgment the ferryboat's signal should have been given before the raft had passed; for the ferryboat had way on; the Van Houten was seen to be much nearer than half a mile, and was in fact less than one-eighth of a mile distant; and the fact that the way of the Elizabeth had been checked by the raft when she was so near the Van Houten, made it specially appropriate that her purpose to go ahead of the latter should be signaled to the Van Houten as required by the inspector's rules, since without any signal the latter might possibly suppose the ferryboat would wait till the Van Houten had passed. The Van Houten indeed had no right to count upon it; and it was, therefore, no legal excuse to her for omitting the proper signal on her own part, or for not proceeding as the rules required.

It is true also that the Elizabeth had a right to expect that the Van Houten would keep out of her way; but that was no excuse for the Elizabeth in omitting to give a timely signal in obedience to the inspector's rules indicative of her intent to increase her speed and go ahead. The rules as to signals being authorized by law (Rev. St. § 4412) have the same force as the statutory rules when not in conflict with the latter. *The B. B. Saunders*, 23 Blatchf. 378, 387, 25 Fed. Rep. 727; *The Dents*, 29 Fed. Rep. 528; *U. S. v. Miller*, 26 Fed. Rep. 97. They are among the cumulative means provided by law for avoiding collision. Their usefulness and absolute necessity in harbor navigation are attested by daily experience; and the failure to observe them in time is one of the most prolific causes of disaster to property and life. Had a timely signal been given by the ferryboat, as late even as when she started up, there is no reason to suppose the Van Houten would not have heard it and gone astern accordingly. For these reasons the damages and costs must be divided; and the libellant is entitled to recover for only one half its loss.

STATE v. SULLIVAN *et al.*

(Otroutt Court, W. D. North Carolina. April 20, 1892.)

**1. REMOVAL OF CAUSES—PROSECUTION OF REVENUE OFFICER—DEPUTY CLERK—REV. ST. § 643.**

The removal of a prosecution against a United States revenue officer from a state to a federal court is effected, and complete jurisdiction acquired, immediately upon the filing of a proper petition therefor in the clerk's office of the federal court; and the subsequent issuance of a writ of *certiorari* or *habeas corpus cum causa* is but the use of auxiliary process, and the performance of a ministerial duty. When, therefore, such petition is filed during vacation, and in the absence of the clerk, the proper writ may be issued by his deputy, and it need not show upon its face that the clerk has held the petition to be sufficient.

**2. SAME—CERTIORARI TO STATE COURT.**

The statute provides in such case that when suit is commenced in the state court by summons or other process, except *capias*, the clerk shall issue a writ of *certiorari*, but that when it is commenced by *capias*, or any other similar form of proceeding, "by which an arrest is ordered," the clerk shall issue a writ of *habeas corpus cum causa*. Held, that the statute must be liberally construed as part of the revenue system, and that a writ of *certiorari* was therefore properly issued when the officer had been released on bail, and had made no application for the writ of *habeas corpus cum causa*.

**3. SAME.**

In such case a writ of *certiorari* addressed to the marshal of the district, instead of to the state court, commanding the marshal to make known to the clerk of the state court the removal of the cause, and that such court is required to send a transcript of the record to the circuit court, is a sufficient compliance with the statute.

**4. SAME—WAIVER—DEFENSE IN STATE COURT.**

Where a state court proceeds with a prosecution against a United States marshal after he has effected a removal to a federal court, he does not lose his right of trial in the latter court by defending in the former.

**At Law.** A motion to proceed with the trial of this case, removed from the state court, the state court having declined to recognize the right of removal, and tried the case.

*Benjamin F. Long*, for plaintiff.

*R. Z. Linney* and *M. S. Mott*, for defendants.

**DICK**, District Judge. Many state and federal courts of the highest authority have heard argument and carefully considered questions of law arising under section 643 of the Revised Statutes of the United States,<sup>1</sup>

<sup>1</sup>Rev. St. § 643: "When any civil suit or criminal prosecution is commenced in any court of a state against any officer appointed under or acting by authority of any revenue law of the United States, now or hereafter enacted, or against any person acting under or by authority of any such officer, on account of any act done under color of his office or of any such law, or on account of any right, title, or authority claimed by such officer or other person under any such law, or is commenced against any person holding property or estate by title derived from any such officer, and affects the validity of any such revenue law, or is commenced against any officer of the United States, or other person, on account of any act done under the provisions of title 36, 'the elective franchise,' or on account of any right, title, or authority claimed by such officer or other person under any of the said provisions, the said suit or prosecution may, at any time before the trial or final hearing thereof, be removed for trial into the circuit court next to be holden in the district where the same is pending, upon the petition of such defendant to said circuit court, and in the following manner: Said petition shall set forth the nature of the suit or prosecution, and be verified by affidavit; and, together with a certificate signed by an attorney or counselor at law of some court of record of the state where such suit or prosecution is commenced, or of the United States, stating that, as counsel for the petitioner, he has examined the proceedings against him, and carefully

and in able, elaborate, and positive decisions declared its constitutionality, and forcibly announced the wise and just principles of public policy upon which it is founded. They have also clearly defined the extent of its operation, and the methods of procedure for the application of its provisions in the administration of justice. This statute is highly remedial, and I am of opinion that it should receive a liberal construction in all courts, as experience has shown that it is essential to the effectual enforcement of the internal revenue laws of the federal government, which is the common government of the people of all the states of the Union. This statute is not a usurpation of authority in disregard of the rights of the states. It certainly cannot be considered as unjust and unreasonable for the federal government to assert the constitutional and essential right to investigate in its own courts the alleged wrongful conduct of its own officers when acting under color of its authority, and in obedience to its mandates. Such a right is inherent and inseparable from the nature of our general government, and the exercise of such power is an imperative duty, the performance of which is indispensable to its existence, and the proper and efficient discharge of the important functions with which it is invested by its constitution and laws. These fundamental principles have been so often, ably, and fully considered and determined in judicial opinions that I deem further discussion unnecessary in this case. In the case of *State v. Hoskins*, 77 N. C. 530, the construction of this statute was involved, and READE, J., in delivering the opinion of the court, clearly and forcibly states principles of law that have been approved by many subsequent decisions of other courts:

"Where a United States officer is charged with a duty, and does acts, under color of his duty, which but for his office would be a crime against the

inquired into all the matters set forth in the petition, and that he believes them to be true, shall be presented to the said circuit court, if in session, or, if it be not, to the clerk thereof at his office, and shall be filed in said office. The cause shall thereupon be entered on the docket of the circuit court, and shall proceed as a cause originally commenced in that court; but all bail and other security given upon such suit or prosecution shall continue in like force and effect as if the same had proceeded to final judgment and execution in the state court. When the suit is commenced in the state court by summons, subpoena, petition, or another process except *captas*, the clerk of the circuit court shall issue a writ of *certiorari* to the state court, requiring it to send to the circuit court the record and proceedings in the cause. When it is commenced by *captas*, or by any other similar form of proceeding by which a personal arrest is ordered, he shall issue a writ of *habeas corpus cum causa*, a duplicate of which shall be delivered to the clerk of the state court, or left at his office, by the marshal of the district, or his deputy, or by some person duly authorized thereto; and thereupon it shall be the duty of the state court to stay all further proceedings in the cause, and the suit or prosecution, upon delivery of such process or leaving the same as aforesaid, shall be held to be removed to the circuit court, and any further proceedings, trial, or judgment therein in the state court shall be void. And, if the defendant in the suit or prosecution be in actual custody or mesne process therein, it shall be the duty of the marshal, by virtue of the writ of *habeas corpus cum causa*, to take the body of the defendant into his custody, to be dealt with in the cause according to law and the order of the circuit court, or, in vacation, of any judge thereof; and if, upon the removal of such suit or prosecution, it is made to appear to the circuit court that no copy of the record and proceedings therein in the state court can be obtained, the circuit court may allow and require the plaintiff to proceed *de novo*, and to file a declaration of his cause of action, and the parties may thereupon proceed as in actions originally brought in said circuit court. On failure of the plaintiff so to proceed, judgment of *non prosecutur* may be rendered against him, with costs for the defendant."



state, then and in that case the United States courts have jurisdiction, and under the act of congress can remove the case from the state courts into the federal courts. This power is indispensable to the United States, and is in no way derogatory to the state."

In the case of *Ableman v. Booth*, 21 How. 506, the supreme court defines with great clearness and force the constitutional relations existing between the courts of the states, the people of the states, and the federal government. The faithful observance of the duties of such relations is essential to the peace, harmony, and prosperity of the national Union.

Upon careful examination of the proceedings instituted for the removal of this case from the state court to this court for trial, I find that they are in substantial conformity to the act of congress. The petition of the defendants represented that they were officers and agents of the government, duly appointed and acting under the revenue laws of the United States, and that the acts for doing which they are criminally prosecuted in the state court were acts done under color of their office and employment, and in the performance of their official duties, in the enforcement of said revenue laws. The representations set forth in their petition, showing the nature of the prosecution and the authority and circumstances under which they acted, were duly verified by oath, and by the certificate required by law to be given by the legal counsel of the petitioners. As the circuit court was not in regular session, the petition was presented to the deputy clerk of such court at his office in Statesville, and was duly filed in said office, and the case was thereupon entered on the docket of the circuit court, to be proceeded with as a case originally commenced in said court, and a writ of *certiorari* was duly signed and issued by a regularly appointed and qualified deputy clerk, acting in the name of the clerk of the court. This writ was placed in the hands of the marshal of this district, and a duplicate copy was delivered by him to the clerk of the state court before the commencement of the trial of the case in said court. As the defendants were on bail, and not in actual custody, a writ of *habeas corpus cum causa* was not applied for in the petition, and was not issued by the deputy clerk. The recognizance in the state court was transferred by operation of law in the removal of the case, and the defendants were under obligation to appear in this court and answer the charges in the indictment found by the grand jury of the state court.

I entertain the opinion that when proceedings for the removal of a criminal prosecution from a state court to a federal court for trial are in conformity to the act of congress providing for such removal, the representations averred in the petition of defendants, constituting sufficient grounds for removal, verified by oath and by certificate of counsel, must be accepted as true, and the case is *ipso facto* removed to the circuit court, and the jurisdiction of the state court is at an end, unless the case shall be remanded thereto. *Spear*, Fed. Jud. 484. The rights of the defendants and the jurisdiction of the circuit court depend upon the authority of law, and not upon the correct performance of a ministerial duty by the clerk

of the court. The act of congress does not invest the clerk with any judicial function or discretion, but commands him to issue the prescribed auxiliary remedial process to prepare the case for trial. No duly authenticated record of the state court has been returned by the clerk, in obedience to the writ of *certiorari*, but I am informed that no objection was made in the state court as to the regularity and sufficiency of the proceedings for removal up to the time of filing the petition in the office of the clerk of this court, and the entering of the cause upon the docket. The refusal of the court to recognize the right of removal was founded upon the fact that the writ of *certiorari* was not personally issued by the clerk; and the court was of opinion that such writ, signed and issued by the deputy clerk in the name of the clerk, was irregular, erroneous, and void. The act of congress, in express terms, prescribes the nature of the representations that must appear in the petition, the method of verification, and the manner of filing the same. When these requisites are complied with, the proceeding at once has the operative force and effect of removing the case, as the statute positively declares that "the cause shall thereupon be entered on the docket of the circuit court, and shall proceed as a cause originally commenced in that court." This clause, so clear and imperative in its terms, must, under a reasonable construction, have the force and effect of conferring paramount jurisdiction on the circuit court, and full power to proceed, at once, to have the cause prepared for trial. This jurisdiction is as complete and plenary as if the cause had been originally commenced in the court. As this court had rightfully acquired jurisdiction under a paramount constitutional law of the United States, the state court was divested of its former jurisdiction, and could not legally proceed to try the cause. The writ of *certiorari* mentioned in section 643 is an auxiliary writ of the court, issued by its ministerial officer, the clerk, or the regularly appointed and qualified deputy clerk, in order that the removed cause may be tried as fairly and speedily as possible. The purpose of issuing such writ is to procure the record of the state court, so that the circuit court may proceed with the case where the jurisdiction of the state court ceased. This writ was also intended to give the state court notice of the removal of the cause, so that it might have an opportunity of complying with a duty expressly imposed by a paramount law of the federal government. The subsequent clause in the statute, declaring that "the suit or prosecution, upon the delivery of such process, or leaving the same as aforesaid, shall be held to be removed to the circuit court, and any further proceedings, trial, or judgment therein in the state court shall be void," was intended as a positive inhibition of any further proceeding in the state court, and to authorize the circuit court to proceed in the manner provided. Conceding for a moment that the objection to the ministerial process of this court has some legal foundation, it is merely technical, and does not affect the merits of the case. As the process issued from a court having rightful and competent jurisdiction of the case, it was not void, and could only be irregular or erroneous. Even if it was irregular or erroneous, it gave full

and explicit notice of the assumed jurisdiction of the court, and of the rights claimed by the defendants under the constitution and laws of the United States, as well defined and established by decisions of our state supreme court and the supreme court of the United States. *State v. Hoskins*, 77 N. C. 530; *Tennessee v. Davis*, 100 U. S. 257; *Davis v. South Carolina*, 107 U. S. 597, 2 Sup. Ct. Rep. 636. Under such circumstances it seems to me that the state court could, as a matter of comity and common justice, have given the defendants a reasonable opportunity of having a mere irregularity of proceeding corrected, and thus administer substantial justice, and avoid any occasion for conflict of jurisdiction between a state and federal court exercising jurisdiction in the same territorial limits. Judicial controversies are always unpleasant and unseemly, and should be avoided, unless such conflicts are necessary to a proper enforcement of the law,—to secure the legal rights of citizens, the right of the government, and the impartial administration of justice. The defendants, by making the best defense they could in the state court, neither lost nor impaired in the least degree their right of trial in this court, which was claimed by them in the manner provided by law. *Steamship Co. v. Tugman*, 106 U. S. 118, 1 Sup. Ct. Rep. 58.

I will now proceed to consider more particularly the nature of the writ of *certiorari*, issued by the deputy clerk of this court in the name of the clerk, to ascertain whether the action of the deputy was in accordance with official duty and power. At common law the writ of *certiorari* is used for two purposes: (1) As an appellate proceeding for the re-examination of some action of an inferior tribunal; and (2) as auxiliary process to enable a court to obtain further information upon some matter already before it for adjudication. *U. S. v. Young*, 94 U. S. 258. It was for this last purpose that the writ was issued in this case. In its relations to this court the state court is in no sense of the word an inferior court. The proceedings in this case are not appellate in their nature. They were instituted under a positive and constitutional law, which entitled the defendants, upon making a certain representation of facts, in a properly verified petition, to have a case untried and pending in a state court having jurisdiction removed for trial to a federal court which had, in accordance with law, acquired, not concurrent, but paramount, jurisdiction. A court must have competent jurisdiction of a matter before it can award a writ of *certiorari*. When a valid law confers upon a court jurisdiction to issue a writ of *certiorari*, such jurisdiction must necessarily be superior to the jurisdiction to which the writ is directed; for such writ commands the performance of a duty. Such superior jurisdiction is derived from positive law, and is in no way dependent upon the formal correctness of the writ which the court issues in order that it may exercise its vested jurisdiction with intelligence and dispatch. When this case was properly entered upon the docket of this court, jurisdiction to issue the writ of *certiorari* and try the case was conferred by the act of congress, and was superior to the jurisdiction of the state court. The writ issued did not enlarge the jurisdiction of the court, but was only auxiliary process,

to obtain the record of the case, and enable this court to exercise jurisdiction speedily and justly. Conceding for a moment that congress has the power to confer judicial functions upon a clerk of a circuit court, no such legislative intention can be inferred from the language of imperative command used in the statute,—the clerk “shall issue a writ of *certiorari* to the state court, requiring it to send to the circuit court the record and proceedings in the cause.” If a judge in court had made such an order, a deputy clerk would undoubtedly have acted as a ministerial officer in issuing the writ. The positive order of the law is certainly as mandatory as the order of its judicial officer. This writ is generally awarded as an auxiliary to the exercise of judicial authority, but there is nothing in the constitution that prevents congress from directing the clerk of a court to issue such writ in his ministerial capacity. A return to the writ can properly be made by the clerk of the inferior court under his hand and the seal of the court. If the defendants in this case had been in actual custody, and in their petition had made application for a writ of *habeas corpus cum causa*, there is no reason why the deputy clerk should not have issued the writ. This is not the high prerogative writ of *habeas corpus*, which can only be awarded by judicial authority. All kinds of writs of *habeas corpus* are subject to the control and regulation of congress, acting within the limits imposed by the constitution. Congress has conferred power upon the courts of the United States to issue “writs of *habeas corpus*,” and this grant of authority includes every species of the writ. Rev. St. U. S. § 751; *Ex parte Bollman*, 4 Cranch, 75. In section 752, congress has only conferred power upon the judges of said courts, in vacation, to award writs of *habeas corpus* for the purpose of an inquiry into the cause of restraint of liberty,—the high prerogative and judicial writ. In section 643, congress has seen proper to employ the old common-law writ of *habeas corpus cum causa* to be issued by a court in session, or clerk of the court in vacation, in the removal of certain specified cases from state courts to federal courts for trial. This writ had become almost obsolete in England and this country, and we must look to the common law to ascertain its nature and application. This old common-law writ issued out of the courts of Westminster, and afforded a very liberal and expeditious mode of procedure for the removal of causes. It was grantable of common right, at all times, without any motion in court, and it instantly superseded all proceedings in the court below. It was awarded by the law without the leave of the court. *Ex parte Bollman*, *supra*; 3 Bl. Comm. 130; Tidd, Pr. 297. Upon a fair and reasonable construction of section 643, it is evident that congress well knew the nature of the common-law writs mentioned, and intended them to be employed by the circuit courts as auxiliary and expeditious remedial process in the removal of causes, and in aid of jurisdiction already acquired by the filing of a petition in conformity with the requirements of the statute. To this end the law positively directs and commands the clerks of such courts to issue such remedial process when the courts are not in session.

Congress has no authority to confer judicial power upon clerks of courts; for under the provisions of the constitution the judicial power of the United States can only be vested in and be exercised by courts created and established by law to expound and administer the law in application to the cases and controversies which may come before them in due course of legal procedure. Const. U. S. art. 3, § 1. Congress may by law impose duties upon executive and ministerial officers of the government, which require them to consider and determine questions of law and of fact, but in so doing they do not exercise judicial power. Such duties have been imposed upon judges, to be performed out of the course of the courts; and their decisions, although judicial in nature, are held not to have been made in the exercise of judicial power under the constitution. *Ex parte Vallandigham*, 1 Wall. 253; *Ex parte Zellner*, 9 Wall. 247. We are aided in forming our opinion as to the intention of congress by considering its legislative will and action in other statutes passed for the removal of causes where citizens claim rights under the constitution and laws of the United States. Under the provisions of these statutes, as a general rule, removal proceedings are instituted in the state courts; and if a petition is there filed and verified, setting forth such representations of facts as show that the circuit court can rightfully take jurisdiction, then, upon a sufficient bond being presented, the case is removed by law to the circuit court, notwithstanding an order of the state court refusing to recognize the right of removal. *Marshall v. Holmes*, 141 U. S. 589, 12 Sup. Ct. Rep. 62. We cannot believe that congress intended that proceedings for removal under section 643 should be less speedy and peremptory where the rights of the government are involved, in the persons of its officers acting under color of its authority, in enforcing its laws in obedience to its mandates. Congress knew well that clerks of courts could not always be in their offices, and that a deputy clerk usually performed the duties of a clerk in his name. The laws of the United States make provision for the appointment of competent and efficient deputy clerks. They are appointed by the court, and may be removed by the judges. They are qualified by taking the official oath required of all clerks of courts, and may be required to execute an official bond to the United States for the faithful performance of official duties. Rev. St. U. S. §§ 624, 626, 796. They act under official obligation imposed by law. They occupy a higher position than ordinary deputies, who hold their position under the appointment and at the will of their principals in office. At common law a deputy, as an essential incident to his appointment, has full power to do most ministerial acts which his principal is empowered to do. A deputy cannot appoint a deputy, or exercise a judicial function, or perform an act which the law expressly requires to be performed by the principal in person. *Parker v. Kett*, 1 Salk. 95; *Miller v. Miller*, 89 N. C. 402. The proceedings of a court are made up of judicial and ministerial acts; and it is often difficult to distinguish the judicial from the ministerial in the courts of a state where there is no constitutional

restriction upon the legislature in conferring judicial powers upon subordinate officers, whose duties are usually ministerial. In determining these questions, state courts have adopted the general rules of the common law for their guidance. A judicial act is that which is done by an officer having power to determine a question by his judgment, involving intellect and discretion in a matter of opinion. A ministerial act is that which is lawfully done by an officer under the direction and command of a superior power. The laws of this state have invested the clerks of the superior courts with judicial and ministerial functions, and there have been many cases in the courts where perplexing questions have arisen from the actions of deputies in the performance of official duties. The supreme court of the state, in many well-considered opinions, has been very liberal in defining judicial and ministerial functions, and in sustaining the acts of deputy clerks in issuing process in cases which required the exercise of judgment and discretion, and some other elements of a judicial nature. The doctrine is clearly announced that "the law contemplates that every man shall have the benefit of the principles as well as the procedure of the law, to enable him to vindicate and establish his rights." That court fully recognizes the importance and necessity of having deputy clerks "to help the dispatch of public business, and to provide for the same when the clerk might be necessarily absent from his office, or unable for any cause to give personal attention to his official duties." *Miller v. Miller*, 89 N. C. 402, and cases cited; *Evans v. Etheridge*, 96 N. C. 42, 1 S. E. Rep. 638; *Butts v. Screws*, 95 N. C. 215.

I have been informed that the supreme court of this state has affirmed the judgment of the court below in this case, but I have not seen the opinion filed. I desire to have an opportunity of carefully reading and considering such opinion before I proceed further. I have confidence in the ability, integrity, learning, and patriotism of the justices who preside in that distinguished court; and I have learned that questions of law arising upon the face of the record were discussed and determined, which were not presented on the trial in the court below. It is ordered that this case be continued to the next term, and that the defendants enter into recognizance for their appearance.

The solicitor of the state for this district, being present, waived any further notice of this proceeding of the court.

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#### SUPPLEMENTAL OPINION.

(At Chambers. March 14, 1892.)

Since delivering and writing out the foregoing opinion, I have seen the decision of the supreme court of this state, (14 S. E. Rep. 796,) af-

firming the judgment of the court below.<sup>1</sup> I will make no comment on the general tone and spirit of the language of the court, but will only view it as an honest, strong, and decided expression of judicial opinion, manifesting a jealous and watchful care over the jurisdictional rights of state courts. The principal ground of the decision was the question of law discussed and decided in the superior court, as to the right and power of a deputy clerk, in the name of the clerk, to receive and file the

<sup>1</sup> The opinion of the state court, delivered by MERRIMON, C. J., is as follows, omitting the part in which the removal statute is set out: "The purpose of this statutory provision is to create jurisdiction in the circuit court of the United States, and to transfer to that court the jurisdiction of state courts in the classes of cases specified therein, when such cases shall be removed as contemplated by it. It is hence very important, and should be strictly observed in all material respects. Such observance is the more important, as the method of removal prescribed does not require the circuit court to supervise and scrutinize applications for removal unless it shall happen to be in session at the time the same shall be presented. The removal of causes is no doubt subject to abuses, and, as suggested, frequently prostituted with a view to evade and delay rather than obtain justice on the part of the party professing to seek it. This statute has been the subject of much judicial criticism. Its validity as a whole, and that of some of its material parts, have been much questioned. But it is now settled that it is valid and operative. It is therefore the duty of the courts, both state and federal, in good faith to give it effect in all proper cases. *Tennessee v. Davis*, 100 U. S. 267; *Davis v. South Carolina*, 107 U. S. 597, 2 Sup. Ct. Rep. 686; *State v. Hoskins*, 77 N. C. 530. The state court will lose, be deprived of, and relinquish its jurisdiction only in the case and in the way and manner prescribed. Courts do not readily give up or abandon their jurisdiction of cases before them. It is of their nature and purpose to administer justice as contemplated and intended by the laws of their creation and being. It is not to be presumed that they are incapable, unjust, or untrustworthy. On the contrary, the presumption is in their favor in all these respects. Hence, statutes not in aid of, but depriving them of, their jurisdiction, particularly where it has already attached, are to be strictly interpreted. The present case is a criminal prosecution, begun by indictment and a *capias*, whereby 'a personal arrest is ordered.' It intends that the defendants shall be arrested and held in close custody by the sheriff, unless they shall give bail as allowed by law. In such case, if it be granted that the defendants regularly and sufficiently presented their petition for removal of the action to the clerk of the circuit court of the United States at his office, that court not being in session at the time, and that the clerk duly filed it, and entered the cause on the docket of that court, the jurisdiction of the latter was not then complete, nor was that of the state court over and at an end. It then became necessary, in order to completely and efficiently transfer the jurisdiction from the state to the circuit court, for the clerk of the latter court to 'issue a writ of *habeas corpus cum causa*, a duplicate of which should have been delivered to the clerk of the state court, or left at his office, by the marshal, his deputy, or some person duly authorized to do so.' Thereupon it would become the duty of the state court 'to stay all further proceedings in the cause.' This being done, the prosecution would 'be held to be removed to the circuit court, and any further proceedings, trial, or judgment therein in the state court' would be void. The statute above recited so expressly declares and provides. The case is not removed. The state court does not lose its jurisdiction until the writ last mentioned is so delivered to its clerk. The state court cannot know of the intended removal except in the way thus prescribed. The statute on purpose prescribes such method of procedure in case of criminal prosecution; and it in like manner prescribes that 'the clerk of the circuit court shall issue a writ of *certiorari* to the state court' in case of the removal of other causes of other classes, 'requiring it to send to the circuit court the record and proceedings in the cause.' These writs, and the proper service of them, are essential to perfect the jurisdiction of the circuit court, and put an end to that of the state court. The method of removal prescribed so expressly requires, and no other method is prescribed in terms or by implication. Any other method adopted by the courts for the sake of convenience, or to cure irregular or defective procedure, would put a very delicate subject, regulated by statute, at the discretion of the courts, and lead to intolerable confusion. The only just and tolerable course is to observe the statute, at least substantially, in all respects. In the present case the clerk of the circuit court did not issue a writ of *habeas corpus cum causa*, as he should have done. The paper writing he signed by his deputy, and had served on the clerk of the state court, was not such writ in form or substance, nor does it purport to be. It was not the writ the law prescribed and required to be issued in such cases, nor did it charge the state court with notice, and put an end to its jurisdiction of the prosecution. It is more like a writ of *certiorari*, and was probably intended to be such, but it was not addressed to the state court or

petition for removal, and to issue the auxiliary writ of *certiorari* that was served by the United States marshal upon the clerk of the state superior court, and subsequently read in open court before the trial of the case. Upon this subject, I have nothing to add to what I have already said in my foregoing opinion, except to express my surprise at the legal conclusions of the distinguished court which has so often shown a liberal and enlightened policy in defining the ministerial functions of a

any of its officers. It was addressed to the marshal of the district, commanding him to make known the facts recited. Such writs must be addressed to the parties commanded and required by them to do the matters and things therein specified to be done. The state court was not bound to take notice of and treat the paper writing delivered to its clerk as the writ of *certiorari* (if that writ could have been appropriate in this case) prescribed by the statute. See appropriate forms of such writs in Dill. Rem. Causes, p. 87; Spear, Rem. Causes, pp. 109, 110. It appears that the petition of the defendants was not presented to the circuit court while it was in session, nor to the clerk thereof at his office out of term time, but it was presented to his deputy, who filed it in the clerk's office, and entered the cause on the docket of the court. The attorney general insisted on the argument that the deputy clerk could not receive and pass upon and file the petition and the certificate of counsel accompanying it. The presentation of the petition is important; it must be made to the court if it be in session, or to the clerk in vacation time. The statute so expressly requires. To what end is this required? Obviously to the end that the court or clerk may examine and allow it to be filed. It must be seen and adjudged that it is sufficient upon its face to serve the purpose contemplated by it. It must be in substance a petition alleging the essential facts, and accompanied by the certificate of counsel; and the court or clerk, as prescribed, must so determine. Granting that the deputy might act in the name of and for the clerk in all matters simply ministerial in their nature, he could not do so in matters judicial in their nature, requiring the exercise of his official judgment and discretion, unless authorized to do so by statute. In such matters the law charges the clerk to act for and by himself, and not by another. In such case the action of the deputy would be void, and of no legal effect. While the circuit court or the clerk must decide upon the sufficiency of the petition, and allow the same, if sufficient, it must appear by the writs issued to the state court that the circuit court or clerk allowed the petition; that it was filed, and the cause entered upon the docket of that court. Surely it cannot be that the circuit court has the authority to simply command the state court to surrender its jurisdiction of an action, and certify the record thereof to that court. Such procedure would be absurd, monstrous, and despotic. The process going from the circuit court to the state court must state the substance of the ground of the authority of the former, and the purpose of the command of the writ. It is the writ thus framed and duly served that perfects the removal of the action, and puts an end to the jurisdiction of the state court. The law does not invest the circuit court with arbitrary authority, nor does it intend to transfer the jurisdiction in particular cases from the state court to that court simply by the latter's command. The authority and pertinent action must appear in an orderly and authorized way. Here it did not appear that the circuit court in session, or the clerk in vacation time, had allowed the petition of the defendants to be filed. The contrary appears by the paper writing served upon the clerk of the state court. It appears that the deputy clerk of the circuit court allowed the petition, and filed it. This he had no authority to do. It cannot justly or reasonably be said that the circuit court alone must decide that he had or had not such authority. The state court must, in the very nature of the matter, decide, when a writ comes to it, the nature and purpose of the command contained in it, and that it, upon its face, comes from lawful authority. If the writ should upon its face show that it was unlawful and void, it would not—could not—serve the purpose of the law, and the state court would not—ought not to—recognize or act upon it. It is not sufficient to say that the circuit court would, in the course of procedure, afterwards correct the error, and remand the case. The state court is possessed of judicial authority, and it is its duty to part with its jurisdiction of cases only in the cases and in the way prescribed by law. Moreover, it is within its jurisdiction and authority to interpret and apply statutes of the United States in appropriate cases, and such statutes are binding upon it in pertinent cases and connections. There is no conflict, in contemplation of law, between the United States and state courts. Any seeming conflict arises from misapprehension and misapplication of the law, or from a willful purpose to pervert it. The state court must decide that it has or has not jurisdiction, and pertinent questions in that respect. Its errors may be corrected in an orderly, lawful way by an authoritative judicial tribunal. In this case it decided that the case before it was not removed to the circuit court of the United States, and proceeded to try and dispose of it in the ordinary course of procedure, and we think it did so correctly. Judgment affirmed.



clerk of a court, and in sustaining the actions of deputy clerks in facilitating the administration of substantial justice.

It is not my purpose to discuss at any length the questions of law considered by the state supreme court, which were not relied upon in the trial of the case in the court below. I desire simply to express my nonconcurrence, and offer a few reasons that influence me in my opinion. I certainly do not concur in the views of the supreme court in regard to a strict and technical construction of the removal statute referred to. Section 643, Rev. St. U. S. This statute is a part of the revenue system of the general government, and the United States supreme court has often decided that revenue statutes are remedial in their nature, and are to be construed liberally to carry out the purposes of their enactment; and what is implied in them is as much a part of the enactment as what is expressed. The intention of the lawmakers and the reason and object of the law are considerations of great weight in the construction of the statute. *Smythe v. Fiske*, 23 Wall. 374. In the opinion of the supreme court it is insisted that the writ of *certiorari* issued by the clerk of the circuit court in this case was not in proper form and properly directed. I will readily concede that such writ is not in conformity with a writ of *certiorari* at common law, but there is good reason in this case for a departure from such usual and established form. At common law the *certiorari* is a writ issued by a superior court having jurisdiction, directed to an inferior court, commanding it, through its clerk, to certify and return the record and proceedings in a particular case pending before it to the higher court. A court that has authority to command the performance of a duty has competent power to enforce obedience by compulsory process. Circuit courts of the United States are not higher courts than the state superior courts, and under the provisions of section 643 have no authority to command state courts and enforce obedience. Under this section, congress has not invested the circuit courts with any such coercive authority, but provision has been made for such courts to notify and require the state courts to certify their records and proceedings; and, if such requirements are disregarded, circuit courts can supply the record, and proceed to make disposition of cases removed without the requested assistance of the state courts. Under such circumstances, I am of opinion that the writ of *certiorari* in this case was appropriate, and is not justly subject to criticism for informality. It was issued under the seal of a court of competent jurisdiction, was delivered to the clerk of the state court by the marshal, was read in open court before the trial, respectfully gave information to the state court of the sufficient grounds upon which the circuit court assumed jurisdiction, and notified the state court of the duty imposed upon it by law. The purpose of issuing the writ of *certiorari* was not to require the state court to surrender jurisdiction and remove the cause to the circuit court, but simply to require a return of the record of the case, duly authenticated by its clerk. Under this statute the state courts have no essential agency in the removal of causes. All proceedings for removal are conducted in the circuit court, and the auxiliary

writs of *certiorari* and *habeas corpus cum causa*, served on the clerk of the state court, are not essential to removal, but are used after the circuit court has acquired jurisdiction for the purpose of notifying the state court of such assumed jurisdiction, and preparing the removed case for trial. The circuit court does not command the state court to surrender jurisdiction, for such jurisdiction is transferred to the circuit court by the operation of a paramount law. This operation of law cannot be justly regarded as arbitrary and despotic, as it was put in force by the legislative representatives of a free and enlightened people, and has been sanctioned by long experience and by the decisions of the highest judicial tribunal of the nation, and pronounced to be essential to the safety and efficient operation of the federal government. A case removed under this statute is tried in accordance with state laws, by a jury composed of the best citizens of the state, under the direction of a judge bound by official obligation to correctly administer such state laws.

It is further insisted in the opinion of the state supreme court that the writ of *certiorari* in this case is defective, in that it does not show on its face that the clerk had expressly adjudged the petition to be sufficient to serve the purpose contemplated. The statute declares in clear and express terms what representations of facts in the petition, and what verification, shall give the petition filed the force and effect of removing the case. The truth of such representations is matter of subsequent inquiry and determination. The only duty imposed upon the clerk is to examine the papers and see that the formal requirements of the law are complied with. He determines these matters by the ministerial acts of inspection and comparison, and manifests his approval in no other way than by filing the petition in his office, and entering the case on the docket. This implied approval clearly appears in the writ of *certiorari* that was issued in this case.

It is further insisted that "the process going from the circuit court to the state court must state the substance of the ground of the authority of the former, and the purpose of the command of the writ." This alleged requisite, if adopted in practice, would introduce a novel feature into a writ of *certiorari*, unknown to the common law. At common law, it was a prerogative writ,—a mandate of the crown,—issued by a court that was invested with a plenitude of power over all inferior courts of the realm, and had a right to command them to return authenticated records and proceedings in a particular case for trial or correction of errors. The courts of the United States derive authority to issue such a writ from the constitution and the legislation of congress; and the nature and purpose of the writ has been set forth in acts of congress, and in frequent decisions of federal courts. It seems to me that it would be unnecessary and improper for a circuit court of the United States, in removal proceedings, to inform a state court, in more specific terms than were used in this case, of the grounds of its authority, and the purpose of the writ, when such matters are disclosed by public and paramount law, presumed to be well known to all courts.

It is further insisted that the proceedings before the clerk of the circuit court were defective and insufficient to effect a removal of the case from the state court, in that no writ of *habeas corpus cum causa* was issued by said clerk. As the defendants were on bail, and not in actual custody, a writ of *habeas corpus* was unnecessary. The bail bond filed in the state court, by express provision of law, was effectual to secure the appearance of the defendants in the circuit court. The defendants made no application in their petition for a writ of *habeas corpus*. Before such a writ can be properly issued, it must be applied for, and the petition must allege that the party is imprisoned or detained against his will, without authority of law.

I have prolonged this discussion further than I at first intended. The judgment of the superior court against the defendants for the offense with which they were charged and convicted by a jury was not oppressive or unreasonable. I feel sure that the judge of the superior court, in his ruling, was prompted by a high sense of judicial duty. I entertain the highest respect for the state supreme court, and read with pleasure and benefit its able, learned, and instructive opinions; and I sincerely regret that an occasion has arisen which has produced a conflict of judicial opinion and authority.

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THE NELLIE MAY.

UNITED STATES v. THE NELLIE MAY.

(District Court, D. Rhode Island. May 27, 1892.)

**PENALTIES AND FORFEITURES—PASSENGER ACT—LIBEL IN REM—WHEN MAINTAINABLE.**  
Under the passenger act of August 2, 1882, (22 St. at Large, p. 186,) a libel against a ship to recover the penalties for violation of that act can only be maintained after the shipmaster's trial and conviction of the same offense, and for the purpose of enforcing payment of the fine imposed upon him.

In Admiralty. Libel to recover penalty for violation of the passenger act of 1882. Dismissed.

*Rathbone Gardner*, Dist. Atty., for the United States.

*Amasa M. Eaton* and *Walter B. Vincent*, for claimant.

**CARPENTER**, District Judge. This is an information and libel filed by the attorney of the United States for this district against the schooner *Nellie May*, wherein it is alleged that the said schooner is an American vessel, belonging to a citizen of the United States, and that Joas J. Godinho, being master of said schooner, has transported from Brava to Providence 48 emigrant passengers without there having been provided for said passengers the accommodations required by an act to regulate the carriage of passengers by sea, approved August 2, 1882, and in violation

of the first, second, third, and fifth sections of that act; and that by reason thereof the vessel has become liable to the penalties provided by said act. Claim is made by Antonio Coelho, part owner of the vessel, who moves that the libel be dismissed, because it is not therein alleged that Godinho has been convicted of the alleged infraction of the statute. I am clear that the libel must be dismissed. The whole scheme of the statute (22 St. at Large, p. 186) is to forbid the performance of certain acts by the master of a vessel, and to denounce against him various penalties for disobedience; and it further provides in section 13—

"That the amount of the several fines and penalties imposed by any section of this act upon the master \* \* \* for any violation of the provisions of this act shall be liens upon such vessel, and such vessel may be libeled therefor in any circuit or district court of the United States where such vessel shall arrive or depart."

The vessel is thus liable for the fines imposed by the act. But the act imposes no fine except upon such delinquents as have been convicted. It states, indeed, for example, in the first section, that "the master of a vessel coming to a port or place in the United States in violation of either of the provisions of this section \* \* \* shall be fined fifty dollars, \* \* \* and may also be imprisoned not exceeding six months." Doubtless, however, in this and all similar clauses of the act the words "being duly convicted" are necessarily implied. The words of the statute therefore do not impart a primary liability of the vessel. And a consideration of the whole scope of the statute, I think, makes it clear that the liability of the vessel is only ancillary, and that the purpose of the remedy by libel against the vessel is only to enforce the payment of a penalty already primarily denounced by judgment against the master. The lien on the vessel is a security for the payment of the fines. If it be not so, then the owner of the vessel might be compelled in the admiralty to pay the penalty for acts which, according to the judgment of the court on the law side, have not been committed. Results such as this do sometimes happen as the result of lawful proceedings in court, but they ought not to happen in consequence of the judicial construction by the same court of two clauses in the same statute. Libel dismissed.

## THE VENEZUELA.

INSURANCE CO. OF NORTH AMERICA *et al.* v. THE VENEZUELA.MERRITT *et al.* v. SAME.

(District Court, S. D. New York. May 14, 1892.)

**SALVAGE—STRANDING—MERITS OF DIFFERENT SALVORS—SUBORDINATE HELPERS.**

The steamship Venezuela went ashore on Brigantine shoals, off the coast of New Jersey. Her agents in New York employed the libelants Merritt *et al.* to float her, and several steamers were at once dispatched by the latter with wrecking appliances. Prior to their arrival at the ship, a wrecking steamer and lighter belonging to the libelants the Insurance Company of North America *et al.* had arrived at the shoals, and had offered their services, which were declined by the master of the Venezuela on the ground that the matter had been referred to the agents in New York. On the arrival of the Merritt boats the services of the vessels of the other libelants were accepted by the master in charge of the Merritt boats, but in no other way than as assisting him, and as subordinates to him, and in his employment. The ship was taken off by the united efforts of all the libelants. Separate libels were thereupon filed by the salvors, to recover compensation for the service. The evidence showed that the control of the service rested entirely with the Merritts; also that their appliances were two or three times greater than those of the other libelants. The value of the Venezuela and her cargo was \$900,000. Her owners did not deny the salvage service, and offered \$40,000 as total salvage, which was agreed to. *Held*, that the libel of the insurance company, though that company acted as a subordinate helper only, could not be dismissed; that the only question remaining was as to the shares of the different libelants; and that Merritt & Co. should receive \$33,500, and the other libelants \$6,500.

In Admiralty. Libel for salvage. Decree for libelants.

*George A. Black*, for Insurance Company of North America.

*Benedict & Benedict*, for I. J. Merritt and others.

*Coulert Bros.*, for the Venezuela.

BROWN, District Judge. On the 5th of February, 1892, the Venezuela, a steamship of 2,900 tons, went ashore on Brigantine shoals, off the coast of New Jersey. The value of the steamship, cargo and freight, was upwards of \$900,000. She was got off between 2 and 3 o'clock A. M. of February 7th, through the united assistance of the above-named libelants as salvors, all of whom are engaged in that business. The above libels were filed to recover salvage compensation. The answer to each libel admits the rendering of a salvage service, but denies some of the matters stated in the libels, and alleges that the ship was got off mainly by the use of her own engine. The causes were heard together. At the commencement of the trial the defendants offered to allow decrees for \$40,000 for the whole service, which has been agreed to by the libelants as a fair compensation for the whole work; and the trial proceeded with reference to the respective rights and shares of the two libelants.

The evidence shows that at about 4 o'clock in the afternoon of February 5th, a telegram was received by the agents of the Venezuela in New York, stating that the steamship was aground; that the Merritt Wrecking Company was on the same afternoon employed by them to get the

vessel off, and the whole charge of the work was put in that company's hands. On the same evening that company dispatched to Brigantine shoals the tug Buckley and the schooner Rapidan, which arrived there at about daylight on the following morning, with Capt. Chittenden as the representative of the company in charge of the work, accompanied by one of the agents of the Venezuela. On the afternoon of the 5th, the company telegraphed to Norfolk, directing their tug Rescue and barge Seymour, fully equipped for wrecking purposes, to go to Brigantine shoals. Two other vessels from New York were also engaged by the Merritt Company, and ordered thither on the 6th.

The steam lighter Tamesi and the wrecking steamer North America, belonging to the other libelants, receiving information on the afternoon of the 5th that the steamship was ashore, also repaired to Brigantine shoals. The Tamesi, proceeding from Somer's point, arrived there at about 6 p. m., and offered her assistance to the master of the Venezuela, which was declined by him on the ground that the matter had been referred to the agents of the ship in New York. The North America, from Lewes, Del., delayed by a thick snowstorm, arrived at about half past 1 a. m. of the 6th, and lay by until morning.

Capt. Chittenden with Mr. Dallas, on the arrival of the Buckley and the Rapidan, were put on board the Venezuela by Capt. Townsend of the Tamesi, with the surfboat of the latter. The Insurance Company and the Atlantic & Gulf Wrecking Company acted together. The evidence leaves no doubt that the entire charge of the undertaking to get the ship afloat was given both by the agents and by the captain of the Venezuela to the Merritt Company, and to Capt. Chittenden acting in its behalf; and that the services of the Tamesi and North America were accepted by Capt. Chittenden in no other way than as assisting him, and as subordinate to him and in his employment. Notwithstanding some difference in the testimony, I cannot find that those vessels took part as independent salvors, or through any employment or acceptance of them as such by the master of the Venezuela.

Upon this ground it is claimed on behalf of the Merritt Company that the other libel should be dismissed, as not rightfully filed. The pleadings, however, and the attitude of the parties are not such, I think, as to make that a proper disposition of the cause. The other libelants as helpers in the salvage service, though subordinate to the Merritt Company and in its employment, might have been joined as co-libelants in the libel of the Merritt Company as any other of their employes might have been joined, such as master and crew, who are often individually joined as co-libelants with the owners in such a cause. In the present case the other libelants filed a separate libel, because they claimed the *status* of independent salvors, instead of being mere employes of the Merritt Company. The owners of the Venezuela in their answer to that libel have not denied that *status*, nor their rendition of salvage aid; nor have they objected to the separate libel; and the Merritt Company have not intervened in that libel to contest it. The latter company have simply filed their own libel for salvage service, alleging that the Tamesi and

the North America were employed by them for such compensation as should be agreed on between the owners of said vessels and Capt. Israel J. Merritt, one of the libelants. Under such pleadings, although the proofs, as I find, sustain the latter allegations, yet inasmuch as the Tamesi and the North America have a *lien* for their salvage services, which the owners of the Venezuela do not deny, I have only to fix the amount which upon the proofs should be allowed to them out of the whole sum agreed on; and in fixing that amount the relation of the parties, as disclosed by the evidence, is very material.

The principal part of the allowance should, I am satisfied, be awarded to the Merritt Company, not merely because they had by far the most vessels, men, and means involved in the enterprise, but also because they were the principals to whom the whole work was assigned, and who had the entire charge and responsibility of it. The services of the other two boats were rejected by the Venezuela, as independent salvors, and were only accepted afterwards by Capt. Chittenden as helpers to him for particular uses in the work of his company. The Merritt Company is one of the largest and most successful in such operations; it had abundant means for the work. It had ordered to the shoals men, vessels, and appliances of all kinds in abundance for getting the steamship off speedily. The North America and the Tamesi had no authority to take any part in the enterprise, except in the employ of Capt. Chittenden, for such work as he might assign them, and for so long only as he might desire. Their services were not really necessary; because other sufficient means already ordered by the Merritt Company would shortly arrive.

But it was a prudent act, considering the possibility of a change of weather, and the desirability of getting the vessel off as soon as possible, for Capt. Chittenden to make use of the two other vessels present, at least until the rest of his own forces should arrive; and it was at the same time considerate and liberal towards those two vessels, although they had come thither without orders or request, to give them some recognition and employment in the work. It is manifest, however, that in thus voluntarily taking them into his service,—the North America to pull on a hawser ahead of the steamer, and the Tamesi to take off about 1,800 bags of coffee, in addition to what was taken by the Rapidan, in order to lighten the vessel a little, for a compensation to be fixed by Mr. Merritt himself,—it was not the intention of Capt. Chittenden to admit those vessels to share in the work on the basis of independent salvors or to surrender in the slightest degree the position of the Merritt Company as the principals in the undertaking, and as such entitled chiefly to its emoluments. They were to be paid upon the basis of subordinate helpers, employed for particular uses only; the North America to give a pull at the times ordered; the Tamesi to lighten a small part of the cargo to New York in tow of the Buckley. Neither skill, nor judgment, as salvors, was required or expected of them, and they incurred no responsibility. The skill, the judgment, the direction, the management, and the responsibility of the work as a whole, all lay

with the Merritt Company. To treat those vessels, therefore, as partners with the Merritt Company, or as standing on the same basis with that company as independent salvors, instead of mere subordinates, employed for particular and limited uses only, would be plainly unjust to the Merritt Company, whose business the whole work was, and would do violence to the letter and spirit of the agreement between them. On the next day the services of other tugs, offered at cheap rates, were declined.

The conduct of the work itself was in plain conformity with this view. Capt. Chittenden directed everything; the examination of the ground by soundings; the determination in which direction it was best to move; the location of the anchor and the purchases, and the arrangement of the cables; the unloading of part of the cargo; and the methods and times of hauling on the ship. In all these things the other vessels took no part. As respects the direction in which to move, they expressed a contrary opinion; but the speedy success of Capt. Chittenden's plan fully justified his judgment and skill.

The suggestion that the anchor and cable were laid broadly off the line of movement is not entitled to credit; nor that the anchor finally "came home," and gave the great cable no efficient hold. The main reliance was upon the steady and continuous tension of the immense 15-inch cable of the Merritt Company, three times the strength of the North America's hawser. Under the steady strain and pressure of such cables, the sand gradually yields a pathway for the vessel. The midday tide on the 6th was not as high as usual; it was not expected that the vessel would come off then; but everything was then adjusted; the preliminary trials were made; the strain was put on the anchor, and it was brought to a firm hold; all the stretch and slack were taken out of the cable; and when in the higher midnight tide the full power of the steamer herself, and of the vast cable and anchor, and the hawsers of the North America and the Buckley were all applied, the ship came speedily afloat.

The outfit provided by the Merritt Company for the work consisted of 6 vessels and 76 men, including the Lovett and Wyman, dispatched on the 6th. The outfit of the other libelants was 2 vessels and 29 men. The value of the vessels and materials of the former was about \$65,000; of the latter, about \$40,000; but of the latter the North America only, worth \$25,000, was used in hauling off the ship, the Tamesi being employed as a lighter only, and towed with her own cables by the Buckley. The whole time occupied both at the shoals and in going and returning was for the vessels of the Merritt Company equal to a little over 13 days, including also going back for the cables and anchor that were slipped when the Venezuela went afloat. The time of the Tamesi and North America, including going and returning, was about four days. The expenditures of the Merritt Company were about \$3,333; those of the other two vessels, so far as proved, about \$100. The hauling force applied to the Venezuela by the Merritt Company with their cable and the tug Buckley was about three times that of the North America.

Taking all these elements together, the means employed in getting off the ship stand in favor of the Merritt Company as against the North



America, about in the ratio of from two or three to one; so that if the two occupied the same *status* as independent salvors, the Merritt Company should receive about two and one half or three parts to the North America's one. But as the North America came in merely as a subordinate and temporary helper to the Merritt Company, one half the share of an independent salvor, or from one seventh to one eighth, will, I think, be a fair adjustment of the North America's compensation as between themselves.

As for the Tamesi's service, as a lighter towed by the Buckley, \$1,500 will, I think, be a very ample allowance. Deducting from the \$40,000 the sum to be allowed for the Buckley, and the expenditures of the Merritt Company, the above proportion of the residue, including the \$100 expended, will be about \$5,000, which I award to the North America. This sum appears to me a liberal award to that vessel, taken as she was for temporary and special use without any obligation on the part of the Merritt Company to share the work with her in any degree, and when the rest of their own forces were expected to be present on the following day. Her actual service in pulling was but for 20 minutes on the 6th, when her hawser broke; and less than two hours on the following midnight tide.

On the other hand, if a reduction of \$6,500 in the receipts of the Merritt Company for a brief use of these two vessels seems large, it must be considered that the very fact of their use of that additional force, and the fortunate result and speedy relief to the Venezuela and her cargo without loss, presumably entered to some extent at least into the concession of the liberal allowance of \$40,000, which was agreed upon for the whole service.

A decree, with costs, may be entered for the Merritt Company for \$33,500; and for the other libelants for \$6,500.

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THE DESPATCH.

MILLARD *et al.* v. THE DESPATCH, (two cases.)

(District Court, S. D. New York. May 18, 1892.)

1. SALVAGE—DIFFERENT SETS OF SALVORS—AWARD TO LATER ARRIVALS.

Though subsequent events sometimes show that of several salvors the services of those arriving later could have been dispensed with, such later salvors are not to be deprived of all share in the award if they rendered accepted aid.

2. SAME—FIRE ON VESSEL—TUGS—CITY FIRE DEPARTMENT.

Fire broke out on a lighter lying in a slip in New York city. The city fire department began work on the fire, and shortly afterwards came two tugs, which pumped water on the flames. Afterwards came the harbor fire boat, to which one of the tugs surrendered her place. The value of the property saved was \$17,000; one tug was worth \$15,000, the other \$12,000. *Held*, that the tug first to arrive should receive \$300 as salvage, and the other \$75.

In Admiralty. Libel for salvage. Decree for libelants.

*Wilcox, Adams & Green*, for libelants.  
*Robinson, Bright, Biddle & Ward*, for claimants.

BROWN, District Judge. At about quarter past 9 in the evening of March 29, 1892, fire was discovered on board the lighter *Despatch*, which was moored outside of the steamship *Saratoga* on the upper side of pier 16, East river. Only one person, a watchman, was on board of the *Despatch*. He gave an alarm, and sent a signal to the city fire department, in answer to which an engine came near the dock, and a hose was run along and across the *Saratoga* upon the *Despatch*. A stream was also played for a short time from the deck of the *Saratoga*, but without much effect. Shortly after the fire department's hose began to play, several tugs came from the slip above to render assistance. The first to arrive was the libelants' steamtug *Adelaide*, which went to the starboard side of the lighter forward; next, the libelants' tug *America*, which went to the lighter's port quarter. Both played upon the lighter, and now claim salvage compensation.

The defense is that the services rendered by these tugs were of no value, inasmuch as there was sufficient help from the fire department without any aid from them. This defense, however, does not meet the whole case. It often appears at the end of the work that the services of the later of several salvors could have been dispensed with, since those which arrived earlier could have done the work. But in such cases those who come later are not wholly excluded, if they take part in the work; the amount of salvage is apportioned among all according to their merit. The present case must be decided in the same way. When the *Adelaide* arrived and began playing upon the boat, the extent of the fire and its probable persistence were not known, and could not be foreseen. Her service was accepted. She first played as directed by some of the firemen. Her hose was next played into the boiler house, where there was a good deal of smoke, and the light of fire was visible; and finally, when an opening was made through the deck, her hose was played into the hold forward, where most of the fire was. Nor can I doubt the testimony of the three persons on the *America*, that their hose was played into the boiler house on the port side, where smoke and the light of fire were visible for some little time before the city fire boat *New Yorker* arrived and ordered off the *America* to make room for the *New Yorker*. Whether such an order was authorized or not, it does not diminish the merit of the *America* that she gave way to the city tug, which was doubtless more fully equipped for the best service. The evidence makes it clear that the fire was not put out for one or two hours after the two tugs arrived. The *Adelaide* played her hose most of the time; the *America*, until the *New Yorker* came.

It is of the highest necessity that tugs as a rule shall hasten to help put out fire on vessels in the harbor, with all possible speed and alacrity. Reliance cannot be placed exclusively upon either the land or the water force of the city fire department, since circumstances very often occur in which the latter cannot render timely and effective aid. The first

minutes in cases of fire are also the most important. Sound policy requires that tugs which proceed promptly to the scene of danger and render accepted service shall be awarded a reasonable compensation.

The fire in this case, though at first seemingly slight, occasioned considerable damage, namely, about one quarter of the value of the lighter. Her value after the fire was \$17,000; that of the two tugs \$15,000 and \$12,000 respectively. The fact, however, that there were abundant other means at hand to put out the fire diminishes greatly the allowance that otherwise might be properly made. A just allowance to the tugs, as their fair proportion of the whole service, will, I think, be \$200 for the Adelaide, and \$75 for the America; two thirds of these amounts to go to the owners of the tugs, and the other third to the officers and crews in proportion to their wages. Decrees may be entered accordingly, with costs.

PROVIDENCE WASHINGTON INS. CO. v. BOWRING *et al.*

(Circuit Court of Appeals, Second Circuit. February 16, 1892.)

No. 59.

1. MARINE INSURANCE—CONSTRUCTION OF POLICY—EXCESSIVE INSURANCE.

Where a vessel valued at and insured for \$100,000 is a total loss, and all the policies have been paid except one for \$5,000, an action thereon cannot be defeated merely because other insurance, to the amount of \$28,750, "on advances" incident to the operation of the vessel, has also been paid; and it is immaterial whether such advances were the proper subject of insurance or not, so long as such insurance did not cover the vessel or any of her belongings.

2. SAME—INSURANCE ON ADVANCES.

Where marine insurance is effected at Lloyds' "on advances," and those words are written in the valuation clause, which already contains a printed description of all parts of the ship, the policy must be construed to be not upon advances for repairs, but upon something independent of the ship, such as moneys advanced in her business.

46 Fed. Rep. 119, affirmed.

Appeal from the District Court of the United States for the Southern District of New York.

In admiralty. Libel by Thomas B. Bowring and others against the Providence Washington Insurance Company. Decree for libellant. 46 Fed. Rep. 119. Respondent appeals. Affirmed.

*Harrington Putnam*, for appellant.

*Convers & Kirlin*, for appellees.

Before WALLACE and LACOMBE, Circuit Judges.

WALLACE, Circuit Judge. By the policy in suit the appellant insured the steamship for the benefit of all persons interested in her in the sum of \$5,000 against the peril by which she became a total loss. By its terms the value of the steamship was agreed upon at \$100,000. The libelants, the owners of the steamship, before this suit was brought, had been paid \$95,000 by other insurers of the steamship upon policies similar to the one in suit. They had also been paid about \$28,750 for

insurance effected at Lloyds', by Hine Bros., the managing owners of the steamship, "on advances." The appellant insists that the libelants had received the full value of the steamship as fixed by the policy in suit, and therefore cannot recover.

There are two questions for consideration in the case: *First*, whether the insurance effected at Lloyds' "on advances" was an insurance upon the vessel herself, according to the proper construction of the policy; and, *secondly*, whether, although not denominated as such in the policy, it was in substance and legal effect an insurance upon the vessel. The first question is one of law, being one of the interpretation of a written instrument; the second is one of fact, because, if the term "advances" signifies moneys expended to enhance the value of the vessel, like repairs, the subject of insurance was really the vessel. No effect can be given to the written words "on advances" in the valuation clause of the policy, unless they mean that the particular property to be insured and valued is something else than that which is described in the printed parts. The policy is in the common form of Lloyds' valued policies, which are printed with blanks for the insertion of the particular terms of the contract to be superadded to the printed forms. The printed parts describe generally the property covered by marine policies, the body, tackle, apparel, and any kind of goods and merchandise of and in the ship, and contain the general conditions of the risk insured against, while the blanks are left for the insertion of a description of the particular subject of insurance and the special conditions of the risk. In a valued policy we should naturally expect to find the property immediately in the contemplation of the parties as the subject of insurance mentioned in the valuation clause; and in Lloyds' forms it is placed there, the printed part containing a description sufficiently broad to cover any part of the ship herself and any part of her cargo, leaving a blank for any other subject of insurance not properly described by the printed language. Thus, for instance, when the insurance is on the freight which the ship may earn on a particular voyage or during a specified period, the words, "on freight chartered or otherwise," together with the agreed valuation, are inserted in writing. When the words "on advances," together with the valuation, are inserted, they cannot be taken to mean any part of the ship or cargo, because all these are already described, not only in the valuation clause, but in the general clause descriptive of the insured property. Greater effect is to be attributed to the written parts than to the printed parts of such contracts, because they are the immediate terms selected by the parties, whereas the others are a general formula. The sensible construction, therefore, of a policy like that now in controversy is that it insures advances against risk from loss of the ship, and the advances thus insured are something independent of and distinct from the ship herself. It is proved that the advances which were intended to be insured in this case were moneys advanced by the managing owners of the vessel in the business of the vessel, and which were in no sense represented by the vessel herself. They consisted largely of premiums for keeping her in-

sured, and they represented other expenditures, such as for coal, other supplies, pilotage, etc., for which the co-owners were liable to account to the managing owners. The amount thus advanced 'may be deemed the capital of the owners at risk in conducting the business of the ship. As it was fluctuating in amount, the balance at any one time depending upon the difference between expenses and receipts, the sum fixed in the valuation clause was intended to cover the balance which would probably be found existing at any time during the period of the risk. In case of a loss, if the balance proved to be larger than the valuation, the owners would lose the difference; if less, they would gain. It cannot be doubted that the capital invested in carrying on the business of the ship is a proper subject of insurance. As the loss of a ship involves the loss of the money which has been advanced in carrying on her business, to the extent that her owners are deprived of reimbursing themselves from her earnings, the money invested is a marine risk. Expected profits may be insured. *Eyre v. Glover*, 16 East, 218; *Stockdale v. Dunlop*, 6 Mees. & W. 224. So moneys expended for the ship's use by the master, his commissions, and his privileges, are subjects of marine insurance. *King v. Glover*, 2 Bos. & Pul. (N. S.) 206. It may be that an insurance on such advances is, in substance, an insurance upon the earnings of the ship, and that where the freight, "chartered or otherwise," is insured on a time risk, an insurance on advances would be double insurance; and it is doubtless true that insurances on advances offer a cover for frauds upon the underwriters, as, when the ship is also insured, the interest of the assured in the safety of the property is diminished. But if such an interest were not a proper subject of insurance, and if, when made so in a valued policy, the contract is void as a gambling contract, or from any other considerations of public policy, that is a question wholly between the insurer and the assured, in which another insurer has no interest. If the libelants had been paid by other insurers of the vessel the whole value of the vessel, as fixed by the policy in suit, that would undoubtedly be a good defense to the suit, because a contract of insurance is one of indemnity against loss, and the libelants would have been already fully indemnified. But if they have received other insurance upon other property than that insured by the appellant, that circumstance cannot avail the latter. The appellant cannot claim the benefit of any payments received by the libelants under other policies, unless those policies covered the same subject-matter of insurance. If the other policies were illegal, the sums paid under them were pure gifts, and do not inure to the exoneration of another insurer. *Burnand v. Rodocanachi*, 7 App. Cas. 333. The case relied upon by the appellant — *Law v. British American Assur. Co.*, (MS.,) decided by the supreme court of Nova Scotia—is not in point, because in that case the insurance was for "advances upon the body, tackle, etc., of the ship," and the advances represented repairs upon the vessel by which her value was enhanced to the extent of the sums advanced. In such a case the insurance is in the concrete upon the vessel herself. The judgment below was right, and should be affirmed.

LACOMBE, Circuit Judge, (*concurring*.) This case is very fully set forth in the opinion of the district judge. There can be no doubt that when the policies on so-called "advances" were issued both the assured and the insurers undertook to describe some interest other and different from the ownership of hull and machinery. It seems also very evident that, besides their part ownership of the *res*, the managing agents, who earn interest and commissions on all moneys they advance from time to time, not for repairs, but to keep the vessel in service, deriving a profit to themselves from such advances, controlling the vessel and her earnings so as to secure their repayment from her profits, and finding their business in such management of the ship, have an interest in her, not identical with that which they have as part owners, entitled to share in her profits if she makes any, in her proceeds if sold, or her insurance if lost. It is not material in this case to determine whether such interest was insurable, or whether the policies on advances did insure it. If they were wager policies or the payments under them a gift, that is no defense to the claim on the policy in suit here. They were not intended to be hull policies, nor paid because they were construed to be. As they purported to cover a different interest from the one defendant has insured, their payment cannot avail to relieve him from liability.

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### THE NESSMORE.

#### PERRY *et al.* v. THE NESSMORE.

(Circuit Court, D. Maryland. May 31, 1893.)

#### 1. COLLISION—STEAM AND SAIL—NIGHT—LOOKOUT.

A steamer going out between the capes of the Chesapeake, and a schooner bound from Bangor to Richmond, collided by night just inside Cape Henry light. The court found that the lights of the schooner were set and burning, and ought to have been seen on the steamer, but were not; nor was any good reason for not seeing them advanced by the steamer. *Held*, that the steamer was in fault.

#### 2. SAME—EXHIBITION OF FALSE LIGHTS.

The steamer was looking for a steam pilot boat as she and the schooner approached on converging courses. The steamer burned a blue light, and the schooner returned a flash light, and afterwards showed a white light on her stern. These lights, and her failure to see the side light, deceived the steamer. *Held*, that the schooner had not sustained the burden of showing that the exhibition of all the lights which she showed, and which were forbidden by law, was not one of the causes of the collision, and that the schooner also was in fault for her lights, and the damages should be divided.

41 Fed. Rep. 487, modified.

Appeal from the District Court of the United States for the District of Maryland.

In Admiralty. Libel by Oliver H. Perry and others, as owners of the schooner Joseph Wilde, against the steamer Nessmore for collision. Decree below holding the Nessmore solely in fault. Decree for divided damages.

*Frank Goodwin and Eugene P. Carver, for libelants.*  
*Brown & Brune, for respondent.*

BOND, Circuit Judge. The facts in this case are fully set forth in the opinion filed by the district judge. *The Nessmore*, 41 Fed. Rep. 437. The principal facts are there stated, and all that is necessary to repeat is that on the night of the 25th of August, 1889, the steamship *Nessmore*, having left Baltimore for Liverpool in charge of a pilot, and nearing Cape Henry at the entrance of Chesapeake bay, was anxious to discharge the pilot, and put him aboard a pilot boat. Those boats generally lie off Cape Henry, inside the mouth of the bay, and when the *Nessmore* reached the proper place for so doing, a blue light was burned over her port side under her rail, to give notice to any pilot boat there in waiting that she was desirous of putting off her pilot. The *Joseph Wilde*, a large schooner, was on a voyage from Bangor, Me., to Richmond, Va. The vessels were on intersecting courses. Those on board the steamer, though the night was not very dark, the stars occasionally shining without a moon, did not see the schooner's lights, which, I think, as the district judge found, were set and burning. One of them (her starboard light) was burning after the collision, and this is the light, in the position the vessels were, that ought to have been seen from the *Nessmore*. Why those in charge of her did not see it the district judge has endeavored to form a theory, but, whether his suggestions are true in point of fact or not, they do not excuse the *Nessmore*, for it is upon those in charge of her to show affirmatively a good reason for not seeing them. I agree with the district judge that this they have not done, and are in fault. Those in charge of the *Nessmore* signaled with a blue light for a pilot boat. Upon so doing they saw in the direction from which the pilot boat was expected to come a bright flash light, which they took to be an answer to their signal. At this time the *Nessmore* had greatly reduced her speed, in order not to pass by the pilot boat, which was supposed to be under steam, approaching her. Then there appeared a white light, which those in charge of the *Nessmore* took to be a stern light of a vessel going in the same direction as the *Nessmore*. Both these lights were exhibited on board the schooner, and not on the pilot boat. Not seeing her regulation lights in the rigging, and seeing the other two lights, those on the *Nessmore* were deceived into thinking that it was the steam pilot boat ahead of them, and not a sailing vessel. The burden rests upon the schooner to show that her exhibition of the lights mentioned, which was forbidden by law, (Act March 3, 1885, c. 354, 23 St. at Large, p. 438,) was not one of the causes of the collision, which shortly afterwards—in a few minutes, indeed—took place. I am of the opinion that both vessels were in fault, and the damages should be divided. A decree will be passed accordingly.

## THE KOMUK.

## THE DON JUAN.

## LOW v. THE KOMUK AND THE DON JUAN.

(District Court, S. D. New York. May 7, 1892.)

## 1. COLLISION—STEAM VESSELS—CROSSING NEAR PIERS—BAD LOOKOUT—FAILURE TO REVERSE—RIGHT OF WAY.

The tug D. J. backed out of a slip without heeding the presence or signals of the tug K., approaching near. The K. recognized the risk of collision, but did not reverse. Held, that the K. in voluntarily going near the piers, had no priority in the right of way over the D. J., though on the D. J.'s starboard hand, and both were held for negligent navigation.

## 3 SAME—NOTICE OF CLAIM—LACHES.

On a slight collision, and no notice of claim or of survey until six months afterwards, and after a season's running of the boat and without repair, libel not filed till eight months, costs disallowed.

In Admiralty. Libel by Mortimer E. Law against the tug Komuk and the tug Don Juan for collision. Decree for libellant against both vessels.

*Hyland & Zabriskie*, for libellant.

*Carpenter & Mosher*, for the Komuk.

*Wilcox, Adams & Green*, for the Don Juan.

BROWN, District Judge. At about 5:40 P. M. on March 28, 1891, as the tug Komuk was going up the East river in the flood tide with two canal boats in tow on her port side, the libellant's boat being the outer port boat, for the purpose of putting them in a tow to be made up off pier 9, the libellant's boat was run into, off the slip between piers 7 and 8, East river, by the tug Don Juan, which was backing out of the slip with a barge alongside, by which it is alleged two planks of the libellant's boat were broken.

The libel was not filed until December 9, 1891. No notice of survey was given until six months after the accident, nor any claim for damages made. All the witnesses from the Don Juan testify that they had no knowledge of any collision at all, and have no recollection of the alleged occurrence. The witnesses from the Komuk, however, examined for the libellant, testify to the collision, and identify the Don Juan as the boat that backed into the tow. The Komuk had taken the two canal boats from the slip below, between piers 6 and 7, and proceeded up the East river about 200 or 350 feet only from the ends of the piers. Her pilot testifies that he did not see the Don Juan coming out of the slip until she was near its mouth and about 250 feet above him; that he gave her a signal of one whistle, got no answer, then stopped his engine, repeated the signal, and hailed the Don Juan's pilot, who gave him no response but kept on backing. This proves negligence in the Don Juan.



Boats navigating near the mouths of slips have no priority as respects the right of way. There is at least an equal right in outgoing boats to come out without obstruction from such navigation. If tugs with tows to be taken a short distance, as in this case, may be justified in going near the shore where the Komuk went, they still have no superior right to tugs coming out of their slips; and they are bound to go at such a moderate speed, and with such special caution, as will not endanger either their own tows or other boats. *The Edgar F. Luckenbach*, 8 U. S. App. 9; 50 Fed. Rep. 129. The evidence of the pilot of the Komuk seems to me to show clearly that he recognized the danger of collision when he saw the Don Juan backing out of her slip, and that the Don Juan neither heeded nor replied to his first signal, and did not hold up. It was the Komuk's duty under rule 21 to reverse at once. Had she done so, there would have been no collision, if she was going at moderate speed before; or if any collision had followed, it would not have been the libelant's boat that would have suffered. I must, therefore, hold both boats liable.

The damage in this case was slight. The collision must have been slight also. No report of it was made to the supervising inspectors, nor to the Don Juan's employers, as would have been the duty of the pilot of the tug, had he been aware of any injurious collision; and I am inclined to accept, therefore, their testimony that they knew nothing of any collision damage. If aware of any contact of the boats at the time, it probably passed from memory on the supposition that no harm had been done. No sufficient explanation is given by the libelant of the long delay in presenting the claim, or in giving notice of the survey. The boat was used for nearly a whole season; and from the libel it appears that no repair of the injury up to December had been made. Such unexplained delay is unreasonable, and is prejudicial to a fair opportunity for defense, or for protection against intervening dangers, or injuries of which the defendants can have no knowledge. To discourage such laches, I must withhold costs.

Decree for the libelant against both vessels, but without costs.

THE AMOS C. BARSTOW.

THE JAMES A. GARFIELD.

MCCALDIN v. THE AMOS C. BARSTOW.

ROBIN v. THE JAMES A. GARFIELD AND THE AMOS C. BARSTOW.

*In re* MCCALDIN.

(District Court, S. D. New York. May 12, 1892.)

1. COLLISION—STEAM VESSELS—ATTEMPT TO CROSS BOWS—RECKLESS NAVIGATION.

The tug G. undertook with a signal of two whistles to cross the bows of the large steamer B., off pier 3, East river, when the steamer was only 400 feet distant, and a strong current was setting the tug towards her, and the position of the steamer was such that the pilot of the tug could not judge with any accuracy of the steamer's speed. Within 80 seconds collision occurred, the G. was sunk, and two men drowned. *Held*, that the G. was in fault for reckless navigation, though the steamer, *in extremis*, had answered with two whistles.

2. SAME—EAST RIVER NAVIGATION—ROUNDING THE BATTERY—EXCESSIVE SPEED—STATE STATUTE—PROXIMATE CAUSE.

The B. rounded the Battery, and entered the East river 600 or 700 feet from the ends of the piers, at a speed of ten knots through the water, and at least 7 knots against the tide, and collided with and sank a tug off pier 3. The vessels were not seen by each other until only 400 feet apart. *Held*, that the B. was in fault for going at such high speed so near the piers, in violation of the state statute, which required her to go "as near mid-river as possible," and that the disregard of the statute was a material and proximate cause of the collision.

In Admiralty. Libels for collision, and for personal injuries caused thereby. Petition to limit liability.

*Carpenter & Mosher*, for petitioner and the James A. Garfield.

*Goodrich, Deady & Goodrich*, for Henry Robin.

*Miller, Peckman & Dixon*, for the Amos C. Barstow.

BROWN, District Judge. The above libels grew out of a collision between the tug James A. Garfield and the propeller Amos C. Barstow, which happened a little after 3 o'clock in the afternoon of October 17, 1890, off pier 3, East river. The Garfield had started from outside of four boats moored at the end of pier 4, in the strength of the ebb tide, to carry the libellant Robin and another passenger across the East river to Prentiss' Stores, Brooklyn. When headed upon her course and about 275 feet off from the end of pier 4, seeing the propeller Barstow off the South Ferry slip coming up the East river, the Garfield gave her a signal of two whistles, indicating that she wished to go ahead of the propeller. The propeller was then not more than 400 feet below the Garfield and from 300 to 400 feet further than the Garfield from the New York shore, and heading up parallel therewith. The Barstow shortly before had given a signal of two whistles to an Annex ferryboat, which was about off pier 4, coming down river from 300 to 400 feet outside of the Barstow. Getting no answer from the ferryboat, the Barstow was about to repeat her signal when the signal of the Garfield was heard. This was the first that the Barstow had noticed of the Garfield. She immediately

answered the Garfield with two whistles, because, as her master testifies, he did not wish to create confusion by contradicting when the two vessels were so near each other. At the same time, he testifies, he put his wheel hard astarboard, stopped his engine, and backed strong. But the Garfield in crossing the strong ebb tide, sagged down upon the Barstow; and as her starboard side came in collision with the Barstow's stem, she rolled over to port and capsized, under the stress of the tide and the Barstow's headway, and swinging round to the southward of the Barstow, sank almost immediately. This all happened within about 30 seconds after the signals were exchanged. The next day the Garfield was found at the bottom of the river in 85 feet of water at a point about 750 feet directly south of pier 2, having floated probably about 150 feet downward and outward while sinking. The fireman and one of the passengers were drowned; and the libellant Robin sustained personal injuries, for which his libel was filed. The owners of the Garfield claim damages against the Barstow in the sum of \$4,800; and they also filed a petition to limit their liability to the value of the Garfield, in case it should be found that the Garfield was in fault. The several cases, as respects the fault of either vessel, have been heard together.

The evidence shows that the Barstow before she reversed was going at the rate of 10 knots, and making at least seven knots against the tide; and that the Garfield was going about 7 knots across the tide. The captain of the Barstow estimates the strength of the ebb at about 4 knots; but this estimate is unwarranted. No circumstances are stated showing that the tide was more rapid than usual; and no doubt it did not exceed 3 knots, the maximum as ascertained by the government surveys.

1. Upon the above facts the Garfield was in fault. She had the Barstow on her starboard hand upon a crossing course, and was, therefore, bound by the nineteenth rule to keep out of the Barstow's way. The Garfield undertook to do so by crossing the bows of the Barstow under a signal of two whistles, when the latter was only about 400 feet distant, and a strong ebb current was setting towards her. Some witnesses for the Garfield testify that at the time the whistles were exchanged, the Barstow was pointing directly towards the Garfield; that the Barstow subsequently turned to starboard, and thus brought about the collision. But other evidence shows that this theory is incorrect. It is not only improbable in the highest degree that the Barstow should have ported her wheel contrary to the signals just given, but specially so considering the fact that an Annex ferryboat was at that time near meeting and passing the Barstow on her starboard side. The direct evidence of the Barstow is also to the contrary, and shows that there was no turn of the Barstow's bow to starboard, except such as might have been unavoidably caused by reversing her engines; and any change in her position to starboard from that cause must have been slight, and not a fault. Had the Barstow been pointing directly for the Garfield at the time the whistles were exchanged, she must have been heading considerably towards the New York shore, instead of directly up river, as all the other witnesses state; and the Garfield, moreover, must in that case have

crossed her course and been well out of the way before the Barstow could have reached her, so that on that theory no collision could have happened. I have no doubt that the Barstow, when the whistles were exchanged, was pointing directly up river, as almost all the witnesses say, and on a line from 300 to 400 feet outside of the Garfield.

The Garfield's attempt to cross the bows of the Barstow when so near, and in the way she attempted it, and in such a tide, was a dangerous and foolhardy attempt. The position of the Barstow was such that the pilot of the Garfield could not see or judge with any accuracy what the Barstow's speed was, and he seems to have mistaken her heading to some extent. He calculated by guess, because there was neither time nor room for the necessary observation. He missed, and in 30 seconds two lives were sacrificed. This is reckless navigation. The assenting whistle of the Barstow, given in *extrémis*, in no way excuses it, or relieves the Garfield from responsibility. *The Dentz*, 29 Fed. Rep. 525; *The Greenpoint*, 31 Fed. Rep. 231, affirmed on appeal.

2. The Barstow was equally in fault for navigating around the Battery at such speed, and so near the shore, in violation of the statute, which required her to go in mid-river "as near as possible." There was nothing to prevent her from observing the statute, as vessels of her class and speed ordinarily observe it. She was not incumbered; and in going around the Battery near the New York shore, where so many boats are going in and coming out, she had not in her favor those economic excuses which tugs heavily incumbered with tows may present, in seeking the advantages that nature offers for economic navigation in the slacker water near the shore. Even these must take the risk of being held in fault. *The Columbia*, 8 Fed. Rep. 716, 718. But the danger from vessels like the Barstow, going at a speed of ten knots, and making at least seven knots against the tide, is very much greater than from incumbered tugs which make but one or two knots headway. And it was this high and unknown speed near the shore that made the Garfield's calculation fatally wrong.

Nor can it be claimed that the position of the Barstow was in this case immaterial, and not a proximate cause contributing to the collision. It was the very fact of her close proximity to the shore under such speed that prevented timely notice of her presence, and sufficient space and time for any proper or correct observation from the Garfield. The excuse of the Barstow for her assenting whistles, that the vessels were too near to admit of contradictory whistles, is itself a proof of the extremity of the situation when they first became visible to each other. There is no evidence that they were not seen as soon as visible to each other. Other vessels were between them, which probably delayed somewhat seeing each other as soon as they might otherwise have been seen. But the Barstow in going near the shore contrary to the statute, took all the risk of such usual obstructions. The purpose of the statute is to prevent all these risks, and to give time and space for the observation and judgment necessary for safe navigation, by requiring vessels to keep away from the shore and "as near as possible in mid-river."

4 Edm. St. 60. Independent of the statute, safe and prudent navigation requires the same thing, as was held by Judge BETTS in the case of *The Relief*, Olcott, 104, 108, 109, which case, it is said, led to the passage of the statute. The same view was expressed by WOODRUFF, J., in *The Favorita*, 8 Blatchf. 539, 540.

In the case of *The Bay State*, 3 Blatchf. 48, Mr. Justice NELSON said that this "state statute ought to be strictly enforced." There the Worcester being "out of the track prescribed by law" in going up the East river near the New York shore, and being obliged to avoid a tug and schooner that she met, sheered to the right, and so ran into the Bay State, and was held solely to blame. The same rule was reaffirmed in *The E. C. Scranton*, 3 Blatchf. 53, and in *The Favorita*, *supra*; and these cases have been followed in numerous others, where the false position has produced embarrassment, or prevented the vessels from seeing each other in ample time for correct observation, or for appreciating and making the proper maneuvers. *The Maryland*, 19 Fed. Rep. 551, 556; *The Columbia*, 29 Fed. Rep. 716; *The Garden City*, 38 Fed. Rep. 860, 862; *The Britannia*, 34 Fed. Rep. 558; *The Yourri*, 10 App. Cas. 276; *The Rockaway*, 38 Fed. Rep. 856, affirmed 43 Fed. Rep. 544; *The Intrepid*, 48 Fed. Rep. 330; *The C. R. Stone*, 49 Fed. Rep. 475; *The Clara*, Id. 765.

The fact that the Garfield might have avoided collision by going more to port, does not lessen the fault of the Barstow. The necessity of that course was not then perceived by the Garfield; and it was not perceived partly because the position of the Barstow was such that the Garfield had not time and opportunity to observe the necessity of it, as she would have had if the Barstow had obeyed the statute. The position and high speed of the Barstow in rounding the turn of the Battery brought the vessels into very certain danger from the moment they were seen by each other. When first seen they in fact were almost in the jaws of collision. The master of the Barstow, aware of his own speed, saw and appreciated the danger; but there was neither time nor space for the maneuvers necessary to avoid accident; and this was due in part to his false position and high speed. Near the shore rounding a bend very moderate speed was required. *The Komuk*, 50 Fed. Rep. 618, (May 7, 1892;) *The Edgar F. Luckenbach*, 8 U. S. App. 9, 50 Fed. Rep. 129.

The fatal result in this case only emphasizes once more the necessity of observing not merely one rule, but all the cumulative rules designed for the avoidance of collisions. *The Clara*, 49 Fed. Rep. 767. To excuse the Barstow in this case would be in effect to nullify the statute in its essential purpose, to encourage fast and dangerous navigation near the shore, and to multiply fatal catastrophes. As the Barstow should be held liable upon this ground, it is not necessary to consider the contradictory evidence bearing upon the question whether she instantly reversed, or not.

Decrees may be entered accordingly, with an order of reference to compute the damages if not agreed upon.

## THE JOSEPH STICKNEY.

## THE HARRY WHITE.

## LOWELL v. THE JOSEPH STICKNEY.

(District Court, S. D. New York. May 14, 1892.)

## COLLISION—STEAM AND SAIL MEETING—LIGHTS—CHANGE OF COURSE.

A schooner bound east by night in Long Island sound, with the wind about abeam from the southward, came in collision, nearly head on, with a tug bound west. The accounts of the collision as told by those on the respective vessels were wholly irreconcilable. On the evidence as to the courses on which the vessels had previously been sailing, and the angle of collision, as to which both sides substantially agree, and the lights which each vessel must under the circumstances have exhibited to the other, held, that the schooner must have made a wrongful change of course to the southward, probably through some mistake in giving or receiving orders, after the tug had reached that side of the schooner's course, and that such change of course caused the collision, and that the tug was not in fault for a change *in extremis*.

In Admiralty. Libel for collision. Dismissed.

*H. D. Hotchkiss and Eugene P. Carver*, for libellant.

*McCarthy & Perier and Harrington Putnam*, for the Joseph Stickney.

BROWN, District Judge. At about 8 P. M. in the evening of March 22; 1892, the libellant's schooner Harry White, bound eastward in Long Island sound, with the wind about abeam from the southward, came in collision, when about seven miles east-southeast from the Watch Hill beacon, with the steam tug Joseph Stickney, bound west, and soon after sank with her cargo, and became a total loss. The above libel was filed to recover the damages.

The night was overcast, dark, and good for seeing lights; the wind, about south by west. The Stickney had in tow two barges and a brig. The first barge was on a hawser of 100 fathoms; the second barge, astern of the former, was on a hawser of 60 fathoms; and the brig, astern of the latter, was on a hawser of about 60 fathoms. The tug displayed the white vertical lights indicating a tow, besides the usual colored side lights; and the brig also had the usual colored side lights. The tug and schooner were each going through the water at the rate of about five knots per hour.

The evidence for the schooner is to the effect that the white lights of the tug were made about a half hour before collision, some five miles off, and bearing about two points on the port bow of the schooner; that 10 or 15 minutes afterwards the red light was seen on the same bearing, and at the same time the red light of the brig in tow; that the schooner thereupon luffed a quarter of a point so as to make her course east  $\frac{1}{2}$  south, which course she kept until the tug was snug up to her, when the tug blew two short blasts of her whistle; that up to that time the red light had been visible, but not the green light, and that then the tug changed her course so as to show her green light; that the vessels were

then too near to avoid collision; that the schooner thereupon luffed to make the speediest change; and that the tug's stem struck the schooner's port bow, angling a little across the schooner towards her starboard side.

The evidence for the tug is to the effect that the green light of the schooner was seen two or three miles off,  $1\frac{1}{2}$  points on the tug's starboard bow; that the tug was then upon a course of west  $\frac{1}{2}$  south, being  $\frac{1}{4}$  of a point more to the southward than the regular course, on account of the southerly wind; that about 10 minutes afterwards the glimmer of a red light was seen in addition to the green light, which was still plainly visible about two points off the starboard bow, estimated to be three quarters of a mile distant; that the tug then blew a signal of two whistles, indicating that they should pass starboard to starboard; that the glimmer of the red light showed about half a minute or less, and then disappeared, leaving the green light alone visible as before; that when at a distance estimated to be about 300 feet, the hull came in view and was noticed to be swinging to the southward; that a signal of two whistles was again given that the schooner might go to port, and that the engines were at the same time stopped; that the schooner did not turn to port, but more to starboard, so that very speedily the green light disappeared, and the red light came in view; whereupon the tug put her helm hard aport, which continued so until collision, the heading of the tug changing some four or five points to the northward; and that the blow of collision was at an angle of about  $1\frac{1}{2}$  points, substantially as stated by the libellant's witnesses; that if the schooner had kept her course, she would have passed easily to the northward of the tug and tow; that the tug at no time changed her course to the southward, as the bearing of the schooner continued to broaden somewhat till the vessels were near together, indicating that they would pass each other safely without any starboarding of the tug.

The two versions of the mode in which the vessels approached each other, and of the lights that were seen or visible, are wholly irreconcilable; nor does the story of either side, as it stands, account for the collision. A plot of the navigation will make this clear. Assuming that the previous courses are correctly stated, they varied when the vessels were a mile apart a point and a half from opposite. If, therefore, the schooner's green light was seen  $1\frac{1}{2}$  points on the tug's starboard bow, the tug must have then been directly ahead of the schooner and already crossing the line of her course; and the tug, diverging  $1\frac{1}{2}$  points, would have been, when the two had come within 300 feet of abreast of each other, over 900 feet to the southward of the schooner; and without some prior change of course, they could not then have come into collision had they tried.

So on the other hand, had the tug's lights been seen when a mile distant *two points* on the schooner's port bow, as the latter's witnesses assert, the schooner when abreast of the tug, both running upon the courses stated, would have been 1,400 feet to the southward of the tug; had they been seen a point and a half on the port bow, they would have been, when abreast, 900 feet distant; if *one point* on the port bow, about 250

feet distant. In either case the schooner would have been always on the tug's port bow; and on that bearing it is very improbable that the tug would have deliberately steered to the left to run down the schooner, if the schooner was going any such considerable distance to the southward; nor in that case could the collision have possibly happened at the angle at which it did happen. Manifestly neither of these accounts can be accepted.

In the contradiction that exists as to the lights visible and the bow over which the lights were seen, the only certain guide that the evidence furnishes is the fact upon which both vessels substantially agree; namely, that at the moment of collision they were nearly head and head, diverging therefrom by a small angle only; and the fact that the tug's stem in striking the port bow of the schooner pointed a little across towards the schooner's starboard side. The pilot of the tug, in placing models to illustrate the position, makes the angle about  $1\frac{1}{2}$  points; and the testimony of the schooner's witnesses is not substantially different. As the previous courses of the two diverged a point and a half only, it follows that to maintain the same angle at collision, they must have changed their courses the same amount in opposite directions. All the witnesses agree that the schooner luffed and turned to the southward. It follows that the tug's change must have been to the northward, as her witnesses testify.

The amount of the change of course by either is a matter of dispute. The captain of the schooner estimates his change at only one and a half points; but the pilot of the tug testifies that at collision he was heading northwest  $\frac{1}{4}$  north, which would make his change, and consequently the schooner's change, five points. I doubt the accuracy of the pilot's observation, and think the change probably two points less; an error easily made under the excitement of collision. But whatever be the amount of the change by either, it is manifest that the witnesses for the schooner are mistaken when they say that the tug changed to the southward. The angle of collision proves that her change was to the northward. It proves further, since the schooner had changed to the southward and the tug to the northward, that prior to these changes the tug must have crossed to the southward of the line of the schooner's course; and that fact being established, it follows, as the vessels were moving through the water at about the same speed, that the tug's green light must have been constantly visible to the schooner, and her red light not visible.

The tug's account is credible with a correction of half a point in the estimate of the bearing of the schooner on the tug's starboard bow. The bearing of a point on her starboard bow when a mile distant, instead of a point and a half, fulfills all the conditions of the situation, except that in that position the red light of the schooner ought to have been visible all the time, as well as the green light, supposing that the line of visibility of the green light crossed to port at the common angle of a half a point. The schooner's lights were set in her fore rigging; she was sailing on her starboard tack; and the red light might therefore have been



obsured by her head sails; if obscured at the distance of a mile, the red light would continue to be obscured until shortly before the collision, inasmuch as the schooner's bearing would continue to broaden off slowly upon the tug's starboard bow, as they approached each other.

Such seems to me to be upon the testimony the most probable account of this collision. If the schooner's red light was visible, it is incredible that the persons on the tug who were watching her, who were governing their navigation accordingly, and were giving signals to her, should not have seen it; and if it had been seen, along with the green light, there was no possible motive for the tug to go to the left, rather than to the right. Several witnesses from the tug testify that no red light on the schooner was seen until after her luff shortly before collision. The rest of the account of the tug's witnesses, with the modification suggested of the bearing upon the port bow, accounts naturally for the collision, and the angle at which it actually took place. The schooner's story, on the other hand, is incapable of being made to account for the collision by any reasonable correction of the estimates of her witnesses as to the bearing, or the lights, alleged to have been seen. There was nothing to obscure the colored lights of the tug; and it is impossible that the collision could have occurred in the way it did occur, had not the tug's green light, from the time when it was a mile distant, been visible about half a point on the schooner's port bow, and the tug's red light not visible at all. The schooner's account is in every way not credible, nor consistent with the most certain facts. I find it impossible, therefore, to place any confidence in her version.

Why the schooner should have turned to the southward when the tug had already crossed to that side of her, can only be accounted for by some mistake either in giving or obeying orders. The helmsman has not been called as a witness. Such mistakes are by no means unknown; and the different modes of rigging the helm, and the different practices of foreign seamen, sometimes make such mistakes natural.

Upon the foregoing view of the facts, I must find the collision to have occurred from the fault of the schooner in changing her course. Had she kept her course, the tug would have passed at least 300 feet clear of her to the southward. The line of her course would have met that of the tow 1,000 feet astern; and a change of course a half a point to port would have cleared the whole tow without difficulty.

The signal of two whistles twice given by the tug indicating that she would go to port, did not induce the schooner's change of course, nor influence her in any way. It was designed to induce the schooner to turn to the northward. But the schooner continued her change to southward; and as the tug's signal in no way changed the schooner's action, it is not material whether the tug's change to the northward was consistent with her previous signal or not; and it is, therefore, immaterial. The pilot of the tug, seeing that the schooner persisted in her luff, turned to the northward, because in his judgment he was otherwise likely to be run down. Whether that be so or not, the vessels were then so near each other that any mistake in that respect is not attributa-

ble to the tug as a fault, but, if erroneous, must be borne by the schooner, whose previous fault in changing her course to the southward brought it about.

Libel dismissed, with costs.

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TUG NO. 13.

THE BUFFALO.

HYLAND v. TUG NO. 13 AND THE BUFFALO.

(District Court, S. D. New York. April 29, 1892.)

**COLLISION—LIGHTS—OBSCURATION BY TOW.**

A tugboat, called "No. 13," was going up the North river, with a barge on her port side. The pilot house of the barge hid the red light of the tug from the tug Buffalo, which was crossing from Jersey City to New York, and had No. 13 on her starboard hand, so that the vessels were not seen till within 400 or 500 feet of each other. The vessels in tow of the tugs collided. *Held*, that No. 13 was navigating in violation of the rule that requires lights to be visible for 10 points around the horizon; that she took the risk of such condition of her lights, and was solely liable for the collision.

In Admiralty. Libel by Josiah A. Hyland against the steam tug Buffalo and Tug No. 13 for collision. Decree for libellant against Tug No. 13.

*Hyland & Zabriskie*, for libellant.

*Wilcox, Adams & Green*, for The Buffalo.

*Frank Loomis and Mr. Mosher*, for The Tug

BROWN, District Judge. At a little before 4 o'clock in the morning of December 29, 1891, as the steam tug Buffalo, with two floats, one on each side, loaded with railroad cars, was on her way from the dock above Pavonia ferry, Jersey City, to Duane street, N. Y., her starboard float came in collision with the libellant's barge Verona, which was going up the North river in tow of Tug No. 13, and on her port side, at a point about 400 feet off from, and a little above, the Duane street pier. The starboard bow of the Buffalo's starboard float struck the port bow of the Verona, and caused damages for which the above libel was filed.

The weather was clear and mild. The courses of the two tugs were crossing each other so as to involve risk of collision. The Buffalo had No. 13 on the starboard hand, and it was the duty of the former to keep out of the way, provided she had means of knowing of the approach of No. 13 and her tow. The defense of the Buffalo is that she had no means of knowing this; because, as she contends, the red light of No. 13, which ought to have been visible to apprise her of the presence and of the course of No. 13, was obscured by the pilot house of the barge on the port side of No. 13, until too late to avoid collision.

The evidence shows that the pilot house of the Verona was higher than the colored lights of No. 13, which were on the pilot house of the latter;

that the red light of No. 13 was visible from straight ahead to one point off her port bow; that between one and two points off her port bow, or more exactly for ten degrees of arc beyond one point the port light was obscured, but became visible again from about two points off the port bow. For the Buffalo it is claimed that in coming across the river she was all the time in the shadow of the Verona's pilot house, as respects the port light of No. 13. Diagrams have been submitted illustrating this contention. No. 13 came up from the Battery in line with the shore at a distance of 500 or 600 feet from the piers, until shortly before reaching the Chambers street slip, when she hauled in a little towards the New York shore to allow an Erie ferryboat, going out of the Chambers street slip, to pass ahead of her. Upon this general course the diagram shows that the port light would be obscured at least until No. 13 changed her heading towards the New York shore, provided the speed of No. 13 was five knots or over, that of the Buffalo being about three knots.

The pilot of No. 13 says he was going about  $4\frac{1}{2}$  or 5 knots an hour. The counsel for No. 13 argues that this is too high an estimate; but as her time after leaving Dock street at 3:15 A. M. could have been only from 30 to 40 minutes, it seems to me that taking into account the differences of the tide in the North and East rivers, her speed up the North river must have been rather above five knots than below it. It was high water that day at Governor's island a few minutes before 7 A. M. At the time the Buffalo crossed the North river, the current had, therefore, only just begun to run flood in mid river, (*The Ludvig Holberg*, 36 Fed. Rep. 917, note, 3, 9,) though running up a half hour earlier along shore; and this was the reason, no doubt, why No. 13 in going up kept so near the New York docks. In the East river, where the flood current sets up river more than an hour earlier, No. 13 would have encountered the flood current in its second hour, running at least  $1\frac{1}{2}$  knots; while along the North river shore she had a current of about one knot in her favor. From these facts I infer a probable speed in No. 13 of at least five knots in the North river. This speed, as stated above, would make the relative positions of the boats such that the colored lights must have been for the most part obscured to each other.

This is confirmed by the answer of No. 13, and also by the testimony of both pilots, that neither saw the colored light of the other until after the ferryboat, which crossed between the two, had cleared and had disclosed the two tugs within about 400 feet of each other. The testimony of the pilot of the Buffalo to this fact, is unqualified. The testimony of the pilot of No. 13 is a little obscure; but the only specific and unambiguous question and answer on this point are to the effect that he did not see the green light of the Buffalo until after the ferryboat had crossed.

"Question. How far from you did she [the Buffalo] appear to be when you first noticed the green light, or how far did you judge her to be? Answer. Up the river; further up?"

"Q. Yes. A. In the neighborhood of 400 or 500 feet.

"Q. Was that before the ferryboat crossed between you? A. No, sir."

The answer of No. 13 states explicitly that "as soon as the green light and staff lights were seen, a signal was given;" and all agree that no signal was given until after the ferryboat had crossed. If the pilot of No. 13, moreover, intended to be understood as saying in his subsequent testimony that he saw not only the two white lights, but also the *green* light of the Buffalo 1,000 feet or more out in the river, and before the ferryboat passed, this would convict No. 13 of gross fault in not signaling to the Buffalo and her tow when they were recognized so near, and so plainly involving risk of collision. Although signals are often unreasonably delayed, I am not willing to believe that in the case of heavy floats like these, where the need of a signal when the vessels are first seen only a thousand feet distant is so imperative, a signal would have been omitted by the pilot of No. 13, had he seen the Buffalo's green and staff lights before the ferryboat crossed. I conclude, therefore, that neither pilot saw the colored light of the other until after the ferryboat had passed, because the colored lights were not visible, through the obscuration caused by the pilot house of the barge on the port side of No. 13.

For this obscuration No. 13 was responsible, and she must take the risk of navigating in that condition of her lights, and of her tow; because it was in violation of the rule of navigation that requires lights to be *visible* for 10 points around the horizon. *The Seacaucus*, 34 Fed. Rep. 68, 70. No fault being established against the Buffalo, the libel as to her must be dismissed with costs; and a decree entered against No. 13, with costs, with an order of reference to compute the damages, if not agreed upon.

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### THE BUFFALO.

#### CLARK v. THE BUFFALO.

(District Court, S. D. New York. May 12, 1892.)

#### **COLLISION—VESSEL AT ANCHOR—FOG—MOVING STEAMER—NEGLECT TO MAKE SOUNDINGS.**

The schooner R. was at anchor in the usual anchorage ground in President roads, Boston harbor, in a dense fog, and was properly ringing her bell. *Held*, that the R. was entitled to recover the damages occasioned by her being run into by the steamer B., which was slowly moving across the anchorage ground for deeper water, at least 1,200 feet out of the ordinary course of such steamers, there being no difficulty, if, as alleged, the compass was unreliable, in ascertaining her position in the fog by soundings, which the steamer had neglected to make.

In Admiralty. Libel for collision. Decree for libelant.

*Owen, Gray & Sturges*, for libelant.

*Foster & Thomson*, for claimants.

BROWN, District Judge. At a little before 3 o'clock in the morning of August 23, 1892, the libelant's schooner Luther A. Roby, while lying at anchor in President roads in the harbor of Boston, was run into by

the steamship Buffalo, in a dense fog, and her bowsprit broken, her headgear carried away, with other damage, for which the above libel was filed.

The Buffalo was outward bound; the weather was clear at a little past 2 A. M. when she left her dock, but in about 20 minutes after she had got around and headed upon her course, she ran into a dense fog, when at Castle island, where the channel is narrow and does not furnish suitable anchorage ground. She, therefore, continued on slowly in the first of the ebb tide, sounding her fog whistle and intending soon to come to anchor. No bell was heard from the schooner, nor was the schooner seen until she was within one or two hundred feet of the Buffalo, when her masts appeared first in the lighter fog above, a very little on the Buffalo's port bow, and too near to avoid collision. The Buffalo's engines were thereupon put ahead half speed, and her helm hard aport, which probably prevented greater damage by enabling her to clear the schooner's hull.

For the claimants it is contended that as no bell was heard, none was properly rung upon the schooner. One man, the night watch, was alone on deck. The testimony, no doubt, shows that when the steamer's approach was recognized by him, he rang the bell more continuously and noisily than before, so that several men below came speedily on deck; some, a little time before collision, and others, at the moment of collision. But the fact that several of them were thus roused and came up before collision, shows that the master of the Buffalo and others are mistaken when they claim that no bell was rung until *after* collision. If, as they say, they did not *hear* any bell before collision, the reason why they did not heed or notice it must be sought in some other circumstance than that the bell was not rung. The explicit testimony of the lookout that he had been previously ringing the bell at proper intervals, is confirmed by several witnesses on board the schooner; and the fact that he did recognize the steamer's approach at some little distance, and did then ring the bell continuously and violently, is proof that he was attentive to his duties.

The pilot of the steamer, on the other hand, testified that he was about to anchor. He says:

"We intended anchoring about where the stern of this schooner was. We had taken it up. I says: 'We cannot proceed. We have got to anchor. I have got to get a couple of lengths further to the eastward before we can anchor in order to get more water.'"

The hands were already forward to attend to this. Among the different causes that might prevent the schooner's bell from being heard or noticed, partial preoccupation of the mind by other duties is certainly not to be excluded. I cannot find from the testimony that the schooner's bell was not properly rung.

The schooner was at anchor in a usual and proper place, and her bell was properly rung. The steamer is, therefore, legally bound to pay the damage she caused, unless it resulted from inevitable accident. *Steam-Ship Co. v. Calderwood*, 19 How. 241, 246; *The Granite State*, 8 Wall.

310; *The Louisiana*, Id. 164, 173. The circumstances do not justify the finding of inevitable accident. The real cause of the collision is found in the fact that the steamer was, and for some time had been, considerably to the southward of the usual and proper course, whether in leaving the harbor, or in search of anchorage ground for such a vessel. The schooner had come to anchor in  $3\frac{1}{2}$  fathoms of water, between Spectacle and Castle islands, probably about  $\frac{1}{2}$  of a mile S. E. by S. of black buoy No. 7. The steamer drew 22 $\frac{1}{2}$  feet of water forward, and she could not anchor safely where the schooner lay. In going further to the south-eastward to get a proper depth of water, as was doubtless the pilot's intention, he had no business to be running, as he was, across anchorage ground in fog at least 1,200 feet to the southward of the ordinary course of such steamers in going between buoy No. 7 and the "Lower Middle." *The Middletown*, 44 Fed. Rep. 941.

I find it difficult to understand fully the account given by the pilot of his course. That he made some attempt, however, to correct his false position, is clear. If there was difficulty, as he intimates there was, in steering by compass, as the steamer was an iron ship and light, there was no difficulty in determining the proper line of her course by soundings between Castle island and the Lower Middle; and soundings would have made clear that he should be more to the northward. This alone is sufficient to prevent the collision from being treated as an inevitable accident.

There is considerable difference in the estimates of the speed of the Buffalo at the time of collision. Mr. Limerick, who was near the steamer's port rail as the broken bowsprit went past him, estimates the time at "not more than ten or fifteen seconds" between the first blow and the second, which were 90 feet apart; and that the bowsprit drew astern along the port rail at about a walking speed. Both these estimates would indicate a speed at that time of about  $8\frac{1}{2}$  knots. It is unnecessary, however, to comment further upon the testimony on this point, as I cannot find the schooner in fault, or the accident inevitable.

Decree for the libellant, with costs.

STAYTON MIN. CO. v. WOODY *et al.*

(Circuit Court, N. D. California. May 9, 1892.)

**1. FEDERAL JURISDICTION—VALIDITY OF RAILROAD GRANT—ADVERSE HOLDING.**

In ejectment, plaintiff claimed title under a railroad land grant, alleging as ground of federal jurisdiction that defendants denied the validity of the grant. The pleadings and evidence showed that defendants not only asserted the validity of the grant, but themselves claimed title through one holding under the grant. *Held*, that the action must be dismissed for want of jurisdiction.

**2. SAME—PLEADINGS.**

An allegation by defendants that G., their predecessor in interest, at a certain time was holding the premises in controversy adversely to S., plaintiff's predecessor in title, who held under the railroad grant, there being no allegation that G. or his successors were so holding adversely to S. at the time the action was brought, was insufficient to show a holding adverse to the grant.

**At Law.** Action of ejectment by the Stayton Mining Company against M. F. Woody and others. Dismissed for want of jurisdiction.

*Joseph D. Redding*, for plaintiff.

*Carroll Cook, J. E. Foulds, and William Hoff Cook*, for defendants.

**McKENNA**, Circuit Judge. This is an action of ejectment. To justify the jurisdiction of the court the plaintiff alleges that it derives title under an act of congress passed July 27, 1866, entitled "An act granting lands to aid in the construction of a railroad and telegraph line from the states of Missouri and Arkansas to the Pacific coast," (14 U. S. St. p. 292,) and that defendants deny the validity of said act of July, 1866. The defendants, in a preliminary answer, not only directly traverse this allegation, but expressly admit the validity of said act of July, 1866, and, fortifying the answer, allege further a contract of plaintiff with one Griffen, whose successors they allege they are, by which plaintiff agreed to convey to him the title which it should receive from the Southern Pacific Railroad Company, and which it was negotiating for at the time of said contract. The plea of defendants was referred on the 14th day of September, 1891, to S. C. Houghton, Esq., described as a master in chancery, to report his conclusions thereon. The master took testimony, and reported February 8, 1892, "that defendants' plea is good." The plaintiff excepts to the report on the ground that the master's conclusions are not justified by the evidence, and defendants move for its confirmation and a dismissal of the action, and for costs. The parties have stipulated in writing waiving a trial by a jury. I have carefully considered the pleadings, argument of counsel, and the testimony, and concur with the master "that defendants' plea is good," and that this court has no jurisdiction of the action. The evidence shows that the defendants rely for defense not by denying the validity of the act of congress of July 27, 1866, but by asserting its validity; not by denying the title of the Southern Pacific Railroad Company, dependent on said act, but by claiming that title through an agreement with their predecessor in interest, one Griffen. But plaintiff's counsel says defendants claim to hold possession of part of the premises under a mining claim, and ad-

versely to the Southern Pacific Railroad Company and the said acts of congress. I do not so construe the answer. The allegation is that the defendants are in possession of that portion of the premises called the "Cincinnati Mining Claim," and that on the 22d day of July, 1885, one Griffen was holding and claiming the same adversely to the said Southern Pacific Railroad Company; but there is no allegation that Griffen or the defendants, or any of them, were holding adversely to the Southern Pacific Railroad Company when the action was brought, or to anybody except to the plaintiff, and only on account of the said contract. The allegation was manifestly meant as a limitation of defendants' possession, and as inducement or explanation of the contract. Besides, Mr. Cook testifies that the defense to the action will be on the ground, and no other than, the existence and effect of such contract with Griffen. It is ordered, therefore, that the action be dismissed, and defendants have judgment for costs.

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**LASKEY *et al.* v. NEWTOWN MIN. Co.**

(Circuit Court, S. D. California. May 16, 1892.)

**JURISDICTION OF CIRCUIT COURT—DIVERSE CITIZENSHIP—PLEADING.**

Where the jurisdiction of the circuit court is founded only on the fact of diverse citizenship, the complaint must show that either plaintiff or defendant resides within the district in which the action is brought.

At Law. Action by L. Laskey and A. R. Conklin against the Newtown Mining Company. Demurrer for want of jurisdiction. Sustained.

*Garber, Boalt & Bishop*, for plaintiffs.

*Reddy, Campbell & Melson*, for defendant.

Ross, District Judge. The complaint filed in this case, to which a demurrer is interposed, shows upon its face diverse citizenship of the parties, but it does not allege that either the plaintiffs or defendant reside within this judicial district; and the question presented and argued by counsel is whether, under the provisions of the present judiciary act, it is essential that the complaint should show that the suit is brought in the district of the residence of either the plaintiff or defendant, where, as here, jurisdiction is founded only on the fact that the action is between citizens of different states. The judiciary act of 1789, after prescribing the cases in which the United States circuit courts should have original cognizance, provided as follows:

"And no civil suit shall be brought before either of said courts against an inhabitant of the United States by any original process in any other district than that whereof he is an inhabitant, or in which he shall be found at the time of serving the writ." 1 U. S. St. at Large, p. 78 *et seq.*



Substantially the same provision was incorporated into the Revised Statutes, (section 739,) and into the judiciary act of 1875, (18 U. S. St. at Large, p. 470 *et seq.*) Under each of those acts a defendant might be sued, not only in the district of which he was an inhabitant, but also in any district in which he was found at the time of serving the writ; and it was repeatedly held that the provision in those acts in respect to the district in which every civil suit should be brought was not a jurisdictional requirement, but the grant of a privilege to the defendant, which might be waived; and, therefore, that it was not necessary to aver that the defendant was an inhabitant of the district, or was found therein. *Gracie v. Palmer*, 8 Wheat. 699, and authorities cited in note to section 739, *Desty*, Fed. Proc. The act of March 3, 1887, (24 St. p. 552,) as amended by the act of August 13, 1888, (25 St. p. 433,) leaves out the provision that if the defendant have the diverse citizenship required by the statute he may be sued in any district where he may be found at the time of the service of process.

"The omission of these words," said the supreme court in *Smith v. Lyon*, 133 U. S. 315, 10 Sup. Ct. Rep. 303, "and the increase of the amount in controversy necessary to the jurisdiction of the circuit court, and the repeal of so much of the former act as allowed plaintiffs to remove causes from the state courts to those of the United States, and many other features of the new statute, show the purpose of the legislature to restrict rather than to enlarge the jurisdiction of the circuit courts, while, at the same time, a suit is permitted to be brought in any district where either plaintiff or defendant resides."

This latter provision of the act of March 3, 1887, as amended by that of August 13, 1888, is, according to the decision of the court in the case of *Smith v. Lyon*, jurisdictional. The court there say:

"The first section of the act confers upon the circuit courts of the United States original cognizance, concurrent with the courts of the several states, of all suits of a civil nature at common law or in equity, where the matter in dispute exceeds the sum of \$2,000, and arises under the constitution or laws of the United States, or treaties made or which shall be made under their authority. It then proceeds to establish a jurisdiction in reference to the parties to the suit. These are controversies in which the United States are plaintiffs, or in which there shall be a controversy between citizens of different states, with a like limitation upon the amount in dispute, and other controversies between parties which are described in the statute. This first clause of the act describes the jurisdiction common to all the circuit courts of the United States, as regards the subject-matter of the suit, and as regards the character of the parties who, by reason of such character, may, either as plaintiffs or defendants, sustain suits in circuit courts. But the next sentence in the same section undertakes to define the jurisdiction of each one of the several circuit courts of the United States with reference to its territorial limits, and this clause declares 'that no person shall be arrested in one district for trial in another in any civil action before a circuit or district court, and no civil suit shall be brought before either of said courts against any person by any original process or proceeding in any other district than that whereof he is an inhabitant; but where jurisdiction is founded only on the fact that the action is between citizens of different states, suit shall be brought only in the district of the residence of either the plaintiff or the defendant.' In the case before us, one of the plaintiffs is a citizen of the state where the suit is brought, namely, the state of Missouri, and the defendant is a citizen of the state of

Texas. But one of the plaintiffs is a citizen of the state of Arkansas. The suit, so far as he is concerned, is not brought in the state of which he is a citizen. Neither as plaintiff nor as defendant is he a citizen of the district where the suit is brought. The argument in support of the error assigned is that it is sufficient if the suit is brought in a state where one of the defendants or one of the plaintiffs is a citizen. This would be true if there were but one plaintiff or one defendant. But the statute makes no provision, in terms, for the case of two defendants or two plaintiffs who are citizens of different states. In the present case, there being two plaintiffs, citizens of different states, there does not seem to be, in the language of the statute, any provision that both plaintiffs may unite in one suit in a state of which either of them is a citizen. It may be conceded that the question thus presented, if merely a naked one of construction of language in a statute, introduced for the first time, would be one of very considerable doubt. But there are other considerations which must influence our judgment, and which solve this doubt in favor of the proposition that such a suit cannot be sustained."

This decision is, I think, conclusive of the question here. It is well settled that the circuit courts have no jurisdiction except such as is conferred by the constitution and laws of the United States, and that to bring a case within it the jurisdiction must be affirmatively shown. It would seem to follow, necessarily, that the complaint or other pleading by which the suit is commenced must show that the case is within the jurisdiction of the court; and as, under the present statute, if I correctly interpret the decision of the supreme court in the case of *Smith v. Lyon*, *supra*, the circuit court has no jurisdiction of a suit where jurisdiction is founded only on the fact that the action is between citizens of different states unless brought in the district of the residence of either the plaintiff or defendant, a complaint in such a case must show that either the plaintiff or defendant resides within the district in which the suit is brought, in order to overcome the adverse presumption, and that jurisdiction be affirmatively shown. *Timmons v. Land Co.*, 139 U. S. 378, 11 Sup. Ct. Rep. 585. It was held in *Coal Co. v. Blatchford*, 11 Wall. 172, that where the want of jurisdiction is made manifest by the affirmative averments of a bill the defect may be taken advantage of by demurrer. No reason is perceived why the objection may not also be taken by demurrer where the want of jurisdiction is manifest because of the absence of averments necessary to show jurisdiction. Demurrer sustained, with leave to plaintiffs to amend the complaint within 20 days, if they shall be so advised.

MT. WASHINGTON RY. CO. v. COE *et al.*

(Circuit Court, D. New Hampshire. May 10, 1892.)

No. 883.

**1. REMOVAL OF CAUSES—CONDEMNATION PROCEEDINGS.**

The rule of the New Hampshire supreme court, requiring special pleas in proceedings at law to be filed within 90 days from the commencement of the term at which the action is entered, is applicable to railroad condemnation proceedings, and therefore, under the removal acts of 1887 and 1888, such proceedings can only be removed before the expiration of that period.

**2. SAME—REMOVAL BY PLAINTIFF.**

If, in condemnation proceedings, the landowner be regarded as plaintiff, (as seems to be the rule of practice in New Hampshire,) then he has no right to remove at any time, as a removal by plaintiff is not provided for in the removal acts of 1887 and 1888.

At Law. Proceeding to condemn lands. Heard on motion to remand to the state court. Sustained.

*W. & H. Heywood, Oliver E. Branch, and Harry G. Sargent*, for appellants.

*Sanborn & Hardy and Frank S. Streeker*, for appellee.

ALDRICH, District Judge. The Mt. Washington Railway Company, a corporation existing and operating a railroad under the laws of New Hampshire, sought under the right of eminent domain to condemn for railroad purposes certain lands on the summit of Mt. Washington, supposed to be owned by Coe and Pingree. To this end a location was filed in the office of the secretary of state, and proceedings had before the railroad commissioners in accordance with the provisions of the statutes of New Hampshire. Under a statute which secures such right the landowners appealed to the supreme court for the southern district of the county of Coos, assigning as a reason that they were aggrieved by the appraisal of damages by the railroad commissioners. The appeal was entered in the office of the clerk of the supreme court on the 23d day of October, 1889, and the terms of such court are by law held in April and October of each year. The landowners, (Coe, a resident of Maine, and Pingree, a resident of Massachusetts,) on the 12th day of August, 1891, filed with the clerk of the state court a petition and bond in the usual form for removal of causes, and properly certified copies thereof were entered in the clerk's office of this court on the 8th day of October, 1891, and on the following day the corporation moved to remand to the state court, assigning three causes: (1) That the landowners are plaintiffs, and not defendants; (2) that the bond was not submitted to the state court for its approval; and (3) that the petition for removal was not filed in season.

If the landowners sustained the relation of plaintiffs, and the party exercising the right of eminent domain that of defendant, as seems to be assumed in *Rorer on Railroads*, (426,) and in numerous cases cited in the notes, as well as in *Chase v. Railroad Co.*, 20 N. H. 195, and *Boom Co. v. Patterson*, 98 U. S. 403, (and such assumption seems to have obtained in practice, at least, in New Hampshire,) then this proceeding should be remanded, as plaintiffs are clearly not within the removal pro-

visions of the act of 1887. But if, on the contrary,—which seems to me to be more logical,—the party who, under the delegated right of eminent domain, takes the initiative and the affirmative in the statutory mode prescribed for the appropriation or condemnation of private property to public uses,—asserting that the public good so requires,—stands as plaintiff, and the landowners who defend their private rights and possessions against such affirmative action on the part of the corporation stand as defendants, then the proceeding, after it reaches the supreme court of the state, takes the form of a suit at law, and is a controversy subject to the ordinary incidents of a civil suit and the rules of the court governing the practice in legal proceedings. *Boom Co. v. Patterson*, *supra*.

Section 3 of the act of congress of March 3, 1887, as amended by section 3 of the act of August 13, 1888, provides, in effect, that a party entitled to remove a suit on the ground of nonresidence may do so by filing a petition and bond in the state court at the time, or any time before the defendant is required by the laws of the state or the rule of the state court in which such suit is brought to answer or plead to the declaration or complaint of the plaintiff. It is very plain—indeed, it is conceded in argument—that the petition for the removal was late, provided there is a rule of the state court in respect to pleadings which is applicable to this class of cases. It appears by a rule of the supreme court for the state of New Hampshire, duly promulgated as a rule of practice in proceedings at law, that “all special pleas shall be filed with the clerk of the court, or delivered to the plaintiff’s attorney, within 90 days from the commencement of the term when the action is entered; otherwise the cause shall be tried upon the general issue,” and the general issue is treated as in, as of course; and by a rule in equity answers are to be filed within 60 days. The petition for removal was filed in this cause nearly two years after the parties who now seek a removal entered their appeal in the state court.

It is urged, however, in argument, that neither the limitation in section 3 of the act of congress in respect to time, nor the rules of the state court, apply to this controversy; for the reason that it is not a proceeding subject to the ordinary rules of pleading and practice above referred to, and that, therefore, the right of removal is not limited, and may be exercised at any stage of the proceeding. I cannot adopt this view. It is well understood that prior to the federal acts of 1887 and 1888 there was a general feeling of unrest and insecurity by reason of the delays and uncertainties resulting from the indefinite time limit, and the broad provisions as to separation of parties and issues under then existing removal laws. The act of 1875 provided, in substance, that either nonresident party, or any one or more nonresident plaintiffs or defendants, might remove before or at the term at which the cause could be first tried. Under the provisions of this act, there were great confusion, uncertainty, and diversity of judicial opinion, and the delays resulting were obnoxious and burdensome to parties, and such as amounted to a practical denial of justice; and the situation presented was repugnant to our system of government, which aims to provide its citizens



and property holders with facilities for speedy, inexpensive, and certain adjustment of disputed rights. And in 1887 and 1888 congress, responding to this widespread dissatisfaction, sought to remedy the evil by more clearly defining the jurisdiction of the federal courts, and the rights of parties in respect to removal of causes. And, among other things, it withdrew from plaintiffs the right of removal. It provided a clear and express time limit; it adopted more definite provisions as to separation of parties and issues; and, as is urged by some, limited the right of removal to cases over which the federal courts have original cognizance, and jurisdiction concurrent with the courts of the several states. It is apparent that the purpose of this legislation was to include within the time limit all classes of cases removable on the ground of diverse citizenship, except such as are within the local prejudice clause; and a construction of the statute and the rule of the state court, which should exempt a large class of cases from its operation, and thereby extend the right of removal indefinitely, would defeat the manifest intention of congress, and would be wrong.

Under the practice in the state courts of New Hampshire, this class of cases is subject to the ordinary rules obtaining in judicial procedure. Section 17, c. 160, Gen. Laws N. H., which gives the right of appeal from the railroad commissioners, provides that upon such appeal the same proceedings shall be had as on appeal from the award of damages by the county commissioners. The assessment of damages for land taken for railroad purposes is based, it is true, on the general right delegated by the state, subject to the right of appeal to the supreme court; and it is also true that such court, when a proceeding is brought there on appeal, may exercise supervision over the proceedings and the doings of the tribunal from which the appeal is taken. It will not be contended that the state, in delegating to railroads the right to appropriate lands, confers the power to take lands for all purposes and under all circumstances; and under the practice in New Hampshire, as I understand it, the landowner in a proceeding of this character, in a proper case, might interpose a plea in bar that there was no such corporation, that the corporate existence had expired by limitation, or that the alleged use was fictitious, and, while the ostensible purpose was for railroad use, the real purpose was banking or some other unauthorized use; and he might, by plea or motion, raise any question of jurisdiction or want of power in respect to the court or commissioners shown on the face of the papers, as, for instance, that the requirements of the statute in respect to notice or other things had not been complied with; or that the location was on one tract of land, and the assessment on another; or that the assessment was made by the commissioners of the state of New York, and not by the commissioners of New Hampshire; and in such case the question of right would doubtless be determined in the same proceeding, and, if adversely to the railroad, judgment would be entered accordingly, rather than proceed to reassess damages in a void and illegal proceeding, leaving the parties to independent process to set the assessment aside; and, in the event that no such special questions should be

raised within the 90-day rule referred to, it follows that the cause would be tried upon the general issue, which, under the statute and the rule of court as well, would involve the single issue as to the value of the land.

Holding the view that if the landowners are plaintiffs they are not within the provisions of the removal act of 1887, and if they are defendants that the rule of the state court applies, and that the landowners are therefore late in point of time, it is not necessary to consider the other ground raised by the motion, nor the further question which might be raised as to whether this class of cases is within the removal provisions of the act of 1887. The case should be remanded upon the grounds considered, and it is so ordered.

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COE *et al.* v. AIKEN *et al.*

(Circuit Court, D. New Hampshire. May 10, 1892.)

No. 238.

**FEDERAL COURTS—JURISDICTION—PENDENCY OF CAUSE IN STATE COURT.**

An action over which the state and federal courts have concurrent jurisdiction was instituted in the state court, and, after answer, at the instance of plaintiffs, was dismissed without prejudice; and defendants, with leave, amended their answer so as to become plaintiffs, and the original plaintiffs became defendants, in respect to the affirmative allegations thereof. *Held*, that the pendency of such proceeding in the state court was no bar to the prosecution of a bill in a federal court by the original plaintiffs on the cause of action set forth in their original bill.

In Equity. Bill by E. S. Coe and David Pingree, trustees, against Walter Aiken, the Boston, Concord & Montreal Railway Company, the Mount Washington Railway Company, and the Concord & Montreal Railroad Company, to determine certain rights with reference to corporations, land, and other property, and for specific performance and accounting. Heard on a plea to the jurisdiction. Overruled.

Henry Heywood, Oliver E. Branch, Harry Sargent, and Everett Fletcher, for plaintiffs.

E. B. S. Sanborn and Frank S. Streeter, for defendants.

ALDRICH, District Judge. It appears that these plaintiffs commenced proceedings in the equity court of the state of New Hampshire on the 3d day of October, 1890, making the present defendants, except the Concord & Montreal Railroad, parties defendant. It also appears that on the 15th day of July, 1891, and after the defendants had filed their answers in the state courts, the plaintiffs gave notice that they should, on the 31st day of July, 1891, ask leave to dismiss their bill. Thereupon the defendants, on the 21st day of July, gave notice that they should, on the same 31st day of July, apply for the orders and injunctions mentioned in their answers. It further appears that on the 31st day of July, and before any hearing upon the merits, the parties being present in person and by counsel, it was ordered by the state court that

the plaintiffs have leave, on payment of the defendants' costs, to withdraw their bill, without prejudice, beyond such results and effects as such withdrawal might involve, and, upon such leave, the costs, being taxed, were paid by the plaintiffs. And thereafter, on the same day and in the same court, the defendants had leave to become plaintiffs, with their answers as an affirmative bill, and to amend so far as necessary for that purpose; and the plaintiffs, who had become defendants as regards the matter set out in the answers, which by such amendment had become a bill, were ordered to make answer thereto. The Concord & Montreal Railroad was admitted as party plaintiff, and upon the original petition, contained in the original answers, Coe and Pingree, the original plaintiffs, were enjoined as to the affirmative matter set forth in such answers to their bill, which answers had become a bill in equity under the circumstances stated; and the proceeding involved in such amendment is still pending in the state court. On the 8th day of August, 1891, and subsequent to all the foregoing, the plaintiffs, who are nonresidents, brought their proceeding on the equity side of this court, setting forth matters originally cognizable therein, and involving substantially, and perhaps precisely, the same causes of action set out in their earlier bill, and amendments thereto, filed in the state court, and praying for similar relief.

Upon proper pleadings, the question is presented as to whether such proceeding in the state court is a bar to or should abate the plaintiffs' right to prosecute their bill for relief in this court. It is well settled that a plaintiff may become nonsuit in an action at law, or, by leave and upon payment of costs, dismiss his suit in equity at any time, at least, before hearing upon the merits, and that such nonsuit or dismissal is not a bar to subsequent proceedings involving the same subject-matter. The authorities holding that, under the provisions of the federal acts, a plaintiff who, having instituted his suit in a state court, has been subjected to a cross action, or, by amendment of his opponent's answer, has become a defendant, is not entitled to remove his suit, on the ground that he must abide the forum originally selected, do not apply to a suit directly brought in the federal courts, involving matter over which such courts have original jurisdiction. While, under the act of 1888, a plaintiff who has selected the state court cannot, under such act of congress, remove his suit direct to the federal court, the fact that a plaintiff has at some former time brought his suit in some one of the state courts, and, upon leave, dismissed his proceeding, upon payment of costs, is not a bar to, and will not abate, a suit upon the same causes of action subsequently brought in the federal court, involving matter over which such court has primary and original jurisdiction. The plaintiffs are nonresidents, and this court has jurisdiction, concurrent with the state courts, over the parties and the subject-matter, and the plaintiffs might have brought their proceeding in this court originally, and, before going to the merits, dismissed the same, and commenced over again in the same court, or in the state court of New Hampshire, or any other court having jurisdiction of the parties and the controversy, and

such original pendency in this court would not, as I understand it, operate as a bar or in abatement; and it follows unquestionably, as well, that prior pendency in a state court does not deprive the federal court of its power to administer justice in controversies within its jurisdiction.

It is contended, however, by the defendants, that the suit is still pending in the state court upon an amendment allowing them to make their answers an affirmative bill, and therefore pending for general relief and all other purposes, and that these plaintiffs, who are defendants to the amended answers, were the original plaintiffs, and as such selected their forum, and must there abide, and that their suit, brought in this court, should be dismissed.

The arguments bearing upon this phase of the question have been presented with marked ability, and I am free to say that strong reasons have been suggested from the different standpoints; but my conclusion is that the pendency in the state court, under the circumstances disclosed, does not operate as a bar to the plaintiffs' right to seek relief in this court. There is authority for holding (*Latham v. Chafee*, 7 Fed. Rep. 520, and other cases) that, if the plaintiffs' suit was fully pending in the state court upon their own bill, such pendency would neither bar nor abate a subsequent suit in their own behalf in the federal court. This doctrine it has been said, is based upon the idea that in this respect the state courts are foreign. It may be that this broad rule should be modified, in view of the provision of the statute making the federal jurisdiction as to certain matters concurrent with that of the courts of the several states. However that may be, in my judgment it is quite clear that these defendants, who, after notice of a motion for leave to dismiss in the state court, filed their amendment, either for the single purpose of relief upon the affirmative matter set forth in their answers, or for the broader purpose of controlling the forum thereby, are not in a position to set up such pendency, either in abatement or in bar of the proceeding here in behalf of the plaintiffs, for relief upon matter set forth in their bill.

I assume that the purpose of the wise and liberal amendment practice obtaining in the state courts of New Hampshire in respect to answers in equity is to avoid circuitry of process, and for convenience and speed in administering justice in such courts, to the end that a defendant may have relief in the same proceeding upon the original and affirmative matter only contained in his answer when the plaintiff fails to prosecute his bill; and that the rule of practice so limited does not embrace defendants' allegations of denial to the original affirmative allegations of plaintiffs, which it is understood they may dismiss. And I assume also that it is not intended that such practice, so limited, shall operate to hold jurisdiction over matter otherwise cognizable in federal courts, or that a party should use the privilege for the purpose of creating situations designed to control the rights of his adversary in respect to a forum. But, if it were otherwise, under such circumstances, effect could not be given to a rule or practice in the state court calculated to operate as an



abridgment of the rights of parties in respect to the jurisdiction of this court, nor to the act of a party calculated, through the use of such rule or practice, to compass a result which should impair the rights of his opponent in equity proceedings herein. *Hyde v. Stone*, 20 How. 170.

The facts alleged in the defendants' plea, and disclosed by the record, furnished no legal bar to this proceeding. Moreover the plea is not founded in equity. It should therefore be adjudged insufficient, and the defendants required to answer, and it is ordered accordingly.

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HEDGES v. SEIBERT CYLINDER OIL CUP Co.

(Circuit Court of Appeals, Third Circuit. April 4, 1892.)

**APPEAL—JOINT JUDGMENT OR DECREE.**

Where a judgment or decree is against several persons jointly, one of them cannot appeal alone, without a proper summons and severance.

Appeal from the Circuit Court of the United States for the District of New Jersey.

In Equity. Suit by the Seibert Cylinder Oil Cup Company against the Newark Lubricator Manufacturing Company, Charles Couse, president, and William H. Hedges, secretary and treasurer, thereof, for infringement of letters patent No. 138,243, for an invention relating to lubricators used in steam engines. There was judgment for plaintiff, (35 Fed. Rep. 509,) and defendant Hedges alone appeals. Motion to dismiss appeal. Appeal dismissed.

*Lawrence E. Sexton*, for the motion.

*J. C. Clayton*, opposed.

Before *ACHESON*, Circuit Judge, and *BUTLER*, District Judge.

*ACHESON*, Circuit Judge. Undoubtedly the final decree in the court below in this case is a joint decree against the three defendants, the Newark Lubricator Manufacturing Company, Charles Couse, and William H. Hedges. These parties were jointly interested in the suit, and the decree affects them all jointly. Yet only one of them, William H. Hedges, has appealed from the decree. His appeal was taken without previous summons and severance, or any equivalent action, and no cause has been shown for the nonjoinder of his codefendants in the appeal. Now, it has been held repeatedly by the supreme court, and is the settled rule in that court, that all the parties against whom a joint judgment or decree is rendered must unite in the writ of error or appeal, or it will be dismissed, unless there has been a summons and severance, or some like proceeding, or sufficient cause is shown for the nonjoinder. *Masterson v. Herndon*, 10 Wall. 416; *Feibelman v. Packard*, 108 U. S. 15, 1 Sup. Ct. Rep. 138; *Estis v. Trabue*, 128 U. S. 225, 9 Sup. Ct. Rep. 58. These decisions are conclusive here, and the appeal of William H.

Hedges must be dismissed for want of the joinder therein of the other defendants.

Having reached this conclusion, we do not deem it necessary to consider the other reason urged in support of the motion to dismiss, namely, that the appeal was taken too late.

Appeal dismissed.

### WALKER *et al.* v. ATMORE *et al.*

(Circuit Court of Appeals, Third Circuit. April 29, 1892.)

#### 1. WILLS—CONSTRUCTION—VESTED AND CONTINGENT REMAINDERS.

Testator directed that his wife should receive the interest on \$5,000 during her life; afterwards such interest to be paid to her daughters, E. and A.; if they or either of them died within 10 years from the date of the will, his son "to have the use of the said \$5,000 by paying the interest to the children" of E. and A.; and, "after the death of both E. and A., (if they should die before the expiration of the above-mentioned ten years, at the expiration of the above-mentioned ten years, in case either or both the aforesaid E. or A. should have died,) the money shall be divided in two equal parts, and be divided between their children equally." The will then gave to the son all testator's real and personal property, after the debts and funeral expenses "and the above-mentioned \$5,000 are paid or secured." *Held*, that the parenthetical clause was merely intended to preserve to the son the ten years' "use" before given, in case E. and A. died before that time, and that on the death of the testator the *corpus* of the property vested in the children of E. and A., and was not contingent upon the death of E. and A. before the expiration of the 10 years.

#### 2. SAME—LEGACY—CHARGE ON LANDS.

The devise to the son of all the real and personal property, after paying the debts and "the above-mentioned \$5,000," constituted the \$5,000 a charge on the real estate.

#### 3. SAME—EXECUTOR'S BOND.

The statutory bond given by the son as executor was merely for the faithful discharge of his official duties, and was not a security for the payment of the \$5,000 legacy.

46 Fed. Rep. 429, affirmed.

Appeal from the Circuit Court of the United States for the District of Delaware.

In Equity. Bill by Jane Atmore, administratrix, and the heirs at law of Ann Jones, deceased, against John H. Walker, administrator *d. b. n. c. t. a.*, and the heirs at law and creditors, of Joseph Dean, for a construction of the will of the said Joseph Dean. Decree below was in favor of complainants. See 46 Fed. Rep. 429. Defendants appeal. Affirmed.

*Edward G. Bradford* and *Benj. Nields*, for appellants.

*H. Gordon McCouch*, for appellees.

Before *ACHESON*, Circuit Judge, and *DALLAS* and *BUTLER*, District Judges.

*BUTLER*, District Judge. Joseph Dean on the 6th of January, 1860, made a will which contains the following provisions:

"*Secondly*. I do direct that my beloved wife Jane Dean shall receive the interest of five thousand dollars during her lifetime in lieu of her dower at common law if she shall so elect, one hundred dollars on account of the first

year's interest of the five thousand dollars to be paid as soon after my death as possible. I do also direct that my beloved wife shall have whatever articles of household furniture she may think proper (at a fair valuation) of which I may die seised or possessed, in part payment on account of the first year's interest of said five thousand dollars. On the death of my beloved wife the interest of said five thousand dollars to be paid to her daughters, Elizabeth Scarborough and Ann Jones, in equal parts during their lives; in case of the death of either or both the aforesaid Elizabeth Scarborough and Ann Jones, before ten years from the date of this will, my son William Dean, is to have the use of the said five thousand dollars by paying the interest to the children of the said Elizabeth Scarborough and Ann Jones. After the death of both Elizabeth Scarborough and Ann Jones (if they should die before the expiration of the above-mentioned ten years, at the expiration of the above-mentioned ten years, in case either or both the aforesaid Elizabeth Scarborough or Ann Jones should have died.) the money shall be divided in two equal parts and be divided between their children equally, with the exception of Robert Kershaw; three hundred dollars of his share to be paid to my son William Dean, for a debt due the firm of Joseph Dean & Son, by Paul Keltz, of which Robert Kershaw received the benefit. *Thirdly*. I give and bequeath to my son, William Dean, after all my debts, funeral expenses and the above-mentioned five thousand dollars are paid or secured to be paid, the residue of my estate, real and personal, of all and every description, of which I may die seised or possessed."

The questions for consideration arise out of the foregoing provisions; and are: *First*, are the legacies to Elizabeth Scarborough's and Ann Jones' children vested or contingent? *Second*, are they charged on the land devised to William?

The appellees contend that they vested on the testator's death, and became a charge on the land devised; while the appellants claim that they were contingent on Elizabeth and Ann dying within 10 years after the date of the will; and that as Elizabeth and Ann survived this period, the legacies were lost.

The language of the testator does not seem to leave his intention doubtful. The general scheme of his will is obvious. It was to give his son William all his property, except \$5,000; to give his widow the interest of this sum for life, and on her death to her daughters, (by a former husband,) Elizabeth and Ann; and after their deaths to give the principal to their children. He starts out with the provision for his wife,—setting aside \$5,000, and giving the interest to her. On her death he gives the interest to Elizabeth and Ann; and in case they die within 10 years after the date of his will, he provides that his son William shall have the "use" of the \$5,000, "by paying the interest" to Elizabeth's and Ann's children. Thus far his intention is not questioned; and it should be observed that if he had stopped here, the children would have taken the interest not for the ten years simply, but for life. William is given the "use" of the principal, and the children the interest without limitation as to time. What follows gives rise to the questions presented. It was added to dispose of the principal,—by conferring it on the children, and thus increasing the legacies before given them. The manifest intent, and effect of the language is to give them the \$5,000 at their mother's death, reserving to William the "use" before mentioned,

in case the mothers die within the ten years. The language here employed to save William's "use" was, manifestly, interjected, parenthetically, when the thought occurred to the testator's mind that the use might otherwise be lost. When, however, the sentence is properly punctuated, it will not bear any other reasonable construction than the one stated. It is as follows: "After the death of Elizabeth and Ann (if they should die before the expiration of the above-mentioned ten years, at the expiration of the ten years, in case either or both the aforesaid Elizabeth and Ann should have died) the money shall be divided and be distributed between their children equally." That is to say: After the death of Elizabeth and Ann the \$5,000 shall be thus divided among their children; if, however, the said Elizabeth and Ann shall die, within the period mentioned (during which William has been given the "use") it is to be divided at the expiration of that period. That the language here placed within parenthesis marks was inserted simply to save the "use" before given William, seems clear from its terms, and the context, as well as from the testator's manifest purpose to dispose absolutely of the \$5,000,—and in doing so to *increase* the legacies previously given the children. A part of this language is pure repetition, and may be omitted in reading the sentence; it tends to confuse. The words "in case either or both the aforesaid Elizabeth and Ann should have died," express, in similar terms, precisely what is expressed two lines above. Omitting this repetition, the sentence reads: "After the death of both Elizabeth and Ann (if they shall die before the expiration of ten years, at the expiration of the above-mentioned ten years) the money shall be divided between their children." Now if the words within parenthesis marks are placed at the end of the sentence, (after a dash, or semicolon,) instead of being interjected near the beginning, there would seem to be no room whatever for the controversy which has arisen. Adding the word *however* between the words "if" and "they," so as to make the sentence read "if, however, they should die before the expiration of the ten years," etc., will produce the same effect. Such transposition is clearly permissible; it does not change the sense but simply serves to illustrate it. The word *however*, in the connection stated, is a plain implication from the context. The same effect is produced by simply breaking the flow of language in the sentence, by proper punctuation,—the addition of parenthesis marks as inserted above. That the courts may make such transpositions, insert implied words, and so punctuate, when the context or general scheme of distribution warrants it, is well settled. 3 Jarm. Wills, 708; *Chapman v. Brown*, 3 Burrows, 1634.

There is no occasion here to invoke the aid of canons of construction,—such as that legacies are to be construed vested, rather than contingent where the language will permit; that a testator must be presumed to intend the disposal of his entire estate, etc. Their only use is to assist in ascertaining the testator's purpose where it is obscure. Here, as we have seen, it is not.

The appellants admit that the language will bear this construction; but claim that it will also bear another, which favors the heirs at law;

and that the latter should therefore be adopted. It must be plain from what has been said that we do not think the language will bear another reasonable construction. To hold that it will, we must ignore the plain intent of the testator, expressed throughout the will, and find that he contemplated dying intestate as respects the \$5,000, not only against the contrary legal presumption, but also against the plain import of his language relating directly to the subject—if not indeed against its express terms. In bequeathing the residue to William he not only takes pains to exclude the \$5,000 from the bequest, but speaks of its payment in terms which seem to preclude the idea of contingency. The thought that the children might not receive it, under all circumstances, we think, never entered his mind.

That the legacies are charged on the land, is not open to question. The testator mingled his real and personal property together and gave the residue to William, after paying his debts and "the above-mentioned \$5,000." Such language, under such circumstances has been uniformly held, in modern times, to create a charge on the testator's land. *Lewis v. Darling*, 16 How. 1; *Fenwick v. Chapman*, 9 Pet. 461. The rule in Delaware, where this land is located, is shown to be the same, by the decision in *Rambo v. Rumer*, 4 Del. Ch. 9.

The statutory bond given by William Dean, as executor, was intended to secure the faithful discharge of his official duties, and had no relation to the payment of this legacy. The time when it might become payable was uncertain, while the obligations of the bond were limited to six years; and expired long before the legacies became due. The bond did not, therefore, "secure" its payment, within the terms of the will, as the appellant urges. The decree of the circuit court is affirmed.

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### BEAL, Receiver, v. CITY OF SOMERVILLE.

(Circuit Court of Appeals, First Circuit. May 5, 1902.)

#### BANKS AND BANKING—CHECKS FOR COLLECTION—INSOLVENCY.

A city treasurer deposited checks in a bank, indorsed by him "For deposit," and the checks were immediately credited to him on his pass book, though not in pursuance of any agreement to that effect. He had been a depositor in the bank for some years, but had no agreement that his checks should be treated as cash, or that he should draw against them before collection. The bank became insolvent before the checks were collected, and their proceeds passed into the hands of a receiver. *Held*, that no title passed to the bank except as a bailee, and that the depositor was entitled to the proceeds. 49 Fed. Rep. 790, affirmed.

Appeal from the Circuit Court of the United States for the District of Massachusetts.

Suit by the city of Somerville against Thomas P. Beal, receiver of the Maverick National Bank, to recover the proceeds of certain checks. From a final decree for plaintiff, defendant appeals. Affirmed.

The allegations of the bill were, in substance, as follows:

(1) On Saturday, October 31, 1891, about a quarter before 3 o'clock in the afternoon, the treasurer of the city of Somerville deposited in the Maverick National Bank, in the name and on account of said city, checks on different banks, amounting to \$21,171.40. (2) The treasurer handed the checks, with other deposits, to the receiving teller, with a deposit ticket, and also his pass book, and the teller at once credited the total amount of the deposit therein. (3) Each of said checks had stamped on its back the following: "For deposit. JOHN F. COLE, Treas. & Coll. City of Somerville." (4) After the bank closed its doors on that day, the books of the bank, according to the usual custom, were posted and balanced, and the amount of said checks were placed to the credit of said city, and the checks placed in the clearing house drawer, with other checks intended for presentation at the clearing house on the following Monday. (5) At the time said checks were received by the bank it was irretrievably insolvent, and made so by the operations of the president and two of the directors. It closed its doors at 3 o'clock on said Saturday, and never resumed business. On the following day (Sunday) it was declared insolvent, and the bank examiner took possession of it, and all its assets and property were held by the examiner until the appointment of said receiver. (6) On said Monday the bank examiner caused the checks to be sent to the clearing house, where they were paid, and the proceeds thereof were transferred to and are held by the receiver, separate from other funds. (7) The treasurer had for several years made deposits with the bank without any special agreement in regard thereto. There was no agreement that checks deposited should be considered as cash, or that the treasurer could draw against them before collection. The treasurer never drew a check for which his deposit was not sufficient without counting the proceeds of uncollected checks, except in a few instances, on a few occasions, by special arrangement with the bank. There was no express understanding that the checks should be credited to the city immediately on deposit, but they were always so credited on the pass book at the time of the deposit; and the treasurer did not know whether the books of the bank were balanced after the close of business on each day, and credits given on the books of the bank for checks deposited on that day, but he did know that the amount of such checks was at once credited to him on his pass book. (8) The bank, in balancing its books at the close of each day's business, credited deposits on that day at their face value, without discount; and it was the custom of the bank, on any of such checks being returned from the clearing house uncollected, forthwith to charge off to such depositor the amount of such check, and thus cancel the credit. (9) It was the practice of the Maverick and the other banks in Boston, in some cases, to allow depositors to draw against checks deposited before such checks are collected, and in some cases not, depending upon the bank's opinion of the reliability of the depositor and the makers of the checks. (10) The treasurer, at the time of making said deposit, believed the bank was solvent, and had no knowledge or means of knowing of its insolvency.

A demurrer to the bill was overruled, (49 Fed. Rep. 790,) and afterwards the case was heard by agreement on the facts stated in the bill, and the further agreed fact "that the officers of the bank had no knowledge of the insolvency of the bank at the time the deposits were made, unless such knowledge is to be inferred as a matter of law from the facts stated in the bill;" and a final decree for plaintiff was rendered thereon.

*Hutchins & Wheeler*, (Edward W. Hutchins, Henry Wheeler, and Frank D. Allen, of counsel,) for appellant.

*Selwyn Z. Bowman*, for appellee.

Before PUTNAM, Circuit Judge, and NELSON and CARPENTER, District Judges.

PUTNAM, Circuit Judge. The conclusion of the circuit court in this case was consonant with justice, and it is therefore gratifying that this court finds that the law requires its affirmance. The transaction was primarily a deposit of the checks, with, secondarily, a duty to be performed concerning them by the Maverick National Bank. The fact that the checks were expressly indorsed "For deposit" does not change the nature of what occurred in this instance, as there are no intervening equities, although it emphasizes it. The paying of actual money by a customer into a bank of deposit does not create a bailment, because, by the settled custom, recognized by the supreme court of the United States, the house of lords, and numerous other courts, the bank is authorized to mingle the money at once with its general fund, creating immediately the relation of debtor and creditor, subject by further custom to draft in the usual course of business. But, with reference to the checks claimed by the city of Somerville, the word by which the transaction is ordinarily described may conveniently have, and therefore should have, its full natural force and meaning. A mere deposit would only require a bank to keep; but a usage requiring the Maverick to do in this case something more has continued so long, and is so notorious and universal, that the law can take judicial notice of it, and it happens that its terms and limitations cannot be mistaken. The bank must use due diligence to collect; and, as collections are completed, the bank no longer holds the avails as bailee, but is authorized to mingle them with its other funds, and thus constitute itself a debtor. This, of course, makes the entire transaction something more than a mere deposit, in any proper sense; but this word well gives color to all that follows, and converts all that is done between the customer and the bank, to and including the actual turning of the checks into money, into *locatio operis*, according to its meaning as explained by Judge Story in his work on Bailments, c. 6, art. 2. Aside from the right of the bank to constitute itself a debtor from the time the checks are converted into cash, or its equivalent, instead of a mere trustee or agent, no qualification of the strict legal relations created by a bailment is deducible from the general nature of the transaction, the terms in which it is expressed, or the settled custom, or is shown by the appellant.

It rests on the appellant to support affirmatively his claim to such departure from the ordinary rules which the law applies to a deposit or other bailment, as is covered by his proposition that the bank from the instant of the deposit became a debtor for the amount of the checks, or their general owner, either with or without a right of return in the event of inability to collect. Such a position would reverse all the principles applicable to the simple transaction of a deposit, or other bailment, and cannot be sustained except by evidence of a special agreement, or of such practice or custom as would be equivalent thereto. If appellant showed that the city had a legal right to draw against the checks from the instant of their deposit, so absolute that the bank could not lawfully suspend it by notice or otherwise, pending their collection, this would tend to support his position throughout. But

the ninth paragraph of the bill, which is admitted and is relied on by the appellant, weighs against him. Appellant is in error in discussing this paragraph as though it bore on a custom, in any proper sense of the word, which the city is holden to prove. As alleged, it relates to a practice of some banks which may or may not apply to them all, and which is sufficient in this case if it applies to the Maverick. The practice, as alleged, is like any course of action by which a corporation or individual indicates that an option is reserved. If the paragraph admitted in terms that the practice had been acquiesced in by the city, or generally by the customers of the Maverick, it would show conclusively an option on the part of the bank wholly inconsistent with any theory except that of bailment. As it stands, its weight, although not very great, is necessarily against the appellant. The first impression coming from the fact that the deposit was immediately entered to the credit of the city on its pass book favors the view of the appellant; but a careful consideration will demonstrate that this was a mere matter of convenience, and the entry would have been the same on either theory, as was illustrated in *Manufacturers' Nat. Bank v. Continental Bank*, 148 Mass. 553, 20 N. E. Rep. 193, and *Railway Co. v. Johnston*, 133 U. S. 566, 10 Sup. Ct. Rep. 390. On the other hand, the appellant fails to show that the city had an absolute right to check against the deposit as soon as made, irrevocable by notice from the bank; and that such right did not exist must be received by this court as a matter of judicial knowledge, notwithstanding the parties in *Moors v. Goddard*, 147 Mass. 287, 17 N. E. Rep. 532, and the complainant in this case, seem to have regarded it necessary to prove the practice of a particular bank with reference to this matter. This is inconsistent with any theory except that the bank is a bailee of deposited checks until they are collected; as is also the admitted fact that the bank is entitled to return to its customer an uncollectible check, though he neither indorses it nor gives any special agreement to that effect. The appellant fails to show any obligation to receive back such checks, except what arises from the nature of the transaction, unless from special custom; and it is more in harmony with fundamental principles to presume that this right to return grows out of the former than the latter. It strains the law to convert the natural incidents of a bailment into a right of an entirely different character, to be sustained, if at all, by a custom violative of the ordinary rules governing analogous transactions. No authorities have been cited or found which bind this court to the contrary of what is hereinbefore expressed. *Railway Co. v. Johnston*, 133 U. S. 566, 10 Sup. Ct. Rep. 390, is not in point, as the paper in question in that case was not a check, but a sight draft, and the decision was made to rest mainly on the ground of fraud, as was stated by the learned judge from whose decree in the circuit court this appeal was taken. *Ex parte Richdale*, 19 Ch. Div. 409, is criticized in *Balbach v. Frelinghuysen*, 15 Fed. Rep. 675. It can be added to what is there said that, so far as the case touches this at bar, the different judges who sat in the court of appeal used essentially varying expressions, all of which were unnecessary, beyond the proposition that the



banker there in question was, under the special circumstances, a holder for value. *Bank v. Loyd*, 90 N. Y. 530, so much relied on as establishing an absolute title in the bank from the instant the checks were deposited, may perhaps settle the law for the state of New York. It apparently was so considered by Judge WALLACE as late as 1886, as stated in *Railway Co. v. Johnston*, 27 Fed. Rep. 243. The law of New York was especially found by the supreme court of Massachusetts to be as stated in *Bank v. Loyd*, in *Brooks v. Bigelow*, 142 Mass. 6, 6 N. E. Rep. 766, and though perhaps not of importance, yet it is noteworthy that the parties deemed it necessary to prove the rule of that state as though local and peculiar, and not to be gathered from the common law. *Bank v. Loyd* is discussed by the supreme court in *Railway Co. v. Johnston*, already cited; and its effect is stated (page 575, 133 U. S., and page 392, 10 Sup. Ct. Rep.,) to be in substance that a transfer by a bank of a draft deposited for collection, and indorsed generally, would confer title by reason of "reputed ownership." This was the pith of the New York decision; the question being, not as to title between the primary bank and its customer, but between the latter and another bank to which the draft had been remitted. *Bank v. Hubbell*, 22 N. E. Rep. 1031, 117 N. Y. 384, (decided November 26, 1889,) can be distinguished from the case at bar only by the fact that in the former the checks were expressly indorsed "For collection." They were charged by the depositor to the banker simultaneously with forwarding them, and were in like manner credited at once on reception and before collection, and such as were protested were charged back. The banker did not keep the proceeds of the collections distinct, nor remit them specifically; but they were mingled with his other funds, and remittances of balances were made each week. These covered the existing credits on the books of the banker, whether or not at that time collected. This method of business had continued for many years. Notwithstanding the checks were indorsed specially "For collection," the transactions as a whole were identical in substance with those usual in connection with a deposit as made in the case at bar; and the course of proceedings and the practical construction given them by the parties were precisely the same as though the checks had been indorsed generally. The special indorsements effected nothing, except to give notice to a transferee or other stranger. They were covered into the transactions, and added nothing to them; because checks delivered a banker are "for collection" in any view. The checks were accompanied with letters stating that they were inclosed "for collection and credit." The court said that this amounted to a direction to credit after the collection; but the practice was to credit before, so that the letters of advice were thus actually superseded. Moreover, as already said about the word "collection," the word "credit" added nothing, and was covered into the transactions, because the banker would do this in any event, unless instructed to remit specially. In this case the court of appeals held that the title to the checks remained in the depositor while they were uncollected. In *Balbach v. Frelinghuysen*, already cited, the United States circuit court for the district of

New Jersey laid down as the result of its considerations the rule that a bank is, until collection, a bailee of checks deposited, or agent of its customers depositing. Morse, Banks, (3d Ed.) § 187, says:

"The best opinion is that checks on the depository, credited as cash, form a general deposit, in the absence of agreement or usage to the contrary, and that other paper credited as cash is also received on general deposit, subject to the right of the bank to cancel the credit if the paper is dishonored without its fault."

Section 586 says:

"When a customer deposits a check on another bank, without any special contract, the property remains in him, and the bank is his agent until it has notice that the correspondent bank has received the money and credited it."

There are many *dicta* and general expressions touching this matter, some of which had in view the solving of other issues, and some of which were built up from the first class without recognizing the method of its origin. So far as this appeal is concerned, this court must maintain itself as a tribunal of final jurisdiction, notwithstanding the possibility that the case may in some form reach the supreme court. If we had a determination in point from that court, it would necessarily conclude us; and, if the question at issue had been met by the United States circuit court of appeals in any other circuit, we should, of course, lean strongly to harmonize with it; but we are obliged to proceed without either. Although, whenever the law is very doubtful, or the propositions complicated, this court may derive great aid from *dicta*, expressions of learned judges or text writers, or decisions of local tribunals, it cannot permit itself to be bound or embarrassed by them, when the facts naturally and easily lead to such just conclusions as we now seem required to accept. We do not find it necessary to consider the other propositions involved in the case. The decree of the circuit court is affirmed, with costs.

HITCHCOCK *et al.* v. BARRETT *et al.*

(Circuit Court, E. D. New York. May 2, 1892.)

## RAILROAD COMPANIES—LEASE—RESCISSION.

Where the directors of a railway company enter into a contract with third persons, whereby a new company is organized, franchises secured, and a road built and leased to the old company, and the profits realized from the transaction are equally divided between the directors and the third persons, the latter are not liable for their profits, even though exorbitant, on suit by stockholders of the old company, unless the contract of lease is rescinded, and the road restored to the new company.

In Equity. Bill by Hitchcock and others, as stockholders of the Brooklyn Elevated Railroad Company, against Barrett and others, to restrain the latter from exercising any acts of ownership over certain shares of stock, and to enjoin the company from recognizing their claim to title therein. Injunction denied.

*Julien T. Davies, Wheeler H. Peckham, and C. J. G. Hall*, for plaintiffs.

*Geo. W. Wingate, Edmund Wetmore, and Wm. H. Paige, Jr.*, for defendants.

WALLACE, Circuit Judge. I am so strongly of the opinion that there is no ground upon which this suit can be maintained that I must decline to grant the interlocutory injunction which has been applied for. This bill is filed by certain stockholders of the Brooklyn Elevated Railroad Company, against that corporation and one Barrett, to restrain the latter from exercising any acts of ownership upon 23,792 shares of stock of the railroad company, from voting thereon at any election of stockholders of the railroad company, and to enjoin the railroad company from recognizing any title of Barrett to such shares. The plaintiffs allege that the corporation is controlled by directors who affiliate with Barrett, and refuse to protect the interests of the corporation. The substantial facts are briefly as follows: Prior to the 1st day of February, 1887, the Elevated Railroad Company, shortly designated as the "Brooklyn Company," was operating its railway over various streets in the city of Brooklyn, and another elevated railway company, shortly designated as the "Union Company," owned franchises, which the Brooklyn Company had attempted unsuccessfully to obtain, for constructing and operating a railway over certain other streets in the city of Brooklyn. Each company was a corporation organized under the laws of the state of New York. It was desirable for the Brooklyn Company that the railway of the Union Company should be built, and, when built, that the properties of the two corporations should be merged and operated under one management. The Union Company had been organized in June, 1886, by Messrs. Wingate, Cullen & Barrett, upon an understanding with Messrs. Lauterbach & Pettus that the former should effect the organization and secure the franchises, and the latter should provide the money to pay all the expenses and build the railway, and that the profits arising from the trans-

action should be divided, one half to go to Wingate, Cullen & Barrett, and persons they had associated with themselves, and the other half to Lauterbach & Pettus and their associates. Lauterbach & Pettus were directors of the Brooklyn Company, and had associated with themselves in the enterprise seven other directors of that company. By February 3, 1887, the franchises of the Union Company had been fully acquired by the efforts of Wingate, Cullen & Barrett, and Lauterbach & Pettus had advanced \$110,000 in organizing and procuring the franchises of the corporation; and on that day these persons organized a construction company as a corporation under the laws of New Jersey, in which one half of the stock was subscribed for and taken by the Wingate party, and the other half by the Lauterbach party. These persons at the time owned or controlled all the stock of the Union Company. The construction company was organized pursuant to a plan of the promoters, that the Union Company should be capitalized at the same amount per mile of railway as the Brooklyn Company, viz.: First mortgage bonds, \$550,000; second mortgage bonds, \$185,000; stock, \$740,000; that the Union Company should make a contract with the construction company, by which all its bonds and stock should be paid to the construction company for building the railway; that a syndicate should be formed of the stockholders of the Brooklyn Company to market enough of the bonds received by the construction company from the Union Company to build the railway; that the Union Company should lease for the full term of its corporate existence its franchises and railway to the Brooklyn Company, and deliver the railway in sections as completed; that the Brooklyn Company should guaranty the interest on the bonds of the Union Company, and the same dividends on the stock of the Union it should declare on its own; that on the completion of the railway the two concerns should be merged, and the stock of the Brooklyn Company should be exchanged, share for share, with that of the Union Company; and that the profits made by the construction company in building the railway for the Union Company should be divided between the construction company and the syndicate representing the shareholders of the Brooklyn Company in specified proportions. Shortly after the construction company was organized, contracts were entered into between it and the Union Company, between it and the syndicate, and between the Union Company and the Brooklyn Company, by which the original scheme was made effective. Among other things, these contracts relieved the construction company from any risk of financial loss in building the railway. By the contract between the Union Company and the construction company the latter agreed to refund to the holders of the capital stock of the Union Company all moneys that had been paid into that company to secure its organization and franchises. The contract between the construction company and the syndicate was designed to enable the construction company to obtain all the money to build the railway, and reimburse the expenses of the promoters; and it was expected that the proceeds of the sale of the first mortgage bonds would be nearly sufficient for the purpose. The contracts were carried out, the railway

was built, and the merger of the two companies was effected. As a result the railway was built out of the proceeds of the first mortgage bonds. The construction company received, as its share of the profits under the contract between it and the syndicate, \$1,364,000 of second mortgage bonds, and 54,680 shares of Union Company stock; the syndicate received \$702,000 of the second mortgage bonds and 37,656 shares of the stock; and the Brooklyn Company got the franchises and property of the Union Company at the same cost per mile of road as that of its own. The profits made by the construction company were divided between its shareholders according to their respective holdings; one half going to the Wingate party, and the other half to the Lauterbach party. The 23,792 shares of stock in suit are part of the shares allotted to the Wingate party upon the distribution of the profits of the construction company. The profits of the syndicate were divided between the stockholders of the Brooklyn Company who participated in the syndicate, and these represented 92-100 of the whole number of shares of that company. The franchises of the Union Company were valuable, and the property of that company at the time of the merger was certainly as valuable per mile of road as that of the Brooklyn Company; and as these franchises and property were transferred to the latter upon the same basis of bonds and stock per mile of road as its own, the transaction was, as between the two corporations, one in which a fair equivalent was given and received.

Upon the facts as they appear upon this motion, it seems plain that the Brooklyn Company was fairly dealt with, unless its directors made a clandestine profit at its expense. Among the promoters, there were nine persons who were its directors; and the plaintiffs invoke the well-recognized rule of equity that those who are directors of a corporation cannot, while directors, enter into and authorize contracts on behalf of the corporation, out of which they will personally derive a secret profit. Undoubtedly, such contracts are voidable at the election of the corporation. Equity forbids any person standing in a fiduciary position from making any profit, in any way, at the expense of the party whose interests he is bound to protect, without the fullest and most complete disclosure. I shall not enter upon the inquiry whether these directors attempted to make any secret profit in this case, or whether the Brooklyn Company, by the action at the several stockholders' meetings held prior to the institution of this suit, has not ratified the transactions which are assailed. It should be said, in justice to them, that there is much to denote that there was no attempt by them to conceal their real part in the transaction, and that their acts were not regarded by the great majority of stockholders as involving any breach of trust. In the most favorable view of the facts which can be taken for the plaintiffs, the Brooklyn Company, upon whose rights the plaintiffs stand, may be entitled to proceed for a rescission of the agreements by which it has acquired the franchises and property of the Union Company, and obligated itself to the liabilities it assumed as a consideration therefor; or, besides the remedy of a rescission, the Brooklyn Company may be entitled to resort to a court of equity to compel those who were its direct-

ors to account and charge the profits made by them with an implied trust. But the present bill does not proceed for a rescission. Its theory is that the Brooklyn Company, while retaining the benefits of the agreements entered into, is entitled to reclaim some of the fruits which are in the hands of the defendant Barrett. None of the profits made by the directors are represented by the stock which was distributed to the defendant Barrett. That stock represents the profits made by the Wingate party, of whom none of the members stood in any fiduciary relation to the Brooklyn Company; and although they acquired it with knowledge of facts entitling the Brooklyn Company to rescind, or compel its directors to account, the stock nevertheless represents their share of the value of the franchises and property of the Union Company. Even though they obtained an inordinate price from the Brooklyn Company for what they transferred, their stock could not be confiscated, or their right to it annulled, without restoring to them what they parted with. But they did not obtain, as it seems to me, more than a fair equivalent. It is said by a recent commentator:

"Because a director of a company may have sold to the company, at an extortionate valuation, property which they supposed he was purchasing for them from another, but which really belonged to himself, it does not follow that the company may confiscate the property altogether, and not pay him anything for it. He will be entitled to retain what it was really worth, and will be obliged to disgorge the unconscionable profit which he has received. Nor will what he may have given for the property be taken as a conclusive standard of its value." *Thomp. Liab. Off.* 861.

Certainly a severer rule ought not to be applied towards Barrett than towards the directors. Yet the directors are not pursued by the present bill. They are not named as parties, and their conduct is apparently condoned by the plaintiffs. Clearly, it would not be equity to allow them to retain their profits, and charge the amount upon the stock of Barrett, on the theory of a trust. The motion is denied.

### GILMOUR v. EWING *et al.*<sup>1</sup>

(*Circuit Court, D. Washington, W. D. May 4, 1893.*)

#### 1. ASSIGNMENT FOR BENEFIT OF CREDITORS—RIGHTS OF MORTGAGEE.

An insolvent debtor cannot by his voluntary assignment defeat the right of a mortgagee to whom he has executed a mortgage to foreclose the mortgage after default.

#### 2. FEDERAL COURTS—JURISDICTION—PENDENCY OF CAUSE IN STATE COURT.

The pendency of an action in a state court will not bar an action in a United States court to determine the same question between the same parties.

#### 3. INSOLVENCY—APPOINTMENT OF ASSIGNEE.

Under the insolvent act of Washington, contained in the Code of 1881, the title of the debtor's property did not pass out of the debtor until an assignee had been appointed, and was authorized to receive the property.

<sup>1</sup> Reported by T. W. Hammond, Esq., of the Tacoma bar.

## 4. SAME—REPEAL OF ACT—PENDING PROCEEDINGS.

The act of 1890, providing for voluntary assignments by insolvent debtors, operated to repeal the old insolvent law of Washington, and proceedings pending in court under the old law when the new law went into effect fell with the old law, unless an assignee had actually been appointed and qualified, so as to divest the debtor of the title to his property.

## 5. SAME.

The appointment of an assignee under the old law, after the new law went into effect, is void.

## 6. PLEADING—ASSIGNMENT FOR BENEFIT OF CREDITORS.

An allegation in a pleading that a party was "duly appointed assignee by a court of competent jurisdiction" is insufficient in a court of equity of the United States, although sufficient in the state courts under a Code.

In Equity Exceptions to answer of Coke Ewing. Exceptions sustained.

This was a suit in equity to foreclose a mortgage. Coke Ewing, claiming to be the assignee in insolvency of the mortgagors, answered in the cause, and insisted—(1) That the plaintiff could not maintain her action because the mortgagors had made an assignment of all their property for the benefit of their creditors, under the insolvent laws contained in the Code of 1881 of the state of Washington, and that by such assignment the property became *custodia legis* in the state court, and that this court could not interfere with it. (2) That a suit brought and pending in the state court by Ewing to set aside the mortgage as fraudulent, as against the creditors of the mortgagors, was a bar to the action in the circuit court. (3) He set forth in his answer facts tending to show the invalidity of the mortgage as against creditors, and sought to have it decreed void. It appeared that, after executing the mortgage, the mortgagors instituted proceedings in the state court to procure a discharge from their debts, under an insolvent law then in force in the state, (Code Wash. 1881, § 2014 et seq.) which provided that the debtor might petition the court for leave to surrender his property for the benefit of his creditors, and, upon such petition being filed in court, the creditors might choose an assignee, or, in the event of their failing to do so, that the court might appoint one to receive the property of the debtor, and administer the trust. The law also provided for the appointment of a receiver to take charge of the property pending the selection and appointment of an assignee. The petition was filed, and, the creditors having failed to select an assignee, the court appointed a receiver to take charge of the property, but did not appoint an assignee until some time after a new assignment law had been passed by the legislature of the state, and gone into effect. Laws Wash. 1889–90, p. 83. The other facts sufficiently appear in the opinion of the court.

*Crowley & Sullivan*, for complainant.

*Ebert T. Dunning* and *W. H. Pritchard*, for defendant Ewing.

HANFORD, District Judge, (*orally*.) The insolvent law and the assignment law both provide only for voluntary surrenders of property by debtors, and the initiation of proceedings under either statute is necessarily the voluntary act of the debtor. A mortgagor of property must be without power to defeat his mortgage by any voluntary act of his own subse-

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quently to the vesting of the mortgagee's rights, and can no more by his act prevent a suit to foreclose the mortgage after default than he can convey the property clear of the lien of the mortgage to another person. He cannot, by any voluntary act, defeat the lien or the right of the mortgagee to proceed, whenever the debt is due, to foreclose the mortgage, and subject the security to the payment of the debt. The insolvent proceeding or assignment made by the debtor is no bar to this suit to foreclose the mortgage, and the plea which sets forth these proceedings as a bar to this suit is, for that reason, insufficient.

The second plea, which sets forth the pendency of another action involving the validity of this mortgage in the superior court of Pierce county, is also insufficient, for the reason that this court has concurrent jurisdiction with the superior court of the county for the determination of this very question, and the suit in one court is no bar to the litigation of the same question between the same parties in another court. I am aware of the difficulty which may sometimes arise from a collision of jurisdiction, but the authorities have settled the question, beyond the power of this court to hold otherwise, that two suits may proceed at the same time, between the same parties, for the determination of the same question, one in a national court and one in a state court, if the conditions which give the national court jurisdiction exist. There may be two distinct judgments, only one of which can be executed; and, according to the decision of the circuit court for this circuit, in the case of *Sharon v. Terry*, 36 Fed. Rep. 337, the decision of the court which first acquires jurisdiction of the parties will prevail, although rendered after the decision of the court which last assumed jurisdiction. That case is directly in point as to the question concerning the jurisdiction of the two courts to determine the validity of this mortgage. It is exactly the same in principle. It was a proceeding to determine the validity of a paper writing alleged to be a marriage contract. Sharon first brought an action in the United States court alleging that Miss Hill had possession of a paper writing purporting to be a marriage contract with himself, which she was proposing to use for the purpose of proving the fact of a valid marriage, and under which she proposed to claim a wife's interest in his property, and prayed for an injunction to prevent her from asserting any rights under that alleged contract, and to compel her to surrender it to be canceled on the ground that it was a forgery and a fraud. Subsequently the defendant in that case brought a suit in the superior court of San Francisco against Sharon, based upon this same alleged marriage contract, alleging her marriage, and praying a divorce and division of property; and, using that paper as evidence of the marriage, obtained a decree in her favor that she was married to Sharon, and should be divorced, and giving her a share of his estate. After that judgment was rendered in the state court, the case proceeded to final judgment in the United States court, and it was there decided and adjudged that the paper was a forgery and void, and an injunction was issued as prayed for, and the paper decreed to be canceled. Subsequently, the divorce case having been reversed by the supreme court of



California, (22 Pac. Rep. 26,) upon a ground not affecting the validity of the paper, on a second trial the state court refused to receive the paper in evidence, or to regard it for any purpose whatever, holding itself to be bound by the decision of the United States court upon the question of its validity. Here the validity of the paper evidence of a contract is the thing in issue. It is the issue which is attempted to be raised by the assignee in this case. He alleges that there is a suit pending in the superior court of Pierce county for the determination of the validity of this mortgage. I do not think that the pendency of a suit in one court is any bar to a proceeding involving the same matter in another court having concurrent jurisdiction. If there should happen to be a variance in the decisions of the courts, the judgment of the court which first acquired jurisdiction would prevail. It seems hardly worth while for parties to go to the trouble and expense of litigating the same question twice, but if they choose to do so the court has no right to deny them that privilege.

The remaining question, as to the right of this assignee to contest the validity of the mortgage in this court, depends upon whether he is in fact an assignee. On the facts stated, I think that he is not. He alleges that he was duly appointed by a court of competent jurisdiction. If this were an action at law, that would be sufficient under the Code of this state; but this is a suit in equity, and the Code rules have no application. I think enough is alleged here to show that there has been no valid appointment of the assignee by the superior court.

The plea does not set up a common-law assignment; it is an assignment under the statute. While it says an assignment was made on January 22, 1890, that cannot be true. The only statute in force at that time provided for such a series of proceedings that the assignment could not have been completed until a date later than that. The act provided for the making of an assignment, but the assignment was not the first thing the debtor had to do. He had to make his petition to surrender his property, and the assignment was not complete until there had been an actual surrender of his property into the hands of some one authorized to receive it. Under that law the debtor did not name the assignee, but simply petitioned the court for leave to surrender his estate to his creditors, and be discharged of his debts. Then the creditors could meet and choose an assignee, and, in the event of their failing to choose one, the court could appoint. The assignee was the person authorized to receive the surrendered property and to handle the assets. Section 2046 provided that, from and after the surrender of the property of the insolvent debtor, all property of such insolvent should be fully vested in his assignee or assignees for the benefit of creditors. There was no change of property; that is, the title was not transferred until the surrender. A surrender could not take place until there was some one authorized to receive it. After the title went out of the insolvent debtor it passed to and became vested in the assignee. Under section 2022, the court was authorized to appoint a receiver, but the receiver was not vested with the authority, and could not perform the functions, of an

assignee. His appointment was merely of a temporary character, to preserve the property from being wasted pending the appointment of an assignee; and of course the title would remain in the insolvent debtor until the assignee was appointed. So there could not have been an assignment on January 22, 1890, the day the petition was filed by the debtor. The order of the court authorizing Mr. Ewing to serve as assignee was made in April, 1891, after the new law had been passed and gone into effect. The new law contains provisions which are inconsistent with the old law. Under the present law, the only way in which an assignment can be made is by an instrument in writing, (a deed,) filed in the office of the county auditor. The new law repealing all laws inconsistent with itself supplants the provisions of the Code, in relation to assignments. The proceedings begun under the Code, if carried to a point where a transfer of title occurred, would I think authorize the court to complete the execution of the trust under the provisions of the Code; but, the power to appoint the assignee under the Code having been cut off by the new law, no assignee having been appointed while the old law was in force, and no transfer of the title having therefore taken place, the proceeding fell with the repeal of the old law. The pleading does not show an assignment made in writing to any person named, or any such compliance with the provisions of the new law as to give the assignment any validity, so I think the assignee, Mr. Ewing, has no such interest in the subject-matter of this mortgage as gives him a right to contest its validity.

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GRAFF *et al.* v. BOESCH *et al.*

(Circuit Court, N. D. California, May 9, 1892.)

APPEAL—DECISION—PROCEEDINGS BELOW—INFRINGEMENT OF PATENT.

In a suit for infringement the supreme court, reversing the decree below, said, in its opinion: "The complainants must be content with the protection of an injunction, and a recovery of the profits realized from the infringing sales." *Held* that, on the return of the case, nothing could be allowed by way of damages, nor could a recovery of the profits be prevented on the assumption that the supreme court did not mean what it said.

In Equity. Bill by Albert Graff and J. F. Donnell against Emile Boesch and Martin Bauer, for infringement of letters patent No. 289,671, issued December 4, 1883, to Carl Schwintzer and Wilhelm Graff, of Berlin, Germany, who assigned one half thereof to J. F. Donnell & Co. of New York. Infringement was found by the trial court, (33 Fed. Rep. 279,) and a decree was afterwards entered for damages. This decree was reversed by the supreme court, on the questions of damages. 10 Sup. Ct. Rep. 378. On the receipt of the mandate the cause was referred to a master, and the question is now on his report.

John H. Miller, for complainants.

John L. Boone, for respondents.

McKENNA, Circuit Judge. This is a suit for the infringement of a patent for lamp burners, and for damages. A decree was heretofore entered for complainants, adjudging respondents guilty of infringement, and for an injunction and damages. 33 Fed. Rep. 279. The supreme court reversed the decree as to damages. 10 Sup. Ct. Rep. 378. After the mandate was filed, this court, by Judge BEATTY, on motion of complainants, and after argument, made an order referring the cause to the master in chancery "to take and state a new accounting." The master has filed his report, and complainants move on it, and on the pleadings, records, and decision of the supreme court, for a final decree in their favor for the sum of \$186.20, profits realized by respondents, and for the sum of \$412.20, damages, and that the latter sum be trebled. The decisive words of the opinion of the supreme court reversing the decree of this court are as follows:

"In the state of the case disclosed by this record, the complainants must be content with the protection of an injunction, and a recovery of the profits realized from the infringing sales. The decree is reversed, and the cause is remanded for further proceedings in conformity with this opinion."

At least provisionally interpreting this language as admitting further proof, this court referred the cause to the master for a further accounting. It is, however, not important to decide whether this reference was right or wrong, for the further proof taken and reported is fruitless of addition or change of the facts upon which the supreme court passed, and on which it based its decision. There were two invoices of infringing burners imported and sold by the respondents, and both were considered and passed on by the court, and no new fact has been proven in regard to them. Mr. Bauer, one of the respondents, was sworn by complainants, and while there was some confusion in his direct testimony caused by the identity of names of different burners, on cross-examination he said that, since his testimony in the accounting on the main case, he had not purchased, or bought, or had on sale, any of the class of burners with a cap on. The "cap" constitutes the infringement. Mr. Graff, one of the complainants, testified that he had seen Mitraillease burners in Mr. Boesch's window. Afterwards he called them "Diamond burners" but he said, "If there is a cap on I don't know." The burners were called, indifferently, "Mitraillease" or "Diamond;" sometimes "Diamant." Mr. Boesch, one of the respondents, called on his own behalf, testified that he had sold no burners since the filing of the master's report in which a half cap or any part of a cap was used, nor had he imported any since that time. All the imported ones were without caps. Against this direct testimony I see nothing in the record—and I have carefully considered it—to justify an inference of other sales than those passed on by the supreme court. The complainants, therefore, for indemnity "must be content," to use the language of the court, "with a recovery of the profits realized from the infringing sales." These are found by the master to amount to \$186.20. But respondents say that complainants, at the first accounting, waived the recovery of profits, and cannot now claim them. The supreme court, however, decides that

complainants are entitled to recover them, and; to avoid the plain language of the decision, respondents' counsel urges that the question of profits and the fact of waiver were not before the court. This is a mistake. In the opening sentences of the opinion the court say:

"The case went to a master, who reported \* \* \* that the appellees had sustained damages to the extent of \$2,970.50, and that they waived all claims to the profits realized by the infringement."

The court, therefore, was manifestly inquisitive and considerate of the whole record, and, having decided in its final judgment that the complainants are entitled to "a recovery of the profits realized from the infringing sales," this court must execute its mandate, and cannot evade it by assuming that the court does not mean what it says. Complainants, therefore, are entitled to a final decree for the sum of \$186.50, profits realized by respondents on infringing sales, and costs, and it is so ordered.

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WESTERN UNION TEL. CO. *et al.* v. AMERICAN BELL TEL. CO.

(Circuit Court, D. Massachusetts. May 28, 1893.)

No. 1,948

EQUITY PRACTICE—DISMISSAL BY PLAINTIFF—MASTER'S REPORT.

At a hearing before a master it was agreed that, prior to the filing of his report, a draft should be submitted to counsel, in order that they might present objections thereto. The master, however, inadvertently filed the report without so doing. Subsequently he withdrew it by consent of counsel, other proceedings were had before him, and objections were presented to the report. *Held*, that the cause stood as if no report had ever been filed, and that defendant had acquired no such right as would exclude the operation of the general rule that, where defendant demands no affirmative relief, complainant may, upon paying costs, dismiss his bill at any time before interlocutory or final decree.

In Equity. Bill by the Western Union Telegraph Company and others against the American Bell Telephone Company for discovery and accounting. Heard on motion of complainants to dismiss without prejudice. Granted.

*Josiah H. Benton, Jr.*, for complainants.

*William G. Russell and E. Rockwood Hoar*, for defendant.

COLT, Circuit Judge. This case was heard on motion of complainants to dismiss the bill without prejudice, on payment of costs. On November 16, 1883, the complainants filed the present bill against the defendant, praying for discovery and account, under a certain contract. The defendant answered, denying the equities of the bill. The complainants then filed a general replication. On May 28, 1886, the case was referred to a master by agreement of counsel, and the following order was made by the court:

"And now, to wit, May 28, 1886, upon agreement of parties filed, it is ordered that the above-named cause be referred to Hon. John Lowell as master

to hear the parties and report the facts, with such part of the testimony as either party shall request, and his rulings on any questions of law arising in the case."

An examiner was subsequently appointed and testimony was taken by both parties. This evidence was submitted to the master, and oral arguments were made before him by counsel and printed briefs filed. At the hearing before the master, it was agreed that, prior to the filing of his report, a draft report should be submitted to counsel, in order that they might present objections thereto. On February 19, 1890, the master filed a report, without having submitted the same to counsel. The next day, upon being reminded of the agreement of counsel, he withdrew the report from the files of the court, and counsel entered into the following stipulation: "It is agreed that the paper filed in this case as the master's report shall be taken into his custody, and considered as not filed, with all accompanying documents." Thereupon the draft report was returned by the clerk to the master. Thirty days were then allowed by the master to each party to submit objections to the report, and the time was subsequently extended to April 25th. Upon that date the complainants applied to the master for time to take further testimony. This application the master refused, and ordered that all objections to the draft report should be made on or before May 7th. On that day the complainants made another application to take further evidence, which the master denied, and ordered that objections to the draft report should then be made. Thereupon objections to the report were filed with the master, the counsel for the complainants filing their objections under protest. On June 1st the complainants filed their motion to dismiss the bill without prejudice, upon payment of costs. On June 3d the complainants requested the master to take no further action, and make no report in the case, pending the decision of their motion to dismiss. On August 11th the master filed his report in court, with all the evidence and accompanying documents.

Upon the foregoing statement of facts, I do not think there can be any question as to the time when the master's report must be considered as filed. Under the agreement of counsel, and by the subsequent action of the master, no report was actually filed until August 11th. Whatever was done February 20th with respect to filing the report was an inadvertence on the part of the master, and can affect in no way the rights or standing of the parties to this suit. In the consideration of this motion I must treat the master's report as not filed until August 11th, or more than two months after the filing of complainants' motion to dismiss.

We have, therefore, this single proposition to decide: whether, under these circumstances, the complainants are entitled to dismiss their bill without prejudice, upon payment of costs; and this is a question purely of equity practice. It is admitted that, under equity rule 90, this court is governed by the equity practice of the high court of chancery of England as it existed in 1842, the time of the adoption of the rule. Under that practice, the general rule was that a complainant might dismiss his

bill upon payment of costs at any time before interlocutory or final decree, and this has been the general practice both in the federal and state courts. There are, however, certain well-recognized exceptions to this rule, and the question which arises upon this motion is whether the defendant comes within any of these exceptions. These exceptions are based upon the principle that a complainant should not be permitted to dismiss his bill when such action would be prejudicial to the defendant. But this does not mean that it is within the discretion of the court to deny the complainant this privilege under any circumstances, where it might think such dismissal would work a hardship to the defendant, as, for example, where it might burden him with the trouble and annoyance of defending against a second suit; but it means that if, during the progress of the case, the defendant has acquired some right, or if he seeks or has become entitled to affirmative relief, so that it would work an actual prejudice against him to have the case dismissed then, the complainant will not be permitted to dismiss his bill. To hold otherwise would be to do away with the general rule altogether, and to make the question simply one of discretion on the part of the court. Where issues are framed out of chancery, and decided by a jury, that would be such a determination of the case as to forbid the complainant to dismiss his bill without prejudice, because the defendant has acquired a new right; and so where a master has filed his report, and his findings are against the complainant, I do not think, for the same reason, he should be allowed to dismiss his bill. Again, where the defendant has filed a cross bill, or where he seeks affirmative relief in his answer, or where, without specifically asking for affirmative relief in his answer, the evidence discloses that he is entitled to such relief, these are instances where the complainant should not be allowed to dismiss his bill. But where there has been no interlocutory or final decree, and no determination of the cause in any way, and the defendant seeks no affirmative relief, or, in other words, where the bringing of another suit will merely submit him to the annoyance of a second litigation, the complainant has a right to dismiss his bill without prejudice, upon payment of costs.

Upon the facts presented in this case, I do not think the defendant comes within any of the exceptions to the general rule. It is not contended that the defendant seeks any affirmative relief in this case, and therefore that class of exceptions requires no further consideration. The only question is whether there has been any such determination in the case as to confer on the defendant some new right. If the master had filed his report before the motion to dismiss, the situation would have been different; but, as the case stood on June 1, 1891, when the complainants filed their motion to dismiss, there had been no determination by the court or by the master in this cause. The draft report submitted to counsel by the master was in no sense a determination in the cause. He might have modified or wholly reversed his findings upon the presentation of objections by counsel. Until his ultimate conclusions were embodied in a final report, and filed in court, he had in fact legally made no findings, and the present case is no different from what it would

have been if the complainants had moved to dismiss their bill before reference to the master, or had moved to dismiss some time during the hearing before the master and before the submission of his draft report.

It seems to me that this case is quite parallel with the leading case of *Carrington v. Holly*, 1 Dickens, 280, where the plaintiff filed his bill to establish his right to certain estates, and an issue to a jury was directed. The plaintiff then moved to dismiss his bill, with costs, and the defendant applied to have the order granting this motion set aside. Lord HARDWICKE said:

"There hath not been any determination. The directing of an issue is merely to satisfy the conscience of the court prefatory to giving judgment. That issue hath not been tried, and till there hath been a determination, I hold a plaintiff may, in any stage of the cause, apply to dismiss his bill, upon payment of costs. Had there been a decree, it would have been otherwise. So, likewise, it would have been had the issue been tried and a verdict in favor of the defendant."

While it cannot be said that the authorities are entirely harmonious, I think the leading cases in this country and in England support the views herein expressed. *Carrington v. Holly*, *supra*; *Handford v. Storie*, 2 Sim. & S. 196; *White v. Lord Westmeath*, Beat. 174; *Curtis v. Lloyd*, 4 Mylne & C. 194; *Bluck v. Colnaghi*, 9 Sim. 411; *Booth v. Leycester*, 1 Keen, 247; *Cooper v. Lewis*, 2 Phil. Ch. 178; *Chicago & A. R. Co. v. Union Rolling Mill Co.*, 109 U. S. 702, 3 Sup. Ct. Rep. 594; *Badger v. Badger*, 1 Cliff. 237; *American Zylonite Co. v. Celluloid Manuf'g Co.*, 32 Fed. Rep. 809; *Stevens v. The Railroads*, 4 Fed. Rep. 97; *Electrical Accumulator Co. v. Brush Electric Co.*, 44 Fed. Rep. 602; *Conner v. Drake*, 1 Ohio St. 167; *Cozzens v. Sisson*, 5 R. I. 489; *Dawson v. Amey*, 40 N. J. Eq. 494, 4 Atl. Rep. 442; *Saylor's Appeal*, 39 Pa. St. 495; *Cummins v. Bennett*, 8 Paige, 79; *Vaneman v. Fairbrother*, 7 Blackf. 541; *Watt v. Crawford*, 11 Paige, 470; *Bullock v. Zilley*, 5 N. J. Eq. 77; *Babb v. Mackey*, 10 Wis. 314; *Seymour v. Jerome*, Walk. (Mich.) 356.

The motion to dismiss the bill without prejudice, upon payment of costs, is granted.

## SEMMEs v. WHITNEY.

(Circuit Court, E. D. Louisiana. June 6, 1892.)

No. 12,018.

**1. JURISDICTION OF CIRCUIT COURT—SUIT AGAINST NONRESIDENT ADMINISTRATOR—APPOINTMENT BY DOMESTIC COURT.**

The circuit court of the United States in Louisiana has jurisdiction of a suit by an attorney residing in that state against a nonresident administrator appointed by a Louisiana court, to enforce an attorney's lien on a judgment recovered by the attorney for the administrator.

**2. SAME—JURISDICTION OF STATE COURT.**

Such jurisdiction is not affected by the fact that the state laws give exclusive jurisdiction of such a suit to the probate court of the state.

**3. ATTORNEY'S LIEN—CONTINGENT FEES.**

A contract made by an attorney with the tutor and tutrix of minor heirs for a contingent fee of 10 per cent. on the recovery, if any, in a suit brought by the attorney to enforce a claim of the heirs, there being no means of paying counsel fees except out of the recovery, is valid, and entitles the attorney to alien on the recovery of his fee.

In Equity. Suit by Thomas J. Semmes against W. W. Whitney, administrator of the succession of Myra Clark Gaines, to enforce an attorney's lien. Decree for plaintiff.

*Thos. J. Semmes*, for complainant.

*Rouse & Grant*, for defendant.

BILLINGS, District Judge. This is a suit in which an attorney at law who conducted the case for the plaintiff, terminating in a judgment in her favor, sues in equity to recover his fee, and have it declared to be a lien upon the judgment.

The first question is as to jurisdiction. The plaintiff is a citizen of Louisiana, and the defendant, though administrator of an estate who is appointed by the Louisiana mortuary court, is a citizen of Massachusetts. The case of *Rice v. Houston*, 13 Wall. 66, is conclusive as to the question of general jurisdiction, i. e., it settles the law to be that, the parties being citizens of different states, jurisdiction is not defeated because one is administrator appointed by the courts of the state of which the other is a citizen. Code Proc. La. arts. 924, 983, undoubtedly give, so far as the courts of the state of Louisiana are concerned, exclusive jurisdiction to the probate court. But this state legislation has no effect to prevent the circuit courts of the United States from exercising jurisdiction. That jurisdiction springs from the putting into operation by congress the constitution of the United States, and cannot be impaired by the states. *Lawrence v. Nelson*, 143 U. S. 215, 228, 12 Sup. Ct. Rep. 440, and *Payne v. Hook*, 7 Wall. 425. This court has jurisdiction, and can render a decree which would, as to the amount of the debt and the existence of the lien, conclude the administrator and the succession. The lien, being that of a solicitor who has recovered a judgment, upon that judgment springs both from the doctrine of the equity courts and from a statute of the state of Louisiana. The lien gives almost a proprietary interest in the judgment. It would be only the residue of the judgment, after deducting the amount of the solicitor's fee, which would,



in the ordinary course of things, be paid over by the plaintiff to the succession. In case of the insolvency of the succession, even if the probate court might have to determine the rank or priority of the lien as between the complainant and the holders of other privileges, the effect of the judgment would still be, beyond all controversy, to fix, as between the plaintiff and the succession, the amount due and the lien upon the specific thing, the judgment. A strong effort was made in the argument to distinguish this case from those where jurisdiction has been maintained, because, in this case, the contract sued upon was made, and the whole work under it performed, after the death of the intestate; the force of the argument being that the mortuary court would so much more properly deal with a case which had entirely arisen under its administration of an estate. But this argument is overcome, as is the state statute, by the force of the paramount law of the United States found in the constitution as put in force by congress. The court, in my opinion, has jurisdiction.

As to the case on the merits. The suit is brought on a contract made between the complainant and the natural tutor and tutrix of the minor heirs. For aiding in conducting this case in this court and in the supreme court the complainant was to receive, in money or bonds, 10 per centum of the amount recovered. The agreement as to the facts upon which the case has been submitted contains the following: "When the contracts were made with the complainants, the estate of Mrs. Gaines had no means of payment of counsel fees or expenses other than recovery in said suit;" that is, the suit in which the employment was had. With this fact in the record, the power to make a contract fixing a contingent fee would seem to necessarily exist in those who administered the estate, as there was nothing but a contingent fee which could be promised. In *Taylor v. Bemiss*, 110 U. S. 44, 3 Sup. Ct. Rep. 441, the court declare the validity of just such a contract made with a tutrix in Louisiana, in these words:

"The bill of the minor heirs states that Mrs. Bemiss had been appointed by the proper court in Louisiana natural tutrix of these children. We are of opinion that this appointment made it her duty to take the necessary steps to obtain this money from the United States, and that, whether the suit was brought in her own name, or in hers jointly with her children, she was equally bound to prosecute it with diligence, and to do all that was necessary to recover the money. It would be a queer condition of the law if, while it imposed this obligation upon her, it gave her no authority to employ counsel to prosecute the claim before the only legal tribunal which could allow it; and, if she could employ counsel, it follows, as a matter of course, she could make a contract for the amount of their compensation. This agreement would bind her as tutrix as well as in her individual right, and it is in both characters she professes to contract. Such undoubtedly is the law of Louisiana, which must govern as to her powers as tutrix, since it is there she was appointed, and there both she and her children resided when she made the agreement with Taylor and Wood. Of her authority to make such a contract as tutrix we have no doubt."

This would be the ruling of the court, unless the evidence as to what was a reasonable or just compensation is such as to make the contract seem unconscionable, or to excite the suspicion of fraud or the want of

due attention to the matter of the contract on the part of the tutor and tutrix. This testimony consists of the whole record of the case in which the fee is claimed to have been earned, and the statements of Mr. Benedict and Prof. Denis. One of these gentlemen fixes the amount of a reasonable fee for Mr. Semmes and Mr. Goldthwaite, each, at 5 per cent. of the recovery; the other, at 10 per cent. Mr. Benedict does not seem to have had his attention particularly called to the fact that the fee was necessarily contingent. There has therefore been no case made upon the proofs which would authorize a court of equity to look upon the amount of the contract compensation as inequitable. My conclusion, therefore, is that the complainant must have a decree for 10 per cent. of the amount recovered according to the terms of the contract, as the payment shall be made in money or bonds, with the lien upon the judgment as prayed for in the bill of complaint.

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GOLDTHWAITE v. WHITNEY.

(Circuit Court, E. D. Louisiana. June 6, 1892.)

No. 12,019.

ATTORNEYS—VALIDITY OF CONTINGENT FEES.

A contract had been made between an attorney at law and the intestate for a fixed fee. Subsequently, and after the death of the intestate, the attorney made a new bargain with the representatives of the estate, by which there was substituted for the fixed fee a contingent fee of 10 per cent. of the amount recovered. *Held* that, for the reasons given in the foregoing case, the second agreement was valid.

In Equity. Suit by Alfred Goldthwaite against W. W. Whitney, administrator of the succession of Myra Clark Gaines, to enforce an attorney's lien. Decree for plaintiff.

*Thos. J. Semmes*, for complainant.

*Rouse & Grant*, for defendant.

BILLINGS, District Judge. The facts in this case are the same as in the preceding, (50 Fed. Rep. 666,) except that Mr. Goldthwaite had been employed during the lifetime of the intestate, and had a contract for an absolute sum, \$50,000, for which the contingent fee of 10 per cent. was substituted by a contract made by him and the tutor and tutrix of the heirs after the death of Mrs. Gaines. I think the same rules of law govern the two cases as to the validity of the contract, and that there must be the same judgment in this as in the preceding case.

## UNITED STATES v. BRADDOCK.

(Circuit Court, S. D. California. May 22, 1892.)

No. 210.

**1. PUBLIC LANDS—TIMBER ENTRIES—REFUSAL OF CERTIFICATE.**

In a suit by the government to restrain defendant from cutting timber from a quarter section of public land, defendant filed a cross bill alleging that he had made application to purchase the land in question under the stone and timber act, (20 St. p. 89,) and complied with all the statutory requirements in that respect; but upon tender of the purchase money the local land officers refused the tender, and declined to issue a certificate of entry and purchase. *Held*, that defendant had acquired no vested interest in the land, and the government was entitled to withdraw it from sale. *The Yosemite Valley Case*, 15 Wall. 77, followed.

**2. SAME—INJUNCTION—SUFFICIENCY OF CROSS BILL.**

The cross bill having failed to show that the cross complainant was prevented from entering the land by reason of any fault on the part of the land officers, the rule that where one offers to do anything upon which the acquisition of a right depends, and is prevented by the fault of the other side, had no application to the case. An allegation that such officers combined to deprive cross complainant of the land, without stating the acts done or omitted in pursuance of the combination, was insufficient to make the rule applicable.

In Equity. Suit by the United States against Walter Braddock to restrain defendant from cutting timber on public land. Cross bill by defendant, setting up an application to purchase the land and compliance with statutory requirements, and alleging a wrongful refusal of the land officers to issue a certificate of entry and purchase. Heard on demurrer to the cross bill. Demurrer sustained.

*M. T. Allen*, U. S. Atty.

*H. C. Dillon*, for defendant.

Ross, District Judge. This suit was commenced to obtain an injunction restraining the defendant from cutting timber from a certain quarter section of timber land situated in township 15 S., range 25 E., Mount Diablo base and meridian, of which the bill alleges the government is, and since the acquisition of California has been, the owner in fee. The defendant filed an answer to the bill, and also a cross bill, to which the government interposed a demurrer, now for disposition. The cross bill, in effect, alleges that on the 5th day of October, 1885, the land in question was surveyed unappropriated timber land of the United States, and open to sale under the terms and provisions of the act of congress of June 3, 1878, (20 St. p. 89,) known as the "Timber and Stone Act;" that on that day cross complainant had the necessary qualifications to enter and purchase the land, and did then, pursuant to law and the regulations of the land department, make application to purchase it, by presenting to the register of the land office of the district in which the land is situate his affidavit, in duplicate, setting forth the statutory requirements, and which was in all things true; that upon the filing of the affidavit the register posted a notice of the application to purchase in the land office for the period of 60 days, and furnished the cross complainant, as such applicant, a copy thereof for publication in the newspaper published nearest the location of the land, which notice the applicant caused to be so published continuously for 60 days; that

upon the last day appointed in the notice, which was not less than 60 nor more than 90 days from its first publication, cross complainant furnished to the register satisfactory evidence that the notice was published as required by law, and that at the same time cross complainant, as such applicant, "presented proofs from at least two disinterested witnesses that the said land was of the character contemplated in the said act of congress; that it was unoccupied, and without any improvements; that it apparently contained no valuable deposit of gold, silver, cinabar, copper, or coal; that at the hearing no contestant or objector appeared; that your orator further presented then and there a supplemental affidavit, at the request of the said register, reciting again the facts of his first affidavit, as aforesaid, and showing that he had not in the interval incumbered the said land, nor made any agreement or contract so that his entry thereof would benefit any one else, and that the money then and there tendered by your orator, as hereinafter stated, was veritably his own, and not borrowed for the purpose upon the said land; which said affidavits and proofs, so presented and made as aforesaid, were true in every particular, and were received, accepted, filed, and approved by the said register, and were then and there declared to be, and were in fact, satisfactory to both the register and receiver of said land office; that then and there, and on, to wit, the year last aforesaid, at the land office aforesaid, your orator, as such applicant, tendered to Tipton Lindsey, then and there being the receiver of the said land office, the full sum of \$410 in gold coin of the United States, in payment for the said land, that being the price for 160 acres of land, at \$2.50 per acre, together with the legal fees of the said land office." The cross bill further alleges as follows:

"That the said J. D. Hyde, register, and the said Tipton Lindsey, receiver, of the said land office, combining and confederating together with one A. J. [Wm. A. J.] Sparks, then and there being the commissioner of the general land office of the defendant, and all of them pretending to act under the authority of the defendant, but in truth and in fact acting without authority of law and without any authority whatever; and the said defendant, combining and confederating with divers persons to your orator unknown, but whose names when discovered your orator prays may be inserted herein as defendants to his cross bill, and made parties hereto, with proper and apt words to charge them; and contriving how to injure and oppress your orator, and deprive him of the said lands,—the said register refused to accept, execute, and deliver to your orator a proper certificate for the entry and purchase of said land, or any certificate whatever of the said entry and purchase by your orator; and the said receiver refused to execute and deliver to your orator a proper or any receipt for such purchase money so tendered by your orator as aforesaid in payment for the said land; that thereupon your orator duly and regularly appealed from the decision of the register and receiver in thus refusing the said tender, and in refusing to issue to him a certificate of the entry and purchase of the said land; that the said appeal was taken to the honorable commissioner of the general land office of the United States of America within the 30 days allowed by law therefor; that afterwards, and in said general land office, such proceedings were had upon said appeal that the commissioner, the Honorable William A. (Lewis A.) Groff, on or about the 31st day of March, A. D. 1891, then and there being the commissioner



of the general land office, reversed the said decision of the register and receiver of the said land office at Visalia; but afterwards, and on or about the 10th day of April in the year 1891, the Honorable John Noble, then and there being the secretary of the interior department of the United States of America, upon reference of the said decision to him from the said commissioner of the general land office, refused to concur therein, and refused to issue or recommend to be issued to your orator a patent for the said land, and canceled said entry."

The act under which the cross complainant applied to purchase the land in question is, as has been said, that of June 3, 1878, (20 St. p. 89.) By the first section of the act it is provided that, subject to certain provisions not necessary to be mentioned, the surveyed public lands of the United States within the states of California, Oregon, and Nevada, and in Washington Territory, not included within military, Indian, or other reservations of the United States, valuable chiefly for timber, but unfit for cultivation, and which have not been offered at public sale according to law, may be sold to citizens of the United States, or persons who have declared their intention to become such, in quantities not exceeding 160 acres to any one person or association of persons, at the minimum price of \$2.50 per acre. By the second section it is provided that any person desiring to avail himself of the provisions of the act shall file with the register of the proper district a written statement in duplicate, one of which is to be transmitted to the general land office, designating by legal subdivisions the particular tract of land he desires to purchase, setting forth that the same is unfit for cultivation, and valuable chiefly for its timber or stone; that it is uninhabited; contains no mining or other improvements, except for ditch or canal purposes where any such do exist, save such as were made by or belong to the applicant, nor, as deponent verily believes, any valuable deposit of gold, silver, cinnabar, copper, or coal; that deponent has made no other application under the act; that he does not apply to purchase the same on speculation, but in good faith to appropriate it to his own exclusive use and benefit; and that he has not, directly or indirectly, made any agreement or contract, in any way or manner, with any person or persons whatsoever, by which the title which he might acquire from the government of the United States should inure, in whole or in part, to the benefit of any person except himself; which statement must be verified by the oath of the applicant. By the third section it is provided that upon the filing of the statement, as provided in the second section of the act, the register shall post a notice of the application, embracing a description of the land, in his office for 60 days, and shall furnish the applicant a copy of the same for publication in a newspaper published nearest the location of the land, for a similar period; and after the expiration of the 60 days, if no adverse claim shall have been filed, the person desiring to purchase shall furnish to the register satisfactory evidence—*First*, that notice of the application was duly published as required; *secondly*, that the land is of the character contemplated in the act, unoccupied and without improvements, other than those excepted, and that it apparently contains no valuable deposit of gold, silver, cinnabar, copper,

or coal; and upon payment to the proper officer of the purchase money of the land, together with the fees of the register and receiver, the applicant may be permitted to enter the land, and, on the transmission to the general land office of the papers and testimony in the case, a patent shall issue thereon. It is also provided that effect shall be given to the provisions of the act by regulations to be prescribed by the commissioner of the general land office.

It is perfectly clear that the mere filing of the application to purchase under this act confers upon the applicant no right as against the United States, and that, until the applicant has acquired a vested right in the land, it is within the power of the government to withdraw it from sale or make any other disposition of it. The filing of an application to purchase may initiate a right to purchase as against a subsequent applicant for the same privilege, but to say that the initiation of such a right imposes an obligation on the government to convey the title is to confound the manifest distinction pointed out by the supreme court in the *Yosemite Valley Case*, 15 Wall. 77, between the acquisition of a legal right to the land as against the owner, the United States, and the acquisition of a legal right as against other parties to be preferred in its purchase. "It seems to us little less than absurd," said the court in the case cited, "to say that a settler or any other person, by acquiring a right to be preferred in the purchase of property, provided a sale is made by the owner, thereby acquires a right to compel the owner to sell, or such an interest in the property as to deprive the owner of the power to control its disposition."

There can be no doubt of the correctness of the doctrine that where one offers to do everything upon which the acquisition of a right depends, and is prevented by the fault of the other side, his right is not lost by his failure. It is strenuously urged by counsel for cross complainant that the present case comes within this principle. But the difficulty is that the cross bill does not show that the cross complainant was prevented from entering the land in question by reason of any fault on the part of the officers of the land department of the government. Such a fault, if it existed, should have been set forth. The facts in respect to the matter should have been stated. It is not enough to charge generally, as is done in the cross bill, that the then register and receiver and commissioner of the land office combined to deprive cross complainant of the land in question, without stating the acts done or omitted to be done in pursuance of such combination. It is alleged that the receiver of the land office refused to execute to the cross complainant a receipt for the money tendered for the land, and that the register refused to execute to him a certificate of entry or purchase; and, although there is no direct averment of the fact, it sufficiently appears—the pleading being taken, as it should be, most strongly against the pleader—that the officers of the local land office refused to receive the money tendered, or to permit the cross complainant to enter the land. Why, does not appear from the cross bill. In an opinion by the secretary of the interior in regard to this same land, in connection with other lands, rendered April 6, 1891,

(Copp, Landowner, May 1, 1891, p. 35,) it is said that the tender of payment was refused, and the application to purchase rejected by the local officers, for the reason that by telegram of December 2 and letter of December 24, 1885, the townships in which the said lands are situate were suspended from entry or filing under the land laws by the commissioner of the general land office; that such suspension and withdrawal of the townships was on account of alleged irregularities and fraud on the part of the claimants; and that this order of suspension and withdrawal was not revoked as to the townships in which the lands in question are situate prior to the acts of congress of September 25 and October 1, 1890, (26 St. pp. 478, 650,) purporting to reserve the land in question, among other lands, for a park and other purposes.

The matters thus stated in the opinion of the secretary of the interior cannot, perhaps, be accepted as facts in passing upon the demurrer to the cross bill, since that pleading omits all mention of them; but it is sufficient ground of objection to it that they may have constituted the reason why the officers of the land department of the government refused to receive the cross complainant's money for the land, or to permit him to enter it. "The commissioner of the general land office exercises a general superintendence over the subordinate officers of his department, and is clothed with liberal powers of control, to be exercised for the purposes of justice, and to prevent the consequences of inadvertence, irregularity, mistake, and fraud, in the important and extensive operations of that officer for the disposal of the public domain." *Bell v. Hearne*, 19 How. 262. And, by the third section of the act under which the application in question was made, the commissioner is expressly required to give effect to its provisions by regulations to be prescribed by him. As was justly said by the secretary of the interior in the opinion to which allusion has been made, an application to purchase land under the act of June 3, 1878, is certainly, as against the United States, of no greater force than a claim initiated by settlement and residence upon and improvement of public lands under the provisions of the late pre-emption law, in respect to which the doctrine is firmly established that the power of regulation and disposition conferred upon congress by the constitution only ceases when all the preliminary acts prescribed by the statute for the acquisition of the title, including the payment of the price for the land, have been performed by the settler. "When these prerequisites have been complied with," said the court in the *Yosemite Case*, *supra*, "the settler for the first time acquires a vested interest in the premises occupied by him of which he cannot be subsequently deprived. He is then entitled to a certificate of entry, from the local land officers, and ultimately to a patent for the land from the United States. Until such payment and entry the acts of congress give to the settler only a privilege of pre-emption in case the lands are offered for sale in the usual manner; that is, the privilege to purchase them in that event in preference to others." For the reasons stated the demurrer must be sustained, without reference to other objections urged to the cross bill. So ordered.

**PRETECA et al. v. MAXWELL LAND GRANT Co.***(Circuit Court of Appeals, Eighth Circuit. May 16, 1892.)*

No. 58.

**1. EQUITY—JURISDICTION—MULTIPLICITY OF SUITS—BILL.**

Complainant's bill averred that it was the owner of certain lands to which its title had been established by divers actions at law against persons in like cases with defendants; that defendants were unlawfully in possession of part of said land, mining and removing valuable minerals therefrom, and cutting timber growing thereon; that the damages for these unlawful acts was incapable of computation and adjudication at law; that while complainant's title was single and exclusive, as against all the defendants, it could not be quieted without numerous actions at law, involving the same question, because defendants' claims, as between themselves, were separate and different; and it prayed that complainant's title might be quieted, and defendants restrained by injunction from committing further trespasses. *Held*, that the averments of the bill make the case one of equitable cognizance.

**2. APPEAL—OBJECTIONS NOT RAISED BELOW—JURISDICTION OF EQUITY.**

Though there may be a doubt whether the case made by a bill is one of equitable jurisdiction, because of the remedy that complainant may have at law, the doubt will, on appeal, be resolved in favor of the jurisdiction, where the question was not raised below.

Appeal from the Circuit Court of the United States for the District of Colorado, sitting at Denver.

Bill in equity by the Maxwell Land Grant Company against Vicente Preteca and others to quiet title and restrain trespasses. There was a decree for complainant, pursuant to a stipulation filed, and defendants appeal. Decree affirmed.

*Alexander Graves*, for appellants.

Before CALDWELL and SANBORN, Circuit Judges, and SHIRAS, District Judge.

CALDWELL, Circuit Judge. The complainant filed its bill in equity in the court below, alleging that it was the legal owner of the lands described in the bill known as the "Beaubien and Miranda Grant;" that complainant's "title to the said lands has been established at law by divers actions of ejectment, duly and regularly brought and prosecuted to judgment in the courts of the territory of New Mexico, by and on behalf of your orator and those through whom it derives its title, against persons in like situation with said defendants, which said actions at law involved and depended on the same questions of title now in controversy between your orator and each of said defendants; that your orator, and, as it is informed and believes, its several predecessors in interest successively, have occupied and held possession of the said grant and tract of land, claiming the whole thereof under the said grant, patent, and conveyances (with the exception aforesaid) continuously from the date of delivery of juridical possession thereof by the Mexican government in A. D. 1843 to the present time, save in so far as they have from time to time been interfered with by the unlawful acts of said defendants and others in like situation as to portions thereof;" that the defendants "have lately wrongfully, unlawfully, and without the permission of your orator entered upon and taken possession of certain portions of the said lands



of your orator not heretofore conveyed to any other party under whom the said defendants, or any of them, claim any right thereto, and still hold and maintain possession thereof, and have excluded, and still do exclude, your orator, and those claiming under it, from occupying and enjoying the same, and have proceeded to mine, remove, and appropriate to their own use the precious and valuable minerals, ores, and coal in and upon said lands; to cut, remove, and use the trees and timber, grass and hay, growing thereon; \* \* \* that the said acts of said defendants are not committed upon any portion of said grant and tract of land claimed or held by them, or any of them, under any grant from the government of Mexico, or under any conveyance or license from your orator, or any of its predecessors in interest, but solely on the pretended ground that said grant is public domain of the United States, and that they have the right to enter the same as such;" that "the damages resulting from the said unlawful acts of the said defendants are of such a nature as to be incapable of computation and adjudication at law, and as to require, if sued for at law, a multiplicity of suits, at various and successive times, against various parties, as to the same subject-matter, and founded upon the same claim, right, and title, and at great cost, expense, and vexation to your orator, and that your orator will therefore sustain irreparable loss and damage by means of the said repeated, continuous, and various acts and trespasses, unless the same are restrained by the order of this honorable court; \* \* \* that the claims of the said defendants, although separate and different as between themselves, are all subordinate to your orator's single title, and to its rights, and are assertions of claims which cast a cloud upon your orator's possession and title, and prevent your orator from the peaceable enjoyment of the fruits of its said ownership; that the right, title, and claim of your orator is single, general, and exclusive against all of said defendants, and that such right and title cannot be quieted at law by one or two actions, but numerous suits would be required, involving the same question, wherein each suit would determine such right only between your orator and the defendant in that suit, thereby making great and unnecessary costs, expense, and vexation, both to your orator and said defendants." The bill prayed for a decree quieting complainant's title, and for a perpetual injunction restraining the defendants from mining or from committing other acts of trespass upon the lands. The defendants entered their appearance to the suit, and filed an answer and cross bill. On the 21st day of June, 1890, the following stipulation was entered into between the parties to the suit:

"It is stipulated and agreed that the above-entitled cause may be continued until after the appeal in the case of *Interstate Land Co. v. Maxwell Land Grant Co.*, No. 2365 on the docket of this court, has been determined by the supreme court of the United States, and, in the event that the judgment of the circuit court in the aforesaid case is reversed by the supreme court of the United States, then this case shall stand for trial; and in the event that the judgment of the circuit court is affirmed, then the cross complaint in this case shall be dismissed, the denials of the defendants withdrawn, and judgment entered for the plaintiff in accordance with the prayer of the complaint."

The case of *Interstate Land Co. v. Maxwell Land Grant Co.*, mentioned in the stipulation, was determined by the supreme court of the United States in favor of the Maxwell Land Grant Company, (11 Sup. Ct. Rep. 656,) and thereupon a decree was rendered in this cause by the court below, in exact conformity to the stipulation of the parties. From this decree the defendants appealed to this court.

The only error relied upon in argument is that the complainant's remedy was at law, "and a court of chancery has no jurisdiction of the cause." From the averments of the bill it is obvious the complainant resorted to equity to avoid a multiplicity of suits and irreparable damage resulting from continued acts of waste and trespass to land. These are recognized heads of equity jurisdiction. A court of equity may take cognizance of a controversy to prevent a multiplicity of suits, although the exercise of such jurisdiction may call for the adjudication upon purely legal rights and confer purely legal relief; and so a court has jurisdiction to restrain waste and trespass to land where the facts are of such a nature that the law cannot afford adequate relief. 1 Pom. Eq. Jur. §§ 243, 245, 252, 271-274, and cases there cited. The bill avers that the complainant's title has been finally adjudicated in its favor by a court of competent jurisdiction in suits brought against persons in like situations with the defendants. The averments of the bill make the case one of equitable cognizance. Against irresponsible parties taking mineral out of the land and removing the same, and cutting and removing timber, actions of ejectment would have been wholly inadequate for the protection of the complainant's rights.

It may be true that the complainant had a remedy at law, but "it is not enough that there is a remedy at law; it must be plain and adequate, or, in other words, as practical and as efficient to the ends of justice and its prompt administration as the remedy in equity." *Boyce v. Grundy*, 8 Pet. 215; *Oelrichs v. Spain*, 15 Wall. 211, 228. This objection was not made in the court below. In the states where the distinction between law and equity is still maintained, the prevailing rule is that such an objection will not be sustained by the appellate court, unless it was made and insisted on in the court below. *Moss v. Adams*, 32 Ark. 562; *May v. Goodwin*, 27 Ga. 352; *Stout v. Cook*, 41 Ill. 447; *Crocker v. Dillon*, 133 Mass. 91; *Russell v. Loring*, 3 Allen, 121, 125; *Blair v. Railroad Co.*, 89 Mo. 383, 1 S. W. Rep. 350; *Iron Co. v. Trotter*, 43 N. J. Eq. 185, 204, 7 Atl. Rep. 650, and 10 Atl. Rep. 607; *Underhill v. Van Cortlandt*, 2 Johns. Ch. 339, 369. And in the courts of the United States the objection, when made for the first time in the appellate court, is looked upon with extreme disfavor. In the late case of *Tyler v. Savage*, 143 U. S. 79, 12 Sup. Ct. Rep. 340, the court say:

"In recent cases in this court the subject of the raising for the first time in this court of the question of want of jurisdiction in equity has been considered. In *Reynes v. Dumont*, 130 U. S. 354, 395, 9 Sup. Ct. Rep. 486, it was said that the court, for its own protection, might prevent matters properly cognizable at law from being drawn into chancery at the pleasure of the parties interested, but that it by no means followed, where the subject-matter belonged to that class over which a court of equity had jurisdiction, and the

objection that the complainant had an adequate remedy at law was not made until the hearing in the appellate tribunal, that the latter could exercise no discretion in the disposition of such objection; and reference was made to 1 Daniell, Ch. Pr. (4th Amer. Ed.) 555; *Wylie v. Coxe*, 15 How. 415, 420; *Oelrichs v. Spain*, 15 Wall. 211; and *Lewis v. Cocks*, 23 Wall. 466. To the same effect are *Kilbourn v. Sunderland*, 130 U. S. 505, 514, 9 Sup. Ct. Rep. 594; *Brown v. Iron Co.*, 134 U. S. 530, 535, 536, 10 Sup. Ct. Rep. 604; and *Allen v. Car Co.*, 139 U. S. 658, 662, 11 Sup. Ct. Rep. 682."

Answering an objection of this kind made for the first time in the supreme court, Chief Justice FULLER, speaking for the court, said:

"Under the circumstances of this case, it comes altogether too late, even though, if taken *in limine*, it might have been worthy of attention." *Keynes v. Dumont*, 130 U. S. 354, 395, 9 Sup. Ct. Rep. 486.

We think the facts alleged in the bill make the case one of equitable cognizance, but, if we entertained doubts of this point, we would, because of the fact that the objection was not made in the court below, resolve them in favor of the jurisdiction. Decree affirmed.

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DELAWARE & A. TELEGRAPH & TELEPHONE CO. v. STATE OF DELAWARE *ex rel.* POSTAL TELEGRAPH-CABLE CO.

(Circuit Court of Appeals, Third Circuit. April 21, 1893.)

No. 2.

1. TELEPHONE COMPANIES—COMMON CARRIERS—DUTY TO FURNISH EQUAL FACILITIES.  
Telephone companies are subject to the rules governing common carriers, and are bound to furnish equal facilities to all persons or corporations belonging to the classes which they undertake to serve.
2. SAME—USE OF PATENTED INSTRUMENTS.  
They are not exempt from this obligation by the fact that the instruments by which their business is carried on are patented; for while a patentee has a perfect title to the thing patented, and its use, and is not bound to apply it to a public use, yet when he does so he is bound by the rules governing such use.
3. SAME—LICENSE—MONOPOLIES—TRANSMISSION OF TELEGRAPHIC MESSAGES.  
A Delaware telephone company, which furnishes facilities to the Western Union Telegraph Company for the transmission of telegraphic messages, cannot be excused from furnishing like facilities to other telegraph companies because its license to use the telephones is expressly subject to an exclusive license in favor of the Western Union Company for the transmission of telegraphic messages; for such exclusive license creates a monopoly, and is void under the Delaware law.

Error to the Circuit Court of the United States for the District of Delaware.

Petition by the Postal Telegraph-Cable Company for a writ of *mandamus* to compel the Delaware & Atlantic Telegraph & Telephone Company to place a telephone transmitter and receiver in the office of relator on the same terms as are given to other subscribers. The petition was originally brought in the superior court of the state of Delaware, for New Castle county, and was removed therefrom to the court below, which awarded the writ as prayed. See 47 Fed. Rep. 633. Respondent brings error. Affirmed.

*Charles L. Buckingham and Edward G. Bradford*, for plaintiff in error.

*R. S. Guernsey and George H. Bates*, for defendant in error.

Before ACHESON, Circuit Judge, and BUTLER and GREEN, District Judges.

BUTLER, District Judge. There is no controversy about the facts of this case. The relator owns and operates a telegraph system with lines extending throughout the country, having its principal office in the city of Wilmington. The respondent owns and operates a telephone exchange in Wilmington connected with the places of business and residences of subscribers, to whom telephonic facilities are furnished. One of the subscribers enjoying such facilities is the Western Union Telegraph Company. The relator, desiring similar facilities, on the 20th of November, 1889, applied to the respondent for connection with its exchange, and the application was refused. The proofs show that up to November 10, 1879, the National Bell Telephone Company and the Western Union Telegraph Company were owners of rival telephone patents, about which they had been engaged in litigation. At that date they entered into a contract by virtue of which the former company became owner of the patents previously held by the latter, and the latter company acquired an exclusive license to use the telephone for transmitting telegraphic messages under all the patents for a term of 17 years. Subsequently the patents were assigned, subject to this license, to the American Bell Telephone Company. All licenses, including the respondent's, subsequently granted under the patents have been made subject to that of the Western Union Telegraph Company.

It is no longer open to question that telephone and telegraph companies are subject to the rules governing common carriers and others engaged in like public employment. This has been so frequently decided that the point must be regarded as settled. While it has not been directly before the supreme court of the United States, cases in which it has been so determined are cited approvingly by that court in *Budd v. New York*, 143 U. S. 517, 12 Sup. Ct. Rep. 468. While such companies are not required to extend their facilities beyond such reasonable limits as they prescribe for themselves, they cannot discriminate between individuals of classes which they undertake to serve. As common carriers of merchandise may prescribe the points between which they will carry and the description of goods they will accept, so, doubtless, may carriers of messages limit their business and obligations. If, therefore, the respondent had confined the use of its telephonic facilities to the carriage of personal messages for individuals, excluding those of telegraph companies and others who forward messages for hire, the relator would, probably, have no just ground of complaint. As we have seen, however, it did not so limit its business, but carried telegraphic messages, as well as others. The respondent contends, however, that this was not its voluntary act; that the Western Union Telegraph Company had acquired rights superior to its own, and that it could not, therefore, ex-

clude this company from the use of its facilities. This position cannot be sustained. The admission of the Western Union Telegraph Company to its system was the respondent's voluntary act. Such admission could only be obtained by its express consent. To say that its license required such admission does not help the respondent. It voluntarily accepted the license and assented to its terms. Nor does it help the respondent to say that the license could not be obtained on other terms. If not, it could have been declined. Had it been, and the business avoided, the responsibilities which attend it would also have been avoided. Accepting the license, however, as the respondent did, and engaging in the carriage of messages, it cannot escape the public duties which attend the employment. It must carry for all persons belonging to the classes it undertakes to accommodate. Its alleged responsibility to the licensor for so carrying impartially affords no excuse. The responsibility was improperly assumed, if it exists. But it does not exist. The object of the stipulation out of which it is supposed to arise, as well as that of the contract in which it originated, between the Western Union Telegraph Company and the National Bell Telephone Company, was to accomplish a result which the law forbids. In other words it was to effect precisely what has occurred,—the establishment of a system of telephone lines and exchanges to carry telegraphic messages, as well as others, which should be so conducted as to confer a monopoly on one telegraph company. Had the owner of the patents come to Delaware and undertaken to do what has been done, it can scarcely be questioned that its act would have been unlawful. And yet this is substantially what has occurred. The owner has effected it through the instrumentality of a license. The respondent has simply done what the owner authorized and required.

It is urged, however, that the Western Union Telegraph Company is not a mere licensee of the National Bell Telephone Company, but something more; that prior to its contract with that company it was the exclusive owner of certain patents under which it might have applied the telephone to its own exclusive use in carrying telegraphic messages; that the effect of its contract was to leave its right to do this unimpaired; and that its subsequent arrangement with the respondent for carrying its messages is simply the exercise of this right, of which no one can justly complain. This statement is defective in several particulars. *First*, it is not true that the Western Union Telegraph Company was originally the owner of patents which enabled it to apply the telephone to its use. Its patents, as conceded on the argument, were mainly, if not exclusively, for improvements on the Bell invention, which could not be used without license from the National Bell Telephone Company. *Second*, it parted absolutely with these patents and took a license, not under them alone, but also under the former patents of the National Bell Telephone Company. It is therefore a licensee and nothing more. But this fact that it is simply a licensee is not of essential importance. The difficulty encountered does not arise out of it, but out of the circumstance that the Western Union Telegraph Company did not employ its rights in the

manner above indicated. Had it done so, and thus kept its interest and business distinct and separate from that of subsequent licensees by establishing its own system of lines and exchanges and confining such subsequent licensees to the transmission of individual messages, this controversy might not, and doubtless would not, have arisen. Instead, however,—and no doubt to avoid the expense attending it which would possibly have rendered the scheme impracticable—the Western Union Telegraph Company sought through the means devised and employed to secure an advantage over other similar companies, by obtaining a monopoly in the systems and business of such licensees. In other words, it contracted with these licensees to carry its messages to the exclusion of all similar messages of others. This, as we have seen, the licensees could not lawfully do; and consequently, as before stated, the contracts by which it was sought to be accomplished are void.

The respondent supposes importance is attributable to the fact that the telephone is protected by patent, and cites *American Rapid Tel. Co. v. Connecticut Tel. Co.*, 49 Conn. 352, 372, in which it is said:

"The plaintiff insists that the defendant has offered its services to the public as a common carrier of articulate speech; that it has thereby made itself the servant of the public and has subjected itself to the operation of the general law which compels all such servants to serve applicants impartially, regardless of the limitations placed upon its use of the instruments. But the property of the American Bell Telephone Company in its patents is absolute and exclusive; it can rent or sell it in whole or in part; it can refuse to make or use, or to allow any one else to make or use, the telephone described in it; or it can make and sell one and no more, and put such restrictions as it pleases upon the time, place, and manner of using that; and it was the privilege of the Connecticut Telephone Company to purchase from it even the most limited right to use one or more of its instruments, and it is not within the power of the court either to enlarge or diminish the purchase."

This statement is mainly correct, but the deductions drawn from it—that one engaged in the business of carrying messages who employs the telephone as a means of conveyance is exempt from the operation of the rules which govern common carriers and others engaged in like public employment—we cannot adopt. Where one engages in such public business it is of no consequence whether the means or instruments whereby it is conducted are patented or not. It is the *business* that is regulated. A patent secures title to the thing patented and its use, just as the law secures title to other descriptions of property. The owner need not apply his property of either description to such public employment, but if he does, the employment itself will be subject to the rules which the law has prescribed for its government, without respect to the means or instrument by which it is conducted.

We do not regard the *Express Cases*, 117 U. S. 1, 6 Sup. Ct. Rep. 542, 628, cited by the respondent, as applicable here. On the facts they are distinguishable from this case; and the exception which they establish to the general rules governing common carriers is not likely to be enlarged. The history of these cases, the division of the court over them, and the opinions of the sev-



eral circuit courts in which they originated, do not, we think, leave this in doubt.

It would be unprofitable to extend the discussion. The decisions of the several state courts in cases involving the same questions, and their citation with approval by the supreme court of the United States, are virtually conclusive. See *Chesapeake & P. Tel. Co. v. Baltimore & O. Tel. Co.*, 66 Md. 399, 7 Atl. Rep. 809; *State of Missouri v. Bell Telephone Co.*, 23 Fed. Rep. 539; *State of Ohio v. Bell Telephone Co.*, 36 Ohio St. 296; *State v. Bell Telephone Co.*, 22 Alb. Law J. 363; *Commercial Union Tel. Co. v. New England Telephone & Telegraph Co.*, 61 Vt. 241, 17 Atl. Rep. 1071; *Louisville Transfer Co. v. American Dist. Tel. Co.*, 1 Ky. Law J. 144; *Central Union Telephone Co. v. State*, 118 Ind. 194, 19 N. E. Rep. 604; *Budd v. New York*, *supra*.

The judgment of the circuit court is affirmed.

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GOTTSCHALK CO. OF BALTIMORE CITY v. DISTILLING & CATTLE FEEDING  
CO. OF ILLINOIS.

(Circuit Court, D. Maryland. April 19, 1892.)

**FOREIGN CORPORATIONS—SERVICE ON AGENT.**

A nonresident corporation sold its goods only to certain persons in each state, whom, in its circulars, it styled "distributing agents," under an agreement whereby each of the latter was to buy exclusively from it, and to sell at trade prices prescribed by it. On complying with these conditions for a given time, the "agent" was to become entitled to a certain rebate, and also to have authority to issue to his wholesale customers certificates binding the corporation to pay a rebate directly to them, provided they continued for a given time to purchase from him exclusively. He sustained no other relation to the company, and the goods purchased by him were absolutely his own. *Held*, that he was not the agent of the corporation, within the meaning of Code Md. art. 28, §§ 295, 296, authorizing service against foreign corporations upon their agents or attorneys.

**At Law.** Action by the Gottschalk Company of Baltimore City against the Distilling & Cattle Feeding Company of Illinois. Motion to set aside the return of service. Granted.

*Wm. Pinkney Whyte* and *Isidor Rayner*, for plaintiff.

*M. R. Walter*, for defendant.

**MORRIS**, District Judge. This action was begun in the superior court of Baltimore city. The defendant is an Illinois corporation. The sheriff's return is: "Summoned the Distilling & Cattle Feeding Company of Illinois, by service on Charles A. Webb, agent; copy of *narr.* and notice to plead left with defendant." The defendant, having appeared specially and moved to set aside the return, has removed the case into this court. The reasons urged in support of the motion to set aside the sheriff's return are that Charles A. Webb, upon whom the writ was served, was not, and is not, an agent of the defendant, or a person in its service, and that the defendant did not transact business within the

state of Maryland. The Maryland Code provides that any foreign corporation, which shall transact business in Maryland, shall be deemed to hold and exercise franchises therein, and shall be liable to suit in any court of the state by a citizen of the state, for any cause of action, and that process may be served on such corporation by service upon any agent, attorney, or other person in the service of such corporation. Code, §§ 295, 296, art. 23. The testimony adduced at the hearing of this motion shows precisely the relation which Webb held to the defendant corporation. The defendant sells its products only to certain selected persons in each state, and to none others. These persons, in a trade circular published by defendant, are styled its "distributing agents." In Maryland there were two. One was Webb, upon whom the process was served, and the other, until just before the institution of this suit, was the plaintiff. The terms upon which these "distributing agents" agreed to deal with the defendant were that they should buy exclusively from the defendant such goods as it manufactured, and should sell them at trade prices established by the defendant; that at the end of five months from the date of each purchase, if they had continued in the mean time to buy exclusively from defendant, they were entitled to a rebate of two cents on every proof gallon; and they were allowed also to issue to their wholesale customers a rebate certificate obligating the defendant to pay such customer, at the expiration of six months, a rebate of five cents per proof gallon, provided during that six months the wholesale customer had purchased all his supply of such goods as the defendant manufactured from some distributing agent of the defendant. The rebate certificates were payable by the defendant at a bank in Illinois. Also on all goods sold by the "distributing agent" to retail customers, the distributing agent was allowed, upon like terms, a rebate of five cents per gallon. The course of business, in substance, amounted to this: that the "distributing agents," if they continued in good faith to deal exclusively with the defendant, were entitled, at the end of five months, to a rebate of two cents per gallon, and on sales to retail customers to an additional rebate of five cents, and their wholesale customers were entitled to a rebate of five cents. The defendants required the "distributing agents" to send them a list of all the wholesale customers to whom they issued rebate certificates, and a list of all the retail customers on sales to whom they claimed the five cents rebate. Except in the arrangement with regard to the rebate, and except the establishing of a trade price at which the goods were to be sold, the transaction did not differ in any way from the purchase by a resident of Maryland of goods from an Illinois corporation at its place of business in Illinois; and, unless it be by granting the rebate and fixing the trade price, the defendant did not transact business in Maryland in any other sense than every foreign corporation does when it sells goods at its home office, and ships them to a resident of Maryland. The defendant, according to the proof, has no office in Maryland, and it has no goods in Maryland, and it receives no money in Maryland, and has no agent here authorized either to sell goods for it or to receive any money for it. The goods purchased from the de



fendant by Webb and by the plaintiff were absolutely their own, and subject to their own control and at their own risk. The only restriction consisted in the understanding that the rebate was payable only on the condition of continuous dealing with the defendant and compliance with its trade regulations. They could do what they pleased with the goods if they chose to sacrifice the rebate, which was payable by the defendant only on the conditions prescribed.

There are only two circumstances to which the plaintiff can point as tending to establish its contention that the service of process was within the terms of the Maryland Code. The first is that the persons in Maryland to whom the defendant sold its goods are in its published circulars called its "distributing agents." The mere name, however, cannot give a representative capacity to a person who does not, in fact, have it, and never attempts to exercise it. It may be said to be a misleading description, but it did not mislead the plaintiff, as the plaintiff, being so designated itself, knew the meaning of the term. These so-called "distributing agents" were such only in the sense that any wholesale merchant or commission house which handles the goods of a manufacturer may be said to be a distributor of its products, and there is nothing unusual in a manufacturer selling exclusively to one person in a given territory, and insisting that such person shall sell only at fixed prices and upon fixed terms to his customers. The other circumstance is that the so-called "distributing agents" were furnished with a printed rebate certificate, which they were authorized to issue in the name of the defendant to their wholesale customers, payable in Illinois at the end of six months, upon the condition of continuous dealing. This was no more than an authority to sign the defendant's name to a draft, or to draw a draft to be paid by the defendant in Illinois, if the prescribed conditions were fulfilled. It was not performing a service for the defendant, but performing a service for the distributor himself, as an inducement to his customer to buy from him the goods which the distributor had bought from the defendant. In no reasonable sense can Webb be said to have stood in any representative character towards the defendant, or to have performed any service for it, so far as the testimony discloses. He was a buyer, and the defendant was a seller, with the added arrangement that, if the buyer claimed the agreed rebate for himself or for his customer, he was required to comply with the terms agreed upon, and in so complying he performed no service for the defendant, but was serving himself, in order to get back the rebate on the price he had paid or had agreed to pay. In *St. Clair v. Cox*, 106 U. S. 350, 1 Sup. Ct. Rep. 354, the supreme court held that a foreign corporation could not be sued in a state unless it transacted business in that state; and Mr. Justice FIELDS, delivering the opinion of the court, very fully discusses the character of the transactions and the nature of the employment which are necessary to give the requisite representative character to the person on whom process may be served. In the case of *U. S. v. American Bell Tel. Co.*, 29 Fed. Rep. 17, the principles of *St. Clair v. Cox* were applied to a case very much stronger in its facts than the present one, and

it was there held that it was not shown that the foreign corporation sued in Ohio had exercised franchises in that state, or placed itself or its business within that state so as to be found there. I am of opinion that the motion to set aside the sheriff's return must be granted.

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WILLIS *et al.* v. RECTOR.

(Circuit Court of Appeals, Eighth Circuit. May 9, 1892.)

No. 60.

**PARTNERSHIP—USE OF NAME—NOTICE—AGENTS.**

In an action against two defendants as partners, trading as "R. & Co.," it appeared that defendant R. allowed the use of his name because the other defendant was unable to obtain a license to carry on business, that R. had no interest whatever in the business, and that plaintiffs' drummer, when he sold the goods whose price was sued for, was informed of this fact. The note sued on, signed "R. & Co." by the other defendant, was given to another agent of plaintiffs. *Held*, that it was proper to direct a verdict for defendant R., for notice to the drummer that he was not in fact a partner was notice to plaintiffs.

In Error to the United States Court in the Indian Territory.

Action by R. S. Willis, P. J. Willis, and J. G. Goldthwaite, trading as P. J. Willis & Bro., against J. H. Rector and C. T. Ryan on a promissory note. Ryan defaulted, and the court having, after trial, directed a verdict for Rector, the plaintiffs bring error. Judgment affirmed.

C. L. Herbert, W. A. Ledbetter, I. H. Orr, and Harvey L. Christie, for plaintiffs in error.

Before CALDWELL, Circuit Judge, and SHIRAS and THAYER, District Judges.

CALDWELL, Circuit Judge. This action was brought in the United States court in the Indian Territory by the plaintiffs against the defendants, J. H. Rector and C. T. Ryan, who were alleged to be partners in trade under the firm name of Rector & Co., to recover the contents of a promissory note of \$1,021.51, payable to the plaintiffs, and signed "Rector & Co." The defendant Ryan interposed no defense to the action, and there was judgment by default against him, and in favor of the plaintiffs, for the amount of the note sued on, with interest. The defendant Rector filed an answer, denying the alleged partnership and denying his liability on the note. Upon the trial the plaintiffs introduced the note sued on and rested. The defendant Rector was thereupon sworn as a witness, and testified that in the year 1884 the defendant C. T. Ryan desired to engage in the mercantile business at Jimtown, Chickasaw Nation, Indian Territory, and could not procure license for such purpose, and applied to him, (Rector) to let him use his name with which to prosecute such business, and this Rector agreed to; that Rector had no interest whatever in such business; that when plaintiffs' drummer, Smith, came to Jimtown to sell goods for plaintiffs, witness

told Smith that he was not a partner of Ryan, and had no interest in his business; he (Smith) gave Rector a hat to persuade C. T. Ryan to order the merchandise, which witness did do. At the close of the defendants' testimony the plaintiffs called the defendant Ryan as a witness, who testified that he was unable to procure license and do business in his own name in the year 1884, and that J. H. Rector, the defendant, authorized witness to run the business in his name, which he did do; that J. H. Rector was a partner in name only, and had no actual or real interest in the business; that witness bought goods of plaintiffs, Willis & Bro., and executed the note sued on to Willis, in name of Rector & Co.; that when the goods were purchased through Mr. Smith, as drummer of plaintiffs, Smith was told and fully advised that J. H. Rector, the defendant, had no interest in the business; that after this time witness, C. T. Ryan, on, to wit, July 22, 1884, executed and delivered to another and different agent of plaintiffs the note sued on. This being all the testimony in the case, the court directed the jury to return a verdict for the defendant Rector, and this direction of the court is assigned for error.

There was no conflict in the testimony. The defendant Rector, who testified in his own behalf, and the defendant Ryan, who was called as a witness by the plaintiffs, agree perfectly in their testimony, and testify to the same state of facts. Upon this uncontradicted evidence the court rightly instructed the jury to find a verdict for the defendant Rector. Notice given to an agent while acting in the agency is notice to the principal. The plaintiffs' agent, Smith, who sold the merchandise for which the note sued on was given, was told before and at the time he sold the goods to Ryan that Rector was not a partner of Ryan, and had no interest in the business, but that the name of Rector & Co. had been assumed by the defendant Ryan because he could not procure a license to conduct the business in his own name. One who holds himself out to the world as a partner is liable as such, although he in fact does not participate in the profits and losses; but where there is a stipulation between two or more persons who hold themselves out to the world as partners that one of them shall not have any share in the profits nor pay any portion of the losses, he is not liable to the creditor of the firm who before giving credit knew of this stipulation, because such creditor has no right to fix upon him a responsibility against his bargain and intention, when such bargain and intention were known to the creditor before he extended the credit. Pars. Cont. 193, and note *g*; *Alderson v. Popes*, 1 Camp. 404, note. See *Thompson v. Bank*, 111 U. S. 529, 4 Sup. Ct. Rep. 689.

Judgment affirmed.

McCLELLAN *et al.* v. PYEATT *et al.*

(Circuit Court of Appeals, Eighth Circuit. May 16, 1892.)

No. 32.

## 1. APPEAL—PRACTICE—ASSIGNMENT OF ERRORS—EXCEPTIONS.

Where the charge to the jury contains a series of propositions, a single exception thereto in gross cannot be sustained if any proposition is sound, and the appellate court will not, on such an exception, inquire whether any part of the charge is erroneous.

## 2. SAME—EXCEPTIONS TO INSTRUCTIONS.

An assignment of error in giving instructions will not be considered where it fails to comply with Cir. Ct. App. Rule 24, 47 Fed. Rep. xi., prescribing that, "when the error alleged is to the charge of the court, the specification shall set out the part referred to *in totidem verbis*, whether it be in instructions given or in instructions refused."

## 3. SAME.

Where one of a series of propositions preferred as one request to charge is unsound, an exception to a refusal to charge the whole series cannot be sustained.

## 4. EXECUTION—CLAIMS BY THIRD PERSONS—BONA FIDES.

When a third person claims title to chattels seized under execution, a bill of sale executed by defendant to a stranger after the alleged sale to the claimant is admissible as bearing on the *bona fides* of the sale to the claimant.

## 5. APPEAL—ASSIGNMENT OF ERRORS—MOTION FOR NEW TRIAL.

Since a motion for a new trial is, under the federal practice, addressed to the discretion of the trial court, and no error can be assigned to the ruling thereon, such motion will not be considered in aid of an insufficient assignment of errors.

## 6. CIRCUIT COURT OF APPEALS—FOLLOWING STATE PRACTICE.

Though the practice act of Arkansas, regulating the practice of state courts of original jurisdiction, is obligatory on the federal courts held in that state and in the Indian Territory, the rules of practice of the supreme court of that state are not adopted by the circuit court of appeals in cases coming from either the state or the territory.

In Error to the United States Court in the Indian Territory.

This was an issue as to the right to property levied on by Henry C. Pyeatt and James C. Kirby under an execution against William P. McClellan, and claimed by Charles M. McClellan. The issue was found for plaintiffs, and judgment rendered against Charles M. McClellan and D. W. Lipe, the surety on his bond, and they bring error. Affirmed.

For decision on motion to dismiss the writ of error and vacate the *superseatas*, see 49 Fed. Rep. 259.

George E. Nelson and Wm. M. Cravens, for plaintiffs in error.

John H. Rogers, for defendants in error.

Before CALDWELL and SANBORN, Circuit Judges, and SHIRAS, District Judge.

CALDWELL, Circuit Judge. The defendants in error on the 3d day of October, 1889, recovered a judgment in the United States court for the Indian Territory against William P. McClellan for the sum of \$7,596.07, upon which execution was issued on the next day, and was levied by the marshal on the 5th day of October on certain cattle and horses, as the property of the defendant in the execution. The property so levied upon was claimed by Charles M. McClellan, who executed a bond conditioned as required by section 3042, Mansf. Dig. Ark., with the defendant Lipe as his surety. Thereupon the plaintiff gave notice, as provided by section 3045 of the same digest, and the trial of the right to

the property levied on by the marshal, and claimed by the plaintiff in error McClellan, proceeded in the mode provided by statute, (sections 3042-3047, Mansf. Dig. Ark.) The case was tried by a jury, who found the issues for the plaintiffs in the execution, and assessed their damages at \$930 and interest, for which sum judgment was rendered against the claimant, Charles M. McClellan, and Lipe, as surety on the bond, who thereupon sued out this writ of error.

It is said in the brief of counsel for plaintiffs in error that "there was no sufficient recital in the bond of an appraisement. The names of the appraisers do not appear in it. Each article is not appraised, nor does it appear how or by whom the appraisers were sworn." But this was not assigned for error below, and the bond was introduced in evidence without objection, and appears to be in proper form.

The first eight assignments of error relied on in the brief of counsel for the plaintiffs in error relate to instructions given and refused by the court. The court charged the jury at considerable length. The instructions deal with the various aspects of the case, and embrace 11 different points or propositions. The plaintiffs in error excepted to the whole charges in mass. The greater part, if not the whole, of the charge, was good law. Whether any part of it is erroneous we will not inquire, because the rule is well settled that "if the entire charge of the court is excepted to, or a series of propositions contained in it is excepted to in gross, and any portion thus excepted to is sound, the exception cannot be sustained." *Beaver v. Taylor*, 93 U. S. 46; *Lincoln v. Claffin*, 7 Wall. 132; *Cooper v. Schlesinger*, 111 U. S. 148, 4 Sup. Ct. Rep. 360; *Burton v. Ferry Co.*, 114 U. S. 474, 5 Sup. Ct. Rep. 960. The court would be justified in disregarding this assignment of errors for another reason. The twenty-fourth rule of this court requires the brief of the plaintiff in error to contain a specification of the errors relied on, and, "when the error alleged is to the charge of the court, the specification shall set out the part referred to *totidem verbis*, whether it be in instructions given or in instructions refused." This requirement has not been observed by the plaintiff in error in this case. Where the record discloses "a plain error, not assigned or specified," we would not be inclined to rigidly enforce this rule, but there is nothing persuasive in this record to induce us to waive it.

What has been said with regard to the exception to the charge given by the court is equally applicable to the exception to the refusal of the court to give the instructions asked by the plaintiffs in error. These comprise a series of six propositions, preferred as one request, "and," the record recites, "the court refusing to give said instructions," the defendant excepted. The sixth proposition of the series was misleading, and not warranted by the pleadings or the facts. Its purpose was to induce the jury to believe that the officer's return that he had levied on the property, and the distinct recital to that effect in the bond executed by the plaintiffs in error, were not sufficient evidence of that fact. This request was properly refused, and, where one of a series of propositions preferred as one request is unsound, an exception to a refusal to charge the whole series cannot be maintained. See authorities cited *supra*.

The court rightly permitted the marshal to amend the return on the execution.

The ninth error to which our attention is called in the brief for the plaintiffs in error is that "the Hedge and Alton bills of sale were irrelevant." These bills of sale were introduced to show that the property which C. W. McClellan claimed to have purchased from W. P. McClellan was treated by both of them, after the alleged sale from W. P. McClellan to C. W. McClellan, as the property of the former, and sold and used for his benefit. These were circumstances bearing on the *bona fides* of the alleged sale of the property by W. P. McClellan to C. W. McClellan, and were properly admitted in evidence.

The suggestion is made that there was a motion for a new trial, and that that motion specifies particularly the paragraphs of the court's charge to the jury intended to be excepted to, and that, as there was an exception to the overruling of the motion for a new trial, all errors properly set out in the motion are sufficiently saved. This is a misconception of the office and effect of a motion for a new trial in the courts of the United States. In these courts the motion for a new trial is designed to invoke the judgment of the trial court on the alleged errors set out in the motion, but the ruling of the trial court on the motion cannot be assigned for error, and neither this court nor the supreme court of the United States will treat the motion for a new trial as a sufficient bill of exceptions or assignment of errors. Its office and functions are limited to the trial court. It has long been settled that a motion for a new trial in a federal court is addressed to the sound discretion of the court, and that the ruling thereon one way or the other cannot be assigned for error. *Dowell v. De La Lanza*, 20 How. 29; *Mulhall v. Keenan*, 18 Wall. 342; *Railway Co. v. Twombly*, 100 U. S. 78; *Railway Co. v. Heck*, 102 U. S. 120.

The act of congress (26 St. pp. 81, 94, c. 182, § 31) put in force in the Indian Territory the practice act of the state of Arkansas, regulating the practice in courts of original jurisdiction. The same practice act, so far as relates to actions at law, is, by act of congress, obligatory on the courts of the United States held within the state of Arkansas, but the rules of practice that prevail in the supreme court of Arkansas are not adopted for this court, nor the supreme court of the United States, in cases coming either from the Indian Territory or from the circuit court of the United States in that state. For more than 40 years it has been the settled rule of practice of the supreme court of Arkansas that a motion for a new trial to correct all the errors of the trial court, not apparent upon the face of the record, is essential before a writ of error will be entertained by the supreme court. *Danley v. Robbins' Heirs*, 3 Ark. 144, decided in 1840; *Steck v. Mahar*, 26 Ark. 536; *Mills v. Reed*, 27 Ark. 507.

In the courts of the United States the errors not apparent upon the face of the record are brought onto the record by bill of exceptions, and the bill of exceptions and assignment of errors are the foundation of the case of the plaintiff in error in the appellate court; and in that court neither the motion for a new trial nor the ruling of the trial court upon

it can have any influence in the decision of the cause, or perform the office of a bill of exceptions or an assignment of error.

Judgment affirmed.

## VILLAGE OF ALEXANDRIA v. STABLER.

(Circuit Court of Appeals, Eighth Circuit. May 16, 1902.)

No. 51.

## 1. APPEALABLE ORDERS—NEW TRIALS.

A ruling either way on a motion for new trial cannot be assigned for error. *McClellan v. Pyeatt*, 50 Fed. Rep. 686, followed.

## 2. APPEAL—REVIEW—SUFFICIENCY OF EVIDENCE.

The sufficiency of the evidence to support the verdict cannot be considered by the reviewing court where the complaining party not only neglected to ask a peremptory instruction for a verdict at the close of the whole evidence, but, without objection, permitted the court to charge the jury, upon the assumption that the case was one proper to be thus submitted. *Railroad Co. v. Hawthorne*, 12 Sup. Ct. Rep. 591, 144 U. S. 202, and *Insurance Co. v. Unsell*, 12 Sup. Ct. Rep. 671, 144 U. S. 489, followed.

In Error to the Circuit Court of the United States, Northern District of Minnesota.

Action by Charles Stabler against the village of Alexandria, Douglas county, Minn., for personal injuries. Verdict and judgment for plaintiff. Defendant brings error. Affirmed.

*Charles C. Willson and H. Jenkins*, for plaintiff in error.

*George H. Reynolds*, for defendant in error.

Before CALDWELL and SANBORN, Circuit Judges, and SHIRAS, District Judge.

CALDWELL, Circuit Judge. This action was brought against the village of Alexandria, Minn., to recover damages for a personal injury received by the plaintiff from falling in the nighttime on a slippery sidewalk, upon which it was alleged the defendant had negligently permitted snow and ice to accumulate. There was a jury trial and a verdict and judgment for the plaintiff, and the defendant sued out this writ of error. No exceptions were taken to the ruling of the court in the course of the trial, or to the instructions to the jury. The defendant moved the court to set aside the verdict and grant a new trial, upon the ground, among others, that the evidence was not sufficient to sustain the verdict, which motion was overruled, to which ruling the defendant excepted.

The counsel for the plaintiff in error states in his brief that "the sole error relied upon is that the evidence is not sufficient to sustain the verdict." If the defendant below desired to test, on writ of error in this court, the sufficiency of the evidence to sustain the verdict, it should have asked at the close of the whole evidence a peremptory instruction for a verdict in its behalf. *Railroad Co. v. Hawthorne*, 144 U. S. 202, 12 Sup. Ct. Rep. 591. It did not do this, but without objection permitted the court to charge the jury, upon the assumption that the case, upon the evidence, was one proper to be submitted to the jury. It is

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true the sufficiency of the evidence to support the verdict might still be challenged in the court below by a motion to set aside the verdict and grant a new trial, but that motion only served to bring the grounds of it to the attention of that court; and its rulings thereon, one way or the other, cannot be assigned for error. *McClellan v. Pyeatt*, 50 Fed. Rep. 686, (at the present term.)

The case of *Insurance Co. v. Unsell*, 144 U. S. 439, 12 Sup. Ct. Rep. 671, the record in which we have consulted, shows there was a motion for a new trial upon the ground, among others, that the evidence was not sufficient to sustain the verdict, but there was no request for a peremptory instruction for a verdict for the defendant. The court, after stating that the only ground for serious doubt in respect of the case was whether the evidence was sufficient, in any view of it, to sustain the only theory of fact upon which the plaintiff could recover, "and whether, if the court had given a peremptory instruction to find for the defendant, the verdict and judgment would have been disturbed," say:

"But we need not consider the case in those aspects, for the defendant assumed that it would be submitted to the jury, and asked instructions touching the several points on which it relied. It did not ask a peremptory instruction for a verdict in its behalf. It cannot, therefore, be a ground of reversal that the issues of fact were submitted to the jury."

Judgment affirmed.

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### FESSENDEN v. BARRETT *et al.*

(Circuit Court, D. New Hampshire. November 24, 1891.)

No. 346.

#### JUDGMENT—RES JUDICATA—IDENTITY OF SUBJECT-MATTER.

Plaintiff sued B. to foreclose a mortgage on land which B. claimed under a tax sale for the year 1873. The tax title was sustained, and judgment rendered for B. Afterwards, plaintiff brought another action to foreclose the same mortgage as to a different tract of land, but acquired by B. under a tax sale for taxes of the same year, made by the same town. *Held* that, the subject-matter of the two actions being different, the judgment in the first was not a bar to the second.

At Law. Action by Albert L. Fessenden against Samuel N. Barrett and others to foreclose a mortgage. Defendants moved to dismiss. Motion overruled.

*R. E. Walker* and *Wm. L. Foster*, for plaintiff.

*R. M. Wallace*, for defendants.

COLT, Circuit Judge. This is an action brought by the plaintiff for the purpose of foreclosing a mortgage on a certain tract of land situated in the town of Mason, N. H. The mortgage covered several other tracts of land, not included in this suit. The present hearing was had upon defendants' motion to dismiss the suit upon the ground that the subject-matter here in controversy has become *res adjudicata*. This question is generally more properly raised by plea; but, since the plaintiff waives





any informality as to the manner in which this defense is presented, we will proceed to dispose of it as if formally pleaded.

The judgment relied upon by defendants as a bar to this action is a former suit brought by the plaintiff in the supreme court of New Hampshire against Nelson L. Barrett, under whom the present defendants claim title, to recover possession of another piece of land covered by the same mortgage. In that suit the defendant claimed title to the tract of land then in controversy by virtue of a tax title from the said town of Mason for the year 1873, and the court held the tax title to be valid, and directed judgment for the defendant. The contention of the defendants in this suit is that the land in the present suit, although not the same, was a part of the land included in the mortgage, and was taxed precisely in the same manner in the year 1873, and that the point in issue was precisely the same in that suit as in this, namely, the validity of the tax title of the town of Mason for the year 1873 as against the plaintiff's title under the mortgage, and that, therefore, the plaintiff is estopped from again adjudicating this question. As opposed to this position, the plaintiff maintains that the former suit is no estoppel to the present action—*First*, because the issue is not the same; and, *second*, because the parties are not the same. It is elementary law to say that if either of these propositions is true the former judgment is no bar to this suit, and the defense of *res adjudicata* fails. The rule that the bar or estoppel in a second suit between the same parties is confined to the material issues adjudicated in the first is easier to state than it is to harmonize the various decisions of the courts on this question. This conflict of opinion in the adjudged cases arises from the different views taken by the courts as to what are to be classified as material issues in a prior suit between the same parties. The courts of some of the states hold that the former judgment may be set up as a bar or estoppel to all facts directly and distinctly put in issue, and the finding of which was necessary to the judgment. *Gales v. Preston*, 41 N. Y. 113; *Gardner v. Buckbee*, 3 Cow. 120; *Wood v. Jackson*, 8 Wend. 11; *Jackson v. Lodge*, 36 Cal. 28; *Chase v. Walker*, 26 Me. 555; *Lynch v. Swanton*, 53 Me. 100; *Babcock v. Camp*, 12 Ohio St. 11; *Bell v. McColloch*, 31 Ohio St. 397. Other state courts seek to confine the effect of a former judgment as a bar or estoppel to the subject-matter in issue in the former suit. *King v. Chase*, 15 N. H. 9; *Metcalf v. Gilmore*, 63 N. H. 174; *Cross v. Cross*, 58 N. H. 373; *Dooley v. Potter*, 140 Mass. 49, 2 N. E. Rep. 935; *Eastman v. Cooper*, 15 Pick. 276; *Clark v. Sammons*, 12 Iowa, 368. The supreme court of the United States, and the weight of authority in the state courts, do not, it seems to me, support the view that the bar or estoppel in a second suit is confined to the subject-matter in issue in the first suit, and that, therefore, all other matters must be deemed collateral, or introduced by way of evidence, but that such estoppel extends to all matters and material facts put in issue, the findings of which are necessary to uphold the judgment. *Aurora City v. West*, 7 Wall. 83, 96; *Beloit v. Morgan*, Id. 619; *Tioga R. Co. v. Blossburg & C. R. Co.*, 20 Wall. 137. In the leading case of *Cromwell v. County of Sac*, 94 U. S. 351, the dis-

inction is drawn between the effect of a judgment as a bar or estoppel against the prosecution of another action upon the same claim and demand, and its effect as an estoppel in another action between the same parties upon a different claim or cause of action. In the former case the judgment, if rendered on the merits, constitutes an absolute bar to a subsequent action, not only as to every matter which was offered and received to sustain or defeat the claim, but as to any other admissible matter which might have been offered for that purpose. But where the second action between the same parties is upon a different claim or demand the judgment in the prior action operates as an estoppel only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered. In all cases where it is sought to apply the estoppel of a judgment rendered upon one cause of action to matters arising in a suit upon a different cause of action, the inquiry must always be as to the point or question actually litigated and determined in the original action, not what might have been thus litigated and determined. Only upon such matters is the judgment conclusive in another action.

The present suit is for a different cause of action than the former suit of *Fessenden v. Barrett*, since the causes of action relate to different tracts of land. The question to be determined in this suit is the title to another tract of land. In the prior suit the defendant relied upon the tax title of 1873 to sustain his claim to the land then in controversy. In this suit the defendants rely upon the tax title of the same year to sustain their claim to the land now in controversy. Admitting that one of the material facts in issue in the former case was the validity of the tax title of 1873, in respect to a certain piece of property, and that the determination of that fact is a bar to any further litigation of the same question in another action between the same parties or their privies, this cannot estop the parties from raising the question of the validity of the tax title respecting another piece of property, because such title might be good in the one case and bad in the other. It is sufficient to say that all the proceedings necessary to establish a valid tax title might have been complied with in respect to the first tract of land, while, in respect to the other tract, they might have been so defective as to render the tax title void. There may have been as many tax deeds given by the town of Mason in that year as there were delinquent taxpayers, and some of these deeds may have conveyed a good title, and others not. The defendant Barrett, in the former suit, may have been the purchaser of several pieces of property sold for the taxes of that year, and received tax deeds therefor. Assuming that these pieces of property were at the time all owned by the same person, and that the tax title as to one piece had been adjudicated and held to be valid, it does not follow that the other deeds are equally valid. It seems to me that this case is outside of the debatable ground as to what matters are concluded by a prior judgment, and that no courts have gone so far as to hold that establishing the title to one piece of property between the same parties also establishes the title to another piece of property as between the

same parties. That both these tracts of land are claimed by the plaintiff under the same mortgage can make no difference, especially in view of the fact that the validity of the mortgage has not been called in question in either suit.

It is unnecessary to consider the second defense, that the parties are not the same in the two actions. The motion to dismiss is overruled.

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UNITED STATES v. WOTTEN *et al.*

(Circuit Court, D. Massachusetts. May 27, 1892.)

1. CUSTOMS DUTIES—"PLUCKED" CONEY SKINS.

"Pulled" or "plucked" coney skins—that is, such as have had the hair removed from them—are not dutiable as "dressed furs or skins," within Tariff Act 1890, par. 444, but are entitled to entry free, under paragraph 588, as "fur skins, not dressed in any manner."

2. SAME—CONSTRUCTION OF STATUTE.

Where the language of the tariff acts has been substantially the same in respect to certain goods, a construction uniformly applied by the treasury department since 1846 will not be disregarded except for very cogent reasons.

At Law. Proceedings by the United States to obtain a review of a decision of the board of general appraisers reversing a decision of the collector. Affirmed.

*Frank D. Allen*, U. S. Atty., *Henry A. Wyman*, Asst. U. S. Atty., and *Elihu Root*, for the United States.

*Whitehead & Suydam*, for respondents.

COLT, Circuit Judge. This is an appeal from the decision of the board of general appraisers, (Act June 10, 1890, § 15.) The question raised relates to the proper classification under the tariff act of October 1, 1890, of pulled coney skins, which are known in the trade as "hatters' furs." The collector classified this import under paragraph 444 of the tariff act of October 1, 1890, which is as follows:

"Furs dressed on the skin, but not made up into articles, and furs not on the skin, prepared for hatters' use, twenty per centum *ad valorem*."

The importers contended that the import was entitled to entry free, under section 588 of the same act, as "fur skins of all kinds, not dressed in any manner." The board of general appraisers reversed the decision of the collector, and decided in favor of the importers. Coney skin is the skin of a rabbit. In its crude state it is of small value. To put it into a marketable condition, it is cut open, spread out flat, and the ends cut off, and, after being put through this operation, it is called an "unplucked" skin. In addition to this, the skin is dampened and cleaned, and by the aid of a sharp knife the hairs are plucked from the skin, leaving only what is known as the "fur." It then becomes a "plucked" skin. The only question in this case is whether a plucked coney skin is a dressed fur within the meaning of the tariff act of October 1, 1890.

In the opinion of general dealers in furs, a plucked fur is not a dressed fur, the word "dressing," as understood by them, having reference to a treatment of the pelt or skin, as distinct from the fur, while, in the opinion of those familiar with hatters' furs, it would seem that plucking is a part of the operation of dressing, and that, therefore, a plucked fur is at least a partially dressed fur.

The evidence in this case is voluminous, and it is mainly directed towards obtaining the views of dealers in furs as to what constitutes a dressed fur. Upon this point the evidence is conflicting. It does not seem to me, however, that the case turns upon this debatable question. Tariff laws relate to commerce, and the first and guiding rule in their interpretation is to discover what is the commercial designation of the particular article, as understood among importers and traders. Whatever may be the opinion, therefore, of dealers in hatters' furs as to whether a "pulled" fur is, strictly and technically speaking, a "dressed" fur, or a fur "dressed in any manner," I do not think, upon an examination of the whole record in this case, it can be said that in a commercial sense a "pulled" fur is a "dressed" fur. Since the tariff act of 1846, substantially the same language has been used with respect to dressed and undressed skins in all the tariff acts down to and including the act of 1890, and under a uniform current of treasury decisions, beginning with that of October 15, 1868, pulled coney skins have been classified as "undressed skins." These rulings by the executive department of the government should have great weight, because it may be fairly presumed that the importation has been made upon the faith of the decisions and classification hitherto made by the government. The supreme court of the United States lays down the principle that, where there has been a long acquiescence in the construction of a law as adopted by the government, and where by such construction the rights of parties have for many years been determined, it will not be disregarded without the most cogent and persuasive reasons. *Robertson v. Downing*, 127 U. S. 607, 8 Sup. Ct. Rep. 1328. It must be assumed, I think, that congress intended this interpretation of the law, because in the report prepared in 1884 by the committee of finance of the United States senate, known as the Senate Report No. 12, pulled skins are classified as "undressed skins." Taking, therefore, the meaning of this import in its general commercial sense, the rulings of the treasury department, and the evident intent of congress, I feel bound to hold that pulled coney skins are not to be classified as a dressed fur or skin, under paragraph 444 of the tariff act, but that they come under paragraph 588, as a fur skin, not dressed in any manner.

The decision of the board of general appraisers is affirmed.

*In re CHASE et al.*

(Circuit Court, D. Massachusetts. May 12, 1892.)

No. 2,562.

**CUSTOMS DUTIES—REVIEW OF GENERAL APPRAISERS' DECISION—INTEREST AND COSTS AGAINST UNITED STATES.**

On a review in the circuit court of a decision of the board of general appraisers, under Act Cong. June 10, 1890, (26 St. p. 131,) no interest or costs can be recovered against the United States in the absence of special statutory provision.

**At Law.**

Petition by L. C. Chase & Co. for a review of the decision of the board of general appraisers as to the classification of common goat hair. The board's decision was reversed, and the importers held entitled to a return of the excess of duties paid. 48 Fed. Rep. 630. The question now is as to the liability of the United States for interest and costs.

The two opinions by the attorney general, referred to in the opinion below as being decisive of this question, are as follows:

**DEPARTMENT OF JUSTICE.**

WASHINGTON, D. C., August 7, 1891.

*The Secretary of the Treasury*—SIR: By your letter of July 31st you submit for opinion "whether or not any authority now exists in law for the payment of interest upon refunds made in conformity with judgments obtained in cases of appeal under section 15 of the act of June 10, 1890, (26 St. p. 131,) from decisions of the board of United States general appraisers." Section 15 provides that if the owner, importer, assignee, or agent of imported merchandise is dissatisfied with the decision of the board of general appraisers, he may, by complying with certain conditions in the section prescribed, have a review of such decision in the nature of an appeal in the circuit court, "said court to hear and determine the questions of law and fact involved in such decision respecting the classification of such merchandise, and the rate of duty imposed thereon under such classification; and the decision of such court shall be final, and the proper collector or person acting as such shall liquidate the entry accordingly," unless a further appeal and trial shall be had in the supreme court, as therein provided. It further provides that "all final judgments, when in favor of the importer, shall be satisfied and paid by the secretary of the treasury from the permanent, indefinite appropriation provided for in section 23 (24) of this act." It will be seen from the foregoing that the statute is silent in relation to interest. The proceeding is in the nature of a suit against the United States. (See opinion of this date to the secretary of the treasury in reference to fees of district attorneys, under this section.) "The general rule is that interest is not allowable on claims against the government. The exceptions to this rule are found only in cases where the demands are made under special contracts or special laws, expressly or by very clear implication providing for the payment of interest. 7 Op. Attys. Gen. 523; 9 Op. Attys. Gen. 57. 'An obligation to pay it,' observes Attorney General Black in the opinion last cited, 'is not to be implied against the government as it is against a private party from the mere fact that the principal was detained from the creditor after his right to receive it had accrued.'" 17 Op. Attys. Gen. 318. This position finds abundant support in the decisions of the supreme court. In *Tillson v. U. S.*, 100 U. S. 43, it is said: "Interest, however, would have been recoverable against a citizen if the payments were unreasonably delayed; but with the government the rule is different, for, in addition to the practice which has long prevailed in the departments of not

allowing interest on claims presented, except it is in some way specially provided for, the statute under which the court of claims is organized expressly declares that no interest shall be allowed upon any claim up to the time of rendition of judgment therein in the court of claims, unless upon a contract expressly stipulating for interest." So in *U. S. v. Sherman*, 98 U. S. 565, it is said: "Before that time (certificate of probable cause) the government is under no obligation, and the secretary of the treasury is not at liberty to pay. When the obligation arises, it is an obligation to pay the amount recovered; that is, the amount for which judgment has been given. The act of congress says not a word about interest. Judgments, it is true, are by the law of South Carolina, as well as by federal legislation, declared to bear interest. Such legislation, however, has no application to the government. And the interest is no part of the amount recovered. It accrues only after the recovery has been had. Moreover, whenever interest is allowed, either by statute or by common law, except in cases where there has been a contract to pay interest, it is allowed for delay or default of the debtor. But delay or default cannot be attributed to the government. It is presumed to be always ready to pay what it owes." See *Harvey v. U. S.*, 113 U. S. 243, 5 Sup. Ct. Rep. 465. So, in *U. S. v. Bayard*, 127 U. S. 251, 8 Sup. Ct. Rep. 1156, this doctrine is forcibly reiterated. The court says: "The case therefore falls within the well-settled principle that the United States are not liable to pay interest on claims against them, in the absence of express statutory provision to that effect. It has been established as a general rule in the practice of the government, that interest is not allowed on claims against it, whether such claims originate in contract or in tort, or whether they arise in the ordinary business of administration or under private acts of relief, passed by congress on special application. The only recognized exceptions are where the government stipulates to pay interest, and where interest is given expressly by an act of congress, either by the name of 'interest' or by that of 'damages.'" Your question is therefore answered in the negative.

Very respectfully,

W. H. H. MILLER, Attorney General.

#### DEPARTMENT OF JUSTICE.

WASHINGTON, D. C., December 10, 1891.

*The Secretary of the Treasury*—SIR: Your letter of November 12, 1891, submitting the question whether, in cases of judgments against the United States by circuit courts on appeals by importers from illegal assessments of duties by collectors of customs, the refund adjudged to be made by the United States includes costs. In my opinion costs are not and cannot be included in such judgments without some declaration of congress to that effect. As Chief Justice MARSHALL said in *U. S. v. Barker*, 2 Wheat. 395, in response to a motion for costs against the United States: "The United States never pay costs." In *U. S. v. Boyd*, 5 How. 29, 51, the court said: "Another ground upon which the judgment must be reversed is that a judgment for costs was rendered against the plaintiffs. The United States are not liable for costs." In the case of *The Antelope*, 12 Wheat. 546-549, the court says: "It is a general rule that no court can make a direct judgment or decree against the United States for costs and expenses in a suit to which the United States is a party, either on behalf of any suitor or any officer of the government. As to the officers of the government, the law expressly provides a different mode." See, also, *U. S. v. McLemore*, 4 How. 286. The proceedings instituted by importers by way of appeal to the courts under section 15 of the act of June 10, 1890, are suits against the United States, as was held by this department, after much consideration, in an opinion dated August 7, 1891, and therefore such proceedings as to costs against the United States fall directly within the rulings in the above cases.

Very respectfully yours,

\_\_\_\_\_, Attorney General.

*Josiah P. Tucker*, for petitioners.

*Frank D. Allen*, U. S. Atty., and *Henry A. Wyman*, Asst. U. S. Atty., for collector.

COLT, Circuit Judge. Whatever may have been the practice under former statutes, I am of the opinion that under the act of June 10, 1890, (26 St. p. 131,) no interest or costs can be recovered against the United States, because the suit is, in substance, brought against the United States, and the act makes no provision for such payment. Upon this point I can add nothing to the opinions of the attorney general under dates of August 7, 1891, and December 10, 1891. The items of interest and costs may therefore be stricken from the judgment in the present case.

### KILBOURNE *et al.* v. W. BINGHAM Co.

(Circuit Court of Appeals, Sixth Circuit. June 6, 1892.)

No. 6.

#### 1. PATENTS FOR INVENTIONS—PROCESS OF MANUFACTURE—WROUGHT METAL SINKS.

In letters patent No. 240,146, issued April 12, 1881, to James Kilbourne, the specifications state that the invention consists of a "sink swaged or struck up from a single sheet of wrought iron or steel, without joint, seam, or interior angle." The claim is for "the herein-described sink, made of a single sheet of wrought steel or iron, without joint, seam, or interior angle, substantially as set forth." No other reference was made to the method of construction. *Held*, that the patent does not cover the process of construction, both because the claim did not embrace it, and because there was no sufficient description of the "manner and process of making," to meet the requirements of Rev. St. § 4888.

#### 2. SAME—INVENTION.

There was no invention, either in the use of a single piece of material or in the absence of joint, seam, and interior angles; for numerous articles, such as butlers' trays, plumbers' sinks, flanged baking pans, and bidet-pans, were made from a single sheet of metal by the swaging operation, long before the patent.

#### 3. SUBSTITUTION OF DIFFERENT MATERIAL.

There was not patentability in the substitution of wrought steel or iron in lieu of cast metal.

47 Fed. Rep. 57, affirmed.

Appeal from the Circuit Court of the United States for the Northern District of Ohio, Eastern Division.

In Equity. Suit by James Kilbourne and the Kilbourne & Jacobs Manufacturing Company against the W. Bingham Company for infringement of patent. The circuit court dismissed the bill, and complainants appeal. Affirmed.

Statement by SWAN, District Judge:

Appellant Kilbourne is the patentee and owner of, and the corporation appellant the exclusive licensee under, letters patent No. 240,146, issued April 12, 1881, on application filed December 28, 1880, for "certain new and useful improvements in sinks." This suit was brought to restrain the alleged infringement of that patent. The patentee in his specification states the nature of his invention thus: "My invention consists of a sink swaged or struck up from a single sheet of wrought

iron or steel, without joint, seam, or interior angle." He then sets forth various defects in sinks made of cast metal, saying:

"Sinks of this kind are neither strong nor durable. They break easily and frequently in shipping or in storing them, and also in placing or setting them up in position for use. They are also liable to fracture or break if water should freeze in them, and, in order to give them the modicum of strength which they possess, a considerable amount of metal must be used in their construction, making them cumbersome and heavy, and increasing expense of manufacture."

He gives this description of his invention:

"I have discovered that the above specified defects can be completely removed by making the sink of wrought iron or steel, said sinks being swaged or struck up from a single sheet of such metal, as hereinbefore first specified. Such a sink is, of course, stronger than one of cast metal, and is not liable to be fractured or broken by a sudden jar or blow. It is cheaper than a cast-metal sink, for the reason that much less metal is required in its construction, and it can, by the swaging operation,—as, for instance, by being struck up in a drop press,—be made more rapidly and economically. \* \* \* The sink, being, as seen in the drawings, without interior angle, has practically equal strength at all points, and has no corners where sediment or dirt can gather."

The issue between the parties is confined to the first claim of the patent, which is thus stated:

"Having described my invention, what I claim and desire to secure by letters patent is: (1) The herein-described sink, made of a single sheet of wrought steel or iron, without joint, seam, or interior angle, substantially as set forth."

The answer denies the infringement charged, the value and utility of the alleged invention, and that the patentee was the original and first inventor or discoverer of any material or substantial part of the thing patented. It gives the names and residences of numerous persons who knew and used the thing patented prior to its alleged invention by Kilbourne. It also alleges that the article had been patented and described, prior to its supposed invention by Kilbourne, in some 30 prior American patents and one English patent, and specifies several printed publications circulated in the United States, in which it had been described, and pleads that the patented article had been in public use and on sale in this country for more than two years prior to Kilbourne's application. It also insists that, in view of the state of the art of manufacturing sinks, bath tubs, and many like articles long before said alleged invention, the letters patent fail to disclose any invention, and that the means claimed as original by said Kilbourne under his patent were common and well known.

*Watson, Burr & Livesay and M. D. Leggett*, for complainants.

*Briesen & Knauth, H. M. Turk, and Arthur von Briesen*, for defendant.  
Before JACKSON, Circuit Judge, and SWAN, District Judge.

SWAN, District Judge. Complainants claim the monopoly of making and vending under Kilbourne's patent the single article of sinks, "swaged or struck up from a single sheet of wrought steel or iron, without joint,



seam, or interior angle." The conceptions claimed as original, on which the validity of the patent is predicated by the argument, are: (1) The mode of construction; (2) the entirety of the material composing the completed article; (3) the use of the wrought steel or iron in the manufacture of the sink; (4) the interior form, without joint, seam, or angle.

1. If the first element of this claim were a new process, it is not sufficiently described to meet the requirements of section 4888, Rev. St. U. S., that an inventor shall make and file in the patent office a written description of his invention, and "of the manner and process of making, constructing, compounding, and using the same, in such full, clear, concise, and exact terms as to enable any person skilled in the art or science to which it appertains, or with which it is most nearly connected, to make, construct, compound and use the same. \* \* \*" The antiquity of the process, and the fact that the patentee does not expressly or by implication claim it, save the patent from this objection. The art of swaging metals into any required form was venerable long anterior to this patent. The drop press, drop hammer, dead stroke hammer, dishing ram, dies, die press, forcers, and stamping machines have long been familiar to metal workers as implements by which hollow ware in all its forms and varieties has been manufactured for over half a century, and are regarded in the art as simply equivalent machines or tools for swaging; that is, beating or drawing the ductile metals into desired shapes. The use of one or the other of these agencies is merely a preferential application by the workman of the power required for the work in hand. The variety of manufactures by this process has been limited only by the art of designing, the ductility of metals, and the possibilities of machinery. The inventor of a new design or material for an article of manufacture, or of a new device for the application of the power needed in this art, or the discoverer of a process for the treatment of refractory metals is entitled to the monopoly assured by the patent laws. These would be additions to our knowledge and contributions to the industry evolved from the inventive faculty. The appreciation and utilization of the efficiency of old methods, means, and material for the manufacture of domestic, mechanical, and agricultural wares "does not spring from that intuitive faculty of the mind put forth in the search for new results or new methods creating what had not before existed or bringing to light what lay hidden from vision; but, on the other hand, is the suggestion of that common experience which arose spontaneously, and by a necessity of human reasoning, in the minds of those who had become acquainted with the circumstances with which they had to deal." *Holister v. Manufacturing Co.*, 113 U. S. 72, 5 Sup. Ct. Rep. 717.

It is not enough that the new manufacture, because of the fitness of the material to the purposes of the article, has obviated innumerable objections inherent in prior manufactures and superseded them in the trade. It must possess an advantage and novelty in form or construction beyond the ability of a mechanic of ordinary skill and intelligence, or be the resultant of means or methods devised by the maker. "The law," says Judge WOODRUFF in *Smith v. Elliott*, 9 Blatchf. 403, "gives no

monopoly to industry to wise judgment or to mere mechanical skill in the use of known means, nor to the product of either, if it be not new. These are within the proper field of competition, and open to all. In general, they will in that competition be justly appreciated, and will command their proper remuneration if usefully employed. It is invention of what is new, and not comparative superiority or greater excellence in what was before known, which the law protects, and it is that alone which is secured by patent." The state of the art of metal working conclusively disproves Kilbourne's claim to a monopoly for the process used in this manufacture, and remits him for his reward to the quality of his wares. He has contributed nothing to its resources or machinery unknown before to the craft. He obtained his patent April 12, 1881. No model accompanied his specifications. From that date until some time in 1883 the sum of his achievements in this line of industry was the abstract conception of the adaptability and fitness of wrought steel and iron to this article of household furniture. He admits that during this interval he expended thousands of dollars and ruined thousands of plates in endeavoring to make the sink. He says:

"I made first small dies and then large ones; had to change and change again the shape of the dies, and almost despaired of success; but I had spent so much time and money on it that I persevered, and finally succeeded."

This confession not only demonstrates that the patentee has failed to disclose the secret of his process, and specify his invention in such a way that others of the same trade would be enabled to do the thing for which the patent was granted, without any new invention or addition of their own,—has merely "set them a problem to solve," to use the phrase of Baron ALDERSON in *Morgan v. Seaward*, Webst. Pat. Cas. 174,—but also that the process was a mystery to himself, which, for two years after his patent had issued, baffled solution. The result of his experiments has justified his faith in the adequacy of "the swaging operation" to this manufacture, but the necessity for the experiments proves that the machinery of his success, which is patentable if original, was obviously a hard-born afterthought, which he had not conceived. But beyond this, there is no language in this patent which can by any latitude of construction be held a claim for the process, beyond the curt references to "the swaging operation," and one of its tools, the drop press, which are alluded to as well-known agencies or machinery equal to the manufacture of the article.

The argument that, under the case of *Smith v. Vulcanite Co.*, 93 U. S. 492, the process detailed is made as much a part of the invention as are the materials of which the product is composed, has no applicability. There, as is said, "the properties of vulcanite were well known; but how to make use of them for artificial sets of teeth remained undiscovered, and apparently undiscoverable, until Cummings revealed the mode." The patent was sustained as a combination of process and product, both of which were new, though the materials were old. The process was fully detailed. The distinctions between that case and this are obvious. For the reasons stated, the claim for the process is untenable.

2. The record shows that neither the entirety of the material of which the sink is made, nor the absence of joint, seam, and interior angle, are new features in this class of manufactures. Butlers' trays, plumbers' sinks, flanged baking pans, bidet pans, and numerous other domestic and mechanical utensils were made by the swaging operation from single sheets of metal, long anterior to the plaintiffs' patent. All of these articles were jointless, seamless, without interior angles, strong, durable, cheap, and light, as compared with like utensils of cast metal; so elastic as largely to obviate injury to dishes placed or dropped therein; could be safely and easily handled, shipped, and set in position; subjected without detriment to extremes of heat and cold; were not affected by the freezing of their contents, nonodorous, and easily cleansed. In short, they remedied every objection to cast metal utensils which experience has developed and the specifications of this patent and the proofs of complainants have particularized. Defendant's exhibit bidet pans is a small bathing vessel, stamped or swaged from sheet metal, without joint, seam, or interior angle. These were made by Hodges, Taylor & Hodges, in Brooklyn, N. Y., as early as 1854; and also as early by Ketchum, of New York. They were usually from 18 to 20 inches long, 10 or 11 inches wide, and from 6 to 8½ inches in depth. The size was limited by the demand, not by difficulty of construction.

Defendant's exhibit baking pan is a type of an utensil which has been manufactured and sold at least since 1850, and has been made with and without flanges. Many sizes and varieties of this dish were made, and they were used for different purposes. Sheet tin was the material commonly used, but, where that was not obtainable of sufficient size, sheet iron was substituted. They were formed of a single sheet of metal, without joint, seam, or interior angle, by the wheeling process, which is defined as "simply raising articles of various forms and depths out of one flat piece of material,—copper, iron, brass, or any other material whatever in the form of sheets,"—by means of two co-operating wheels, one of which is adjustable, so arranged that by their pressure the metal forced between them could be given any desired form. The capacity of this process for the manufacture of household utensils of any depth or shape is practically unlimited. The usual depth of its manufactures was from eight to eight and a half inches. Defendant's exhibit butler's tray is another exemplification of these wares. It is in fact a portable sink for use in the dining room, formed of "a single sheet of wrought iron, without joint, seam, or interior angle," by the swaging operation. In shape, material, and manner of construction it is strikingly suggestive of the Kilbourne sink. The proofs are convincing that these were made as early as 1878, if not in 1876. Between the basin of this tray and defendant's flanged baking pan, which is as old as the tray, there is but little difference in shape. They were made in the same manner before the year 1880. They were 20 inches in length and 16 inches in width.

As long ago as 1846, British letters patent No. 11,073 were granted to Thomas F. Griffiths for an improvement in the form of dies, and a combination of the processes of shaping sheet metal by stamping and

burnishing into required shapes and designs. Speaking in his specifications of stamping plate and sheet metal in accordance with his process, he says: "A great variety of articles, it is well known, are now made by stamping, and by stamping combined with burnishing to form, and both these processes are well known." He appends to the specifications three illustrative drawings of articles stamped from single pieces of sheet metal and iron plate, of the same shape as the sinks made by complainant, and thus verifies his claim that "the workman will only have to vary his dies, forcers, and chucks in order to make articles of other sizes and forms." December 21, 1869, J. G. Knapp obtained letters patent for an improvement in sheet metals, flour, grain, and other scoops. His invention consisted "in forming the bowls in one piece of metal, without seams or joints, by stamping up sheets of metal into the form of troughs, with a flange around the top," etc. Letters patent were granted James Kidd, December 19, 1876, for an improvement in metal wheelbarrows, which consists in making the tray or body of the barrow of a single sheet of steel, struck up or stamped from a plate of steel or any other sufficiently ductile metal, by a dishing ram. On the same day, Kidd took out another patent for an improvement in dishing metals, by which plates of sheet metal "can be stretched or stamped into a dished or concave form, with any desired outline of the concave, and with a surrounding flange or strengthening edge." Farrington & Armstrong's patent of November 18, 1873, for improvement in sheet-metal coffins, furnishes another anticipation of Kilbourne's use of the single sheet of metal. They made these caskets of two pieces of wrought iron, by dishing or distorting the plain sheets or plates of iron by means of dies, into the required shape and depth. T. F. Rowland's patent of May 30, 1876, for an improvement in wrought-iron vessels for buoys, etc., consisted in forming a complete hollow, welded vessel, of two hemispheres, struck up by dies from entire circular plates. These hemispheres were flanged by the same process, so that they could be welded to form the buoy or hollow vessel. Under Morris Wells' patent of January 2, 1866, for sheet-metal dies, seamless hollow ware was struck up from single sheets of metal by a series of dies. November 4, 1879, Hiram W. Ball received a patent for an improvement in road scrapers, under which the scoops of those implements were constructed of a single piece of steel, "having upturned sides and back, without seams, joint, or interior angle," swaged or formed to the required shape. Of this patent Kilbourne is the assignee. The similitude of language and ideas in Ball's and complainant's specifications, and the fact that Kilbourne is the assignee of the Ball patent, is at least suggestive of his appreciative apprehension of the prior manufacture. With Ball's patent before him, his ingenuity would not be taxed to discern the efficacy of the swaging operation to strike up a blank sheet of wrought steel or iron into a four-sided vessel "without seam, joint, or interior angle"—the Kilbourne sink in short,—with as much facility as it produced Ball's three-sided scoop from the same metals. William G. Avery obtained a patent November 4, 1879, for an elevator bucket without joint or seam,

struck up from a single piece of metal, and formed with a flat bottom, curved front and sides, and flat back. It is useless to multiply examples of manufacturers from single sheets of wrought metals, possessing every merit and peculiarity claimed for this sink. The list might be indefinitely prolonged. The catalogue of patented machines and process for swaging, stamping, and striking up household and miscellaneous utensils and conveniences which were jointless and seamless, and preserved the entirety of the material of the article, is as voluminous. The instances cited of the application of this art to common uses deprive these features of this sink to all claim to novelty. While an exact counterpart of Kilbourne's sink in shape had not been produced in wrought metal, its prototype in form appears in Bignall's cast-iron sink, for which letters patent were issued January 1, 1867, to L. C. and M. C. Bignall. This is without joint, seam, or interior angle, and has a grooved or recessed flange in its upper and outer edge, projecting horizontally, into which the upholding framework or inclosure is fitted. The flat flange of complainant's sink serves the same purpose. The form or pattern, therefore, lacks originality.

3. The use of wrought steel or iron in lieu of cast metal is mere substitution of materials, which, whatever the degree of superiority given to the manufacture thereby, is not patentable. *Hotchkiss v. Greenwood*, 11 How. 248; *Hicks v. Kelsey*, 18 Wall. 670; *Phillips v. Detroit*, 111 U. S. 604, 4 Sup. Ct. Rep. 580; *Gardner v. Herz*, 118 U. S. 180-192, 6 Sup. Ct. Rep. 1027; *Brown v. District of Columbia*, 130 U. S. 87, 9 Sup. Ct. Rep. 437; *Florsheim v. Schilling*, 137 U. S. 64, 11 Sup. Ct. Rep. 20.

The decree of the circuit court dismissing the complainant's bill is clearly correct, and is affirmed, with costs.

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THE JOHN C. FISHER.

THE TOM ROSS.

ROSS *et al.* v. GRUBBS.

(Circuit Court of Appeals, Third Circuit. April 23, 1892.)

1. COLLISION—RIVER STEAMER LANDING—BOAT AT WHARF.

A large river steamer, which in landing, head on, swung her stern around so as to strike a smaller steamer, safely moored at an adjacent private wharf, where she had a right to be, is liable for the damages caused thereby.

2. MARITIME LIENS—EXTINGUISHMENT—GIVING NOTE.

In admiralty a note does not extinguish the lien of the claim for which it is given unless such is the understanding of the parties at the time. *The General Meade*, 20 Fed. Rep. 923, followed.

Appeal from the District Court of the United States for the Western District of Pennsylvania.

In Admiralty. Suit by I. W. Grubbs, owner of the steamer Tom Ross, against William Ross and others, claimants of the steamboat John C. Fisher. Decree for libelant. Libelee appeals. Affirmed.

*Mr. Barton*, for appellant.

*David S. McCann*, for appellees.

Before ACHESON, Circuit Judge, and BUTLER and GREEN, District Judges.

ACHESON, Circuit Judge. On December 10, 1889, the small steamer Tom Ross was safely moored and securely tied at a private wharf in the port of Cincinnati, Ohio. The boat was lying along the outside of a barge, and was at her usual berth, and in a place she had a right to occupy. About noon of that day the large and powerful steamboat John C. Fisher came into port, and in landing immediately above the Ross, head on, swung her stern around so as to strike the Ross with great force, and squeeze that vessel between the Fisher and the barge, crushing in both sides of the Ross. It does not appear that the Ross was culpable in any particular. She was plainly visible to those in charge of the Fisher, and it was their duty to steer clear of her. *Culbertson v. The Southern Belle*, 18 How. 584; *The Granite State*, 3 Wall. 310. No good reason for not avoiding the Ross is shown. The conclusion of the court below that the Fisher was wholly at fault, and was liable for the damages caused by the collision, was clearly warranted by the proofs.

Some months after the occurrence, the captain of the John C. Fisher, acting on behalf of that boat and the owners, signed as captain, and gave to the owner of the Tom Ross, a 90-days promissory note on account of the damages occasioned by the collision, and, if this note had been paid, the amount, although less than the claim, would have been accepted in full satisfaction. But it was not paid, and after default the libel in this case was filed against the Fisher. It is now contended that the taking of the note discharged the lien, and this is set up in bar of the libel. It is, however, well settled in admiralty that a note does not extinguish the lien of the claim for which it is given unless such is the understanding of the parties. *The Kimball*, 3 Wall. 37; *The General Meade*, 20 Fed. Rep. 923. Here it is not proved that there was any express agreement that the note should operate as a discharge of the lien. Neither do the circumstances under which the note was accepted warrant the inference that a waiver of the lien was intended. But the decided weight of the evidence is towards the conclusion that the note was taken by the owner of the Ross upon the express condition that it was not to operate as satisfaction of the claim unless it was paid. This defense altogether failed upon the proofs.

We find no error in this record, and the decree of the court below is affirmed.

AHLHAUSER v. BUTLER *et al.*

(Circuit Court, E. D. Wisconsin. June 6, 1892.)

1. REMOVAL OF CAUSES—WAIVER OF OBJECTIONS—JURISDICTION OF STATE COURT.

The filing of the petition for removal of a cause from a state to a federal court is no waiver of an objection that the state court was without jurisdiction of the cause for want of personal service of process, and of a *res* to support service by publication. *Atchison v. Morris*, 11 Fed. Rep. 582, followed.

2. SAME—GARNISHMENT—PRIOR FEDERAL SUIT.

B., a nonresident, brought suit in the federal circuit court against C., a resident, to recover moneys due. Pending that action, and before trial, A., a resident, brought suit in the state court against B., and therein garnished C. as debtor of B. B. filed a petition for removal of the suit to the federal circuit court. *Held*, that the pendency of the suit against C. in the federal court, being *in personam* only, did not deprive the state court (and the federal court, on removal) of jurisdiction of the garnishment, which was a proceeding *in rem*, though no judgment should have been rendered against the garnishee had the suit remained in the state court.

3. SAME—PLEA OF PRIOR SUIT.

Whether, both suits being now within the same jurisdiction, the plea of prior suit within another jurisdiction is longer availing. *quære*.

At Law. Action by William Ahlhauser against William Allen Butler and others. Heard on motion to dismiss for want of jurisdiction. Motion denied.

Charles Quarles, for the motion.

W. H. Timlin and C. H. Hamilton, opposed.

JENKINS, District Judge. The defendants, citizens of New York, brought suit in this court against Messrs. Cotzhausen, Sylvester & Scheiber, citizens of Wisconsin, to recover certain moneys claimed to be owing from them. Pending that action, and before trial thereof, the plaintiff here, a citizen of Wisconsin, brought this suit in a court of the state of Wisconsin, and therein garnished the defendants in the other suit as debtors of the defendants here, and for the debt which was the subject-matter of controversy in that other suit. The garnishees answered, and *inter alia* pleaded the pendency of the prior suit against them in this court. There was no personal service of process upon the defendants, substituted service being had by publication under the state law. The basis of jurisdiction was that the debt garnished was property of the defendants within the state, and subject to attachment. Within the time for answering, and without otherwise appearing to the suit, the defendants filed in the state court their petition for the removal of the suit into this court, and it was removed accordingly. The defendants now appear specially to a motion to dismiss this suit for want of jurisdiction of the state court in this: that the debt was not subject to garnishment because of the pendency of the prior suit against the garnishees in another jurisdiction; that, therefore, no property or debt was impounded in the state court which could be subjected to the payment of the plaintiff's demand if and when ascertained, and there was no *res* for the exercise of any jurisdiction by the state tribunal.

It is objected preliminarily that the filing of the petition for removal

is a personal appearance in the suit, submission by the defendants to jurisdiction, and tantamount to personal service of process. It has been ruled in numerous cases that the filing in a state court of a petition for removal does not constitute a general appearance, or waive any want of jurisdiction of the person. *Parrott v. Insurance Co.*, 5 Fed. Rep. 391; *Blair v. Turtle*, 1 McCrary, 372, 376, 5 Fed. Rep. 394, 398; *Atchison v. Morris*, 11 Fed. Rep. 582; *Small v. Montgomery*, 17 Fed. Rep. 865; *Hendrickson v. Railroad Co.*, 22 Fed. Rep. 569; *Kauffman v. Kennedy*, 25 Fed. Rep. 785; *Miner v. Markham*, 28 Fed. Rep. 387; *Perkins v. Hendryz*, 40 Fed. Rep. 657; *Golden v. Morning News*, 42 Fed. Rep. 112; *Cleus v. Iron Co.*, 44 Fed. Rep. 31; *Bentlif v. Finance Corp.*, Id. 667; *Reisenider v. Publishing Co.*, 45 Fed. Rep. 433; *Forrest v. Railroad Co.*, 47 Fed. Rep. 1; *O'Donnell v. Railroad Co.*, 49 Fed. Rep. 689. It is said that in many of these cases the question was one of privilege, not of jurisdiction. The distinction is not apparent. General appearance to a suit works a waiver of privilege. There are also cases holding to the doctrine that the filing of a petition for removal is a general appearance to the suit and submission to jurisdiction. *Sayles v. Insurance Co.*, 2 Curt. 212; *Edwards v. Insurance Co.*, 20 Fed. Rep. 452; *Tallman v. Railroad Co.*, 45 Fed. Rep. 156. In *Sweeney v. Coffin*, 1 Dill. 73, Judge TREAT held that the filing of the petition was an appearance, within the meaning of the judiciary act, requiring its filing at the time of entering appearance. Whether appearance for that purpose should be construed as a general or special one was a question not there involved or determined. In *Bushnell v. Kennedy*, 9 Wall. 387, 393, 394, there are certain remarks of Chief Justice CHASE, supposed to uphold the contention that the filing of the petition for removal is subjection of the person to jurisdiction. The chief justice is speaking to the question of the jurisdiction of the federal court, not of the state court. There was undoubted jurisdiction in the state court. The exception to the jurisdiction of the federal court was held to rest in privilege of the defendant, and could be and was waived by the act of the defendant in removal of the cause; otherwise, as the chief justice observes, a nonresident defendant could remove a case from a court having jurisdiction, into a court where exception to jurisdiction rested in personal privilege, and by motion to dismiss defeat the jurisdiction of both courts. The observations of the chief justice do not warrant the construction placed upon them. In *Schwab v. Mabley*, 47 Mich. 512, 11 N. W. Rep. 294, it was held that defendants not served with process had not, by uniting in a petition for removal with others who had been served, appeared to the action in the state court. Judge COOLEY, in delivering the opinion, observes:

"Counsel may be correct in supposing that, if the case had been removed to the federal court, all these defendants would have been in that court. The purpose of the petition was to put the case in the federal court for the purpose of trial and final disposition, and it might well be held that the granting of the prayer of the petition subjected all the defendants to the jurisdiction of that court. But it does not follow that the defendants were before the superior court for the like purposes."



If this suggestion be correct, the removal of the cause into a federal court is operative to jurisdiction by that court of the person of the party petitioning for removal,—if the cause be a removable one,—although an unsuccessful attempt to remove would be inoperative as a general appearance in the state court. In *Construction Co. v. Fitzgerald*, 137 U.S. 98, 105, 11 Sup. Ct. Rep. 36, it is stated that a defendant by demurrer, petition for removal, and other proceedings, had waived all question of service of process. Whether it was intended to assert that the petition for removal alone would have that effect is uncertain. The argument that the petition for removal is subjection of the person to the jurisdiction of the one court, or the other, at least when accompanied or preceded by no formal objection to jurisdiction, is not without force. If the question were *res nova* here, it would be deserving of careful consideration. I am, however, bound by the holding of Judge DRUMMOND in *Atchison v. Morris*, *supra*, and, until otherwise instructed by superior authority, must hold to the contrary.

The motion presents the question whether the prior suit in the federal court against the garnishee had the effect to oust the state court of jurisdiction to entertain this suit. Failing personal service of process or voluntary subjection to jurisdiction, the proceeding in the state court was in its essential nature a proceeding *in rem*, operative only upon the liability impounded by the garnishee proceedings. *Cooper v. Reynolds*, 10 Wall. 308; *Pennoyer v. Neff*, 95 U. S. 714. If, by reason of the prior suit in the federal court, the state court had not jurisdiction over the debt of the garnishees, the proceeding was wholly void. The principle is established that, as between courts of concurrent jurisdiction, that which first obtains possession of the controversy, or of the property in dispute, must be allowed to dispose of it finally without interference or interruption from the co-ordinate court. The principle has been frequently stated and its limitation declared by the supreme court. Thus, in *Covell v. Heyman*, 111 U. S. 176, 182, 4 Sup. Ct. Rep. 355, it is said:

“The forbearance which courts of co-ordinate jurisdiction, administered under a single system, exercise towards each other, whereby conflicts are avoided, by avoiding interference with the process of each other, is a principle of comity, with perhaps no higher sanction than the utility which comes from concord; but between state courts and those of the United States it is something more. It is a principle of right and of law, and therefore of necessity. It leaves nothing to discretion or mere convenience. These courts do not belong to the same system, so far as their jurisdiction is concurrent; and, although they coexist in the same space, they are independent, and have no common superior. They exercise jurisdiction, it is true, within the same territory, but not in the same plane; and when one takes into its jurisdiction a specific thing, that *res* is as much withdrawn from the judicial power of the other as if it had been carried physically into a different territorial sovereignty. To attempt to seize it by a foreign process is futile and void. The regulation of process, and the decision of questions relating to it, are part of the jurisdiction of the court from which it issues.”

In *Heidritter v. Oil Cloth Co.*, 112 U. S. 294, 5 Sup. Ct. Rep. 135, it was held that when proceedings *in rem* are brought in a state court, and analogous proceedings *in rem* in a court of the United States against the

same property, exclusive jurisdiction for the purposes of its own suit is acquired by the court first taking possession of the *res*. And upon the same grounds, wherever property has been seized by an officer of the court by virtue of its process, the property is within the custody of the court and under its control, and no other court except one of supervisory or superior jurisdiction may rightfully interfere with that possession. *Freeman v. Howe*, 24 How. 450; *Buck v. Colbath*, 3 Wall. 334. The rule rests in comity, and is in avoidance of indecorous and injurious conflicts between courts in the administration of justice. It is not, however, a rule without limitation. It is restricted to such procedure as "invade the custody of the court over the property." *Heidritter v. Oil Cloth Co.*, *supra*; *Railroad Co. v. Gomila*, 132 U. S. 478, 10 Sup. Ct. Rep. 155. Thus the possession of property by a marshal of a court of the United States under its writ against A. is a complete defense to an action of replevin by B., the rightful owner of the property, (*Freeman v. Howe*, *supra*; *Covell v. Heyman*, *supra*;) but does not prevent an action in trespass in a state court to recover the value of the property seized, (*Buck v. Colbath*, *supra*; *Lammon v. Feusier*, 111 U. S. 17, 19, 4 Sup. Ct. Rep. 286.)

The decisions upon the effect of the pendency of a prior suit by a defendant against the garnishee establish the principles: (1) The pendency of such an action in the same court will not preclude the charging of the garnishee; (2) where the two proceedings are in courts of different jurisdiction, that which was first instituted will be sustained; (3) when the garnishee, if charged, cannot avail himself of the judgment in attachment as a bar to recovery in the prior action against him, he cannot be held as garnishee. *Drake*, *Attachm.* § 621. These principles rest in the equitable consideration that the garnishee ought not to be twice cast for the same debt. Within these principles, and by the decision in *Wallace v. McConnell*, 13 Pet. 136, the garnishees here, the suit remaining in the state court, ought not to be charged, because they could not, in the prior suit against them in this court, plead payment of judgment in attachment in satisfaction, in whole or in part, of the claim asserted against them. But does it follow that therefore the state court was without jurisdiction? I think not. The debt of the garnishees was liable to be impounded to satisfy the demand of the plaintiff. If exempt therefrom, it was only because of the prior suit. But that was a suit *in personam*. The court in which it was depending, although one of different jurisdiction, had no custody of property subject to be interfered with by the suit in the state court. If both suits were *in rem*, touching the same property, the court last asserting control would not be ousted of jurisdiction. It could proceed so far as its action would not have the effect of avoiding the jurisdiction of the court first exercising jurisdiction. *Heidritter v. Oil Cloth Co.*, *supra*. Here the one suit was to declare liability, the other to subject that liability to satisfaction of another debt. It is true that the federal court, in assertion of its rightful jurisdiction, would not permit any action of the state court in the subsequent suit to stay its hand in declaring the debt or in enforcement of satisfaction of it. But that is not

denial of jurisdiction. It is subordination of jurisdiction. It does not follow that because one court has obtained jurisdiction of the parties and the subject-matter of an action, another court of co-ordinate jurisdiction may not also acquire jurisdiction in another suit and over the same subject-matter. Thus the pendency of one suit would not abate a subsequent suit in another jurisdiction between the same parties for the same cause. *Stanton v. Embrey*, 93 U. S. 548, 554; *Insurance Co. v. Brune's Assignee*, 96 U. S. 588; *Gordon v. Gilfoil*, 99 U. S. 168, 178. It is true that here, the suits remaining in different jurisdictions, the garnishees ought not to be charged. That is a rule of decision, not of jurisdiction. It would doubtless have been proper in the state court to stay its hand until the federal court had exhausted its jurisdiction, (*Clifton v. Foster*, 103 Mass. 233,) or, proceeding, to have held the garnishee acquit within the principles stated. But it had jurisdiction to stay its proceedings; to determine the liability of the garnishee, and to determine it erroneously; and, upon discontinuance or dismissal of the suit in the federal court, to proceed to adjudge and enforce the liability of the garnishee. The whole matter rests in comity, and is not availing to destroy jurisdiction. Its exercise might be inoperative as against the defendants, however effectual it might prove through erroneous decision against the garnishee.

The removal of the suit into this court draws to it jurisdiction over the ancillary proceeding against the garnishees. *Pratt v. Albright*, 10 Biss. 511, 9 Fed. Rep. 634; *Cook v. Whitney*, 3 Woods, 715, 719. While without jurisdiction of the persons of the defendants, this court, by virtue of the removal acts, takes the jurisdiction possessed by the state court over the *res*, and may rightfully determine the liability of the garnishees. Whether, the proceeding being now removed into this court by the procurement of the defendants, and, in the language of the removal act "to proceed in the same manner as if it had been originally commenced" in this court, the plea of prior suit in this jurisdiction is longer availing, is a question not arising upon this hearing. The motion to dismiss is overruled.

## WHEELWRIGHT v. ST. LOUIS, N. O. & O. CANAL & TRANSP. CO.

(Circuit Court, E. D. Louisiana. May 30, 1892.)

No. 12,084.

### 1. JURISDICTION OF CIRCUIT COURT—SUIT TO ENFORCE LIEN—SINGLE DEFENDANT.

Act 1875, § 8, (18 St. p. 472.) confers power on the circuit court, in any suit to enforce a lien on property within the district wherein the suit is brought, in which "one or more of the defendants therein shall not be an inhabitant of or found within the said district," to order process against such absent "defendant or defendants." *Held*, that the circuit court has jurisdiction of such a suit when the citizenship is diverse, although there is but one defendant and neither party resides within the state in which suit is brought.

**2. SAME—SEIZURE UNDER STATE PROCESS.**

The fact that the property on which the lien existed was within the custody of the sheriff, under writs of attachment issuing from a state court, though it might affect the power of the circuit court to take possession of the property, could not affect its jurisdiction of the suit.

**In Equity.** Suit by William D. Wheelwright against the St. Louis, New Orleans & Ocean Canal & Transportation Company to foreclose a mortgage. Heard on a demurrer for want of jurisdiction and a plea to the jurisdiction. Demurrer and plea overruled.

*Farrar, Jonas & Kruttschnitt*, for complainant.

*Gurley & Mellen*, for defendant.

**BILLINGS**, District Judge. This is a case brought to foreclose a mortgage, and to have the mortgaged property preserved pending the suit. The complainant is a citizen of the state of New York, and the defendant is a citizen of New Jersey. The mortgaged property is situated within this district.

The first question presented is by an objection to the jurisdiction, which is urged in support of a general demurrer, on the ground that neither party is a citizen of the state within which the action is brought. It is urged by the defendant that the effect of the act of August 13, 1888, (25 St. p. 433,) is to deprive this court of jurisdiction. To this objection the complainant replies that this suit is brought and jurisdiction is conferred under and by virtue of section 8 of the act of March 3, 1875, which section is by section 5 of the act of 1888 expressly continued in force as if that last statute had not been passed. Section 5 of the act of 1888 (25 St. p. 436) is as follows:

"Sec. 5. That nothing in this act shall be held, deemed, or construed to repeal or affect any jurisdiction or right mentioned either in sections six hundred and forty-one or in six hundred and forty-two or in six hundred and forty-three or in seven hundred and twenty-two, or in title twenty-four of the Revised Statutes of the United States, or mentioned in section eight of the act of congress of which this act is an amendment, or in the act of congress approved March first, eighteen hundred and seventy-five, entitled 'An act to protect all citizens in their civil and legal rights.'"

The reservation as to section 8 of the act of 1875 is full and complete, and the only question remaining upon this objection is whether section 8 of the act of 1875 (18 St. p. 472) confers jurisdiction upon the circuit courts where there is but one defendant, and neither party resides within the state in which the suit is brought. Section 8 of the act of 1875 is as follows:

"That when, in any suit commenced in any circuit court of the United States to enforce any legal or equitable lien upon, or claim to, or to remove any incumbrance or lien or cloud upon, the title to real or personal property within the district where such suit is brought, one or more of the defendants therein shall not be an inhabitant of or found within the said district, or shall not voluntarily appear thereto, it shall be lawful for the court to make an order directing such absent defendant or defendants to appear, plead, answer, or demur by a day certain, to be designated, which order shall be served on such absent defendant or defendants, if practicable, wherever found, and also

upon the person or persons in possession or charge of said property, if any there be," etc.

It is to be observed that the language of the act is:

"When, in any suit commenced in any circuit court of the United States, one or more of the defendants shall not be an inhabitant of or found within the said district."

It would seem that this expression, "one or more of the defendants," means one defendant, if there is but one, or one or more, if there are several; for the necessity of the provision springs out of the fact that the *res* upon which the lien is sought to be asserted and enforced is located in a district not that of the defendant's domicile. If another defendant resided in the district, it would still leave an equal necessity for the provision as to the nonresident defendant. In this class of cases, it is the residence of the defendant away from the property sought to be affected which is the reason for conferring the jurisdiction; for the property must be in the district where the court sits, so that it can lay its hand upon it to enforce the lien. This would be equally true whether there was one or more defendants, or whether some of them were residents. In this connection it is to be noticed how differently the provision is constructed, conferring jurisdiction over resident defendants, where some of the defendants were nonresidents, found in 5 St. p. 321, in that case, it is added, "when there shall be several defendants." The reason for that provision caused this additional expression to be inserted, while, in the provision under consideration, it caused it to be omitted. The reason for the statute leads me to think it was the intent of congress that it should apply in case of a single defendant as well as in case of several defendants. Possible jurisdiction is given under the constitution of the United States, since the parties are citizens of different states, and it is made effectual by section 8 of the act of 1875, which is unrepealed.

There is further objection to the jurisdiction presented by the plea. The plea pleads that the property upon which the lien exists is already in the custody of the sheriff, under two writs of attachment issuing from the state court. Whatever impediment these attachment writs might interpose to the court taking actual possession of the property, either for the purpose of preservation or for the purpose of enforcing any final decree, they do not at all prevent or qualify the jurisdiction which the court has over the parties and over the cause. The demurrer is overruled, and the plea adjudged insufficient, and the defendant has until the next rule day to answer the bill of complaint.

**McCLASKEY *et al.* v. BARR *et al.*****BARR *et al.* v. McCLASKEY *et al.***

(Circuit Court, S. D. Ohio, W. D. May 27, 1922.)

No. 3,984.

**1. POWERS OF ATTORNEY TO CONVEY LAND—SCOPE OF AUTHORITY—MISDESCRIPTION  
SOURCE OF TITLE.**

In 1881 four persons brought suit against numerous occupants of a tract of land for partition, alleging that they were "the heirs at law of William Barr, Sr., deceased, and as such heirs at law were the owners in fee simple," etc. For the purpose of settling with any defendants willing to purchase their interest they each gave to a third person a power of attorney to convey "my interest as heir at law of my father, William Barr, who was the son of John Barr, who was the brother of William Barr, Sr., in the land in controversy, "being the same premises owned during his life by William Barr, Sr., the granduncle of the constituents of this power of attorney." The attorney made conveyances to various defendants, generally by quitclaim deeds, which in some cases followed the language of the power of attorney in describing the source of title. It appeared, however, that plaintiffs derived no interest in the land as heirs of their father, William Barr, but that they did derive by inheritance an interest through Jane Barr, in whom the title vested on the death of William Barr, Sr. *Held* that, as the powers of attorney and deeds were given for conveying the interest in litigation, they were effectual to pass any interest derived from William Barr, Sr., by representative heirship, notwithstanding the misdescription as to the immediate source of title.

**2. SAME.**

At the time of giving the power of attorney, and at the date of the deeds made by the attorney, plaintiffs also had an interest in the land, derived from a devise to them by Robert Barr, a brother of William Barr, Sr. But this interest was then unknown to them, was not involved in the litigation, and the will, which was executed in another state, had not been admitted to record in the county where the lands were situated, as required by the local statutes. *Held*, that this interest did not pass by virtue of the power of attorney and the quitclaim deeds.

**3. SAME—REVOCATION BY DEATH.**

A power of attorney to convey lands is immediately revoked by the death of the principal, and deeds subsequently made by the attorney are null. *Ish v. Crane*, 8 Ohio St. 521, distinguished.

In Equity. Bill for partition of lands. For former decisions, see 33 Fed. Rep. 165; 40 Fed. Rep. 559; 42 Fed. Rep. 609; 45 Fed. Rep. 151; 47 Fed. Rep. 154; 48 Fed. Rep. 130.

*C. W. Cowan, Henry T. Fay, and Howard Ferris*, for complainants.

*Samuel T. Crawford and W. S. Thurstin*, for cross complainants.

*Stephens, Lincoln & Smith, and Bateman & Harper*, for respondents.

JACKSON, Circuit Judge. The questions now before the court for determination in the above causes arise under the cross bill, and relate chiefly to the proper construction of the powers of attorney given in 1881 and 1882, by Robert Barr, Samuel Barr, Jane Chapman, and Martha Reed, to Ozra J. Dodds and Irvine B. Wright, and to the effect and operation of the releases which said attorneys in fact executed to the several cross defendants under and by virtue of said powers. Cross complainants do not attack or attempt to set aside and vacate said releases for fraud or want of consideration. They claim that said powers of attorney did not authorize any release of the interests in the land which their present suit seeks to recover; that said powers of attorney only authorized their agent to release such interest in the land as they inherited as heirs

at law of their father, William Barr; and that the interests they are seeking to recover in the present suit as heirs of Mary Jane Barr and as devisees under the will of Robert Barr, deceased, were not embraced in said power of attorney, nor released by their said agent in the attempted execution thereof. They further claim, in respect to the releases executed by the said attorney in fact Irvine B. Wright after May 18, 1883, that the same are void as to the heirs of Martha Reed, who departed this life on said date.

Cross complainants first move to suppress the power of attorney and releases made thereunder. This motion is denied. Said power of attorney and the releases executed thereunder are relevant and competent evidence in behalf of cross defendants, and no valid reason or ground for excluding these documents is presented.

On the other questions arising under said power of attorney and the releases executed by Irvine B. Wright as attorney in fact, and in respect to the circumstances and conditions attendant upon and surrounding the parties at the date or dates of their execution, there are no disputes or controverted facts or issues. The material facts are that in July, 1881, Robert Barr, Samuel Barr, Jane Chapman, and Martha Reed commenced four several suits in the court of common pleas of Hamilton county, Ohio, against many of the then occupants and claimants of the land in controversy, alleging that William Barr, Sr., died seised of the fee in said land, and that each of them, respectively, was "the heir at law to the estate of William Barr, Sr., deceased, and as such heirs at law were the owners in fee simple" of an undivided interest therein which they respectively sought to have declared and set apart to them. The attorneys representing said plaintiffs were to be paid a contingent fee as compensation for their services, based upon what might be secured by compromise of their claim, or might be recovered in the suit. After the suit was commenced said plaintiffs executed first to said Ozra J. Dodds in 1881, and, after his death, to Irvine B. Wright, in 1881 and 1882, power of attorney "to bargain, sell, and convey in fee simple, by deed of special or general warranty, for such price in cash or upon such terms of credit and to such person or persons as he shall think fit, my interest as heir at law of my father, William Barr, who was the son of John Barr, who was the brother and heir at law of William Barr, Sr., deceased, in and to the whole or any part of" the land in controversy, (describing the same,) "being the same premises owned during his life by Wm. Barr, Sr., the granduncle of the constituent of this power of attorney." The several powers of attorney are in substantially the same form. During 1881, 1882, and 1883 the attorney in fact under said power made releases of all the right, title, and interest of the several constituents of said powers in the land in controversy, generally by quitclaim conveyances, which in some cases followed the language of the power of attorney in the use of the words "as heirs at law of my father, William Barr, who was the son of John Barr, who was the brother and heir at law of Wm. Barr, Sr., deceased," etc., and in other cases omitted those words.

When the aforesaid suit was commenced, and when said powers of attorney were executed by Robert Barr, Samuel Barr, Jane Chapman, and Martha Reed, they, nor either of them, had or held any right, title, or interest in said tract of land, either as heirs at law of their father, William Barr, or of their granduncle, William Barr, Sr., the latter being in his lifetime the fee-simple owner of the land. It is shown by the decree entered in the original cause November 17, 1891, to which reference is here made, that upon the death of William Barr, Sr., the title to said land was vested in Mary Jane Barr, subject to a life estate of Maria Bigelow therein; and that upon the death of said Mary Jane Barr on November 27, 1821, (the life estate of said Maria Bigelow being still outstanding,) the title to said lands became vested, subject to said life estate, in the brothers and sisters of said William Barr, Sr., or in the heirs of such brothers and sisters. Without going through the entire line of succession, the makers of said powers of attorney held an interest in the land which was derived or inherited from said Mary Jane Barr, and, in addition thereto, the said Robert and Samuel Barr had an interest therein as devisees of their uncle, Robert Barr, who was a brother of William Barr, Sr., the said Robert Barr having died testate on September 14, 1822, in Pennsylvania. His will was probated and recorded in Hamilton county, in February, 1884. Mrs. Martha Reed (*nee* Barr) died on May 18, 1883. Irvine B. Wright, after her death, executed some five or more releases of her interest in the land to different parties. From this general outline of the material facts bearing upon the questions presented for determination the conclusions of the court are as follows, viz.:

1. That all releases and conveyances made and executed by Irvine B. Wright as agent or attorney in fact after the death of Martha Reed on May 18, 1883, are void as to her heirs, and do not operate in any way to cut off the interest of such heirs in and to the parcels of land covered by or embraced in the releases made after her death. There is nothing in the evidence to take the case out of the general rule that the death of the principal is a revocation of the agency or power of attorney by operation of law, whether the fact of the principal's death be known to the agent or not when executing the supposed power. No act or acts of Mrs. Reed's heirs are established which estop them from claiming and insisting upon the benefit of this general rule. The present case is not controlled by the decision of the Ohio court of appeals in *Ish v. Crane*, 8 Ohio St. 520. There the guardian of the heirs had demanded and received a portion of the purchase money in this behalf. The heirs do not appear to have disaffirmed their guardian's act in so doing. The transaction was a matter *in pais*, and not by deed. Neither was it one, says the court, which of necessity had to be done in the name of the principal. In the present case there is nothing in the way of subsequent receipt of all or a portion of the considerations for the releases made after Mrs. Reed's death by her heirs. The transaction was not *in pais*. It was by deed, and had necessarily to be done in the name of the principal. The case of *Ish v. Crane* does not apply, and, if it did, we should feel disinclined to follow its authority on the question of estoppel.



2. That, with the above exceptions, the releases executed must be held to have released and conveyed to the several grantees therein all the right, title, and interest in and to said land, which Robert Barr, Samuel Barr, Jane Chapman, and Martha Reed inherited or derived by heirship or legal and representative succession of Mary Jane Barr. Said parties in their respective suits in the court of common pleas of Hamilton county claimed their several interests in the land as heirs at law of William Barr, Sr., deceased, the original owner and holder thereof. The power of attorney was manifestly executed with the intention to authorize and empower their attorney in fact to sell and convey such interest as they had acquired by direct or representative heirship from or under William Barr, Sr. Both sides so understood the transaction. The law presumes that the constituents of said power intended that the execution of the power or conveyance made under and in pursuance thereof would pass such inherited interest in said estate as they possessed, or such as they were then asserting through the courts. Read in the light of surrounding circumstances, the expressions in the power of attorney "as heir at law of my father, William Barr, who was the son of John Barr, who was a brother and heir at law of William Barr, Sr., deceased," taken in connection with the further statement or recital following the description of the land, "being the same premises owned during his life by Wm. Barr, Sr., the granduncle of the constituents of this power of attorney," cannot properly be construed as limiting or restricting the authority or power to sell only such interest as they might have in fact directly inherited from their father, William Barr. Instead of being limitations and restrictions upon the power conferred, or descriptive of the right, title, and interest on which the power was to operate, the language employed should, upon well-settled principles, be regarded as a recital of the source of their title and interest, in order to give the instrument effect, and prevent its operating as a fraud upon those dealing with the agent. The intention was clear to vest their agent with power to sell, convey, or release some interest. It is well settled that a misdescription as to the source or origin of their title or interest will not and should not defeat a conveyance made in execution of the power. In *Dolton v. Cain*, 14 Wall. 474, the power of attorney authorized the agent to sell lands in Illinois "which Mr. and Madam Jacquemast at present own, and in which the said constituents have interests." The husband and wife were not owners of any lands or interests in lands. The husband alone had an interest in land, which the agent disposed of. It was contended that the power of attorney did not authorize the sale of any land or interests owned by either, but only of such as were owned by them jointly, in support of which *Dodge v. Hopkins*, 14 Wis. 630, was cited. But the supreme court rules otherwise, holding that it was sufficient to authorize the sale of the husband's interest. The case of *Hathaway v. Juneau*, 15 Wis. 262, is, however, more directly in point. It was this: Ellen F. Juneau executed to Hathaway, upon property described as "all her interest as one of the heirs of Solomon Juneau, deceased, in and to lots 7 and 8," etc., the interest which she had in the lots descendant to her as the heir of Josette

and not of Solomon Juneau. It was held by the supreme court of Wisconsin that the erroneous statement as to the origin or source of title in no way affected or invalidated the mortgage, which covered her inherited interest in the lots. It is the duty of the court to so construe instruments as to carry out the intention of parties executing them, if no legal obstacle exists; and in giving effect to the intention of the parties executing and acting upon written instruments it is proper to consider all their parts in the light of the surrounding circumstances and the situation of the parties. The court may also look to the practical construction which the parties themselves have placed upon the instrument. In the present case the power of attorney would be not only inoperative, but prove a fraud upon those dealing with the agent, if the construction counsel for cross complainants place upon the terms of the instrument should be adopted. The words therein employed, "as heir at law of my father, Wm. Barr, who was the son of John Barr, who was a brother and heir at law of Wm. Barr, Sr., deceased, who was the granduncle of the constituents" of the powers, and the original owner of the premises in which their interests were claimed, should, as contended for cross-defendants, be treated as descriptive of the pedigree of the parties executing or making the power of attorney, and of the source or origin of their title to the interests intended to be disposed of. To effectuate the clear intent to confer authority to sell their inherited interest derived from William Barr, Sr., as the original origin or source of title, the erroneous statement that they inherited such interest as heirs at law of their father, William Barr, will be discarded. Sufficient remains to authorize a sale of such inherited interest as they acquired through or under Mary Jane Barr, and that interest, under the releases executed by their agent, has been extinguished, except as to Mrs. Reed's heirs, in respect to releases and conveyances made after May 18, 1883, as indicated in the first conclusion above.

3. That the interests in the land which Robert Barr, Samuel Barr, Jane Chapman, and Martha Reed, or either of them, acquired as the devisee or devisees of Robert Barr, deceased, were not covered by or included in said power of attorney, nor were they released by the conveyances which the agent, Wright, executed under and in pursuance of the authority conferred by said powers. The interests which the constituents of said owners, as devisees, had under said will were not involved in the suits instituted in 1881. They were not intended to be, nor is there any language employed which requires that this interest should be included in the powers of sale. It is shown by S. A. Miller, John D. Gallagher, George F. Meyers, and Irvine B. Wright, the attorney in fact, that during the period of said transactions they knew of no such interest. No purchaser is shown to have dealt with the agent in respect to that interest. While that interest may have vested in 1822, upon the death of the testator, the evidence of the devisees' title under the will was not perfected until 1884,—long after the releases were executed. Until the probate and record of the will in Hamilton county, Ohio, the constituents of the power, or those of them having such interest as the

devises of Robert Barr, deceased, could not have enforced any rights as such. They made no attempt to do so. Their contract with their attorneys did not relate to this interest, nor did said attorneys know of or undertake to represent or to recover that interest. It is manifest that the constituents of the several powers supposed they were each dealing with the same interest inherited as heirs. They did not have a common interest as devisees, and it is not to be presumed that those of them who did have such interest as devisee or devisees would have dealt with such interest on a footing of equality with the others who had no such interest, or that the latter would have included in their power interests in which they had no concern. The court has, by construction of the power, reached the conclusion that their interests as heirs of Mary Jane Barr, deceased, were properly released. The grounds upon which that construction rested could hardly be so extended as to include a separate and distinct interest in some of the constituents of the powers derived from another and different source, not by descent, but by devise. While the language employed in the powers of attorney is descriptive of pedigree and the origin and source of title, it also indicates the interests or estate on which the power was to operate, viz., such interest in the property as had descended directly or by representation from William Barr, Sr. The case comes to this: that when the powers were executed some of the constituents thereof had two separate and distinct interests. They all execute the powers to sell the interest they hold in common as heirs. Those of them having the additional interest as devisees are sought to be concluded as to such separate interest under the powers and conveyances which extinguished the common interest. Such an intention is not presumed. It must be clearly established. There is nothing in the present case to warrant the court in holding that the interests derived under the will of Robert Barr, deceased, were intended to be included in the power of sale, or that said interests were actually conveyed or have been extinguished. Counsel for cross defendants place most reliance upon the statements of Robert Barr, Samuel Barr, and Jane Chapman in relation to the will of Robert Barr, deceased, and as to the time they first learned of its provisions. These statements fall far short of establishing that the interests derived by that will were intended to be or were included in the powers of sale. On the contrary they tend to establish just the reverse. Cross defendants rest chiefly upon the proposition that the power of attorney and conveyances cover such devised interests. We think this cannot be maintained under the facts of this case, either upon principle or authority. In *Munda v. Cassidy*, 98 N. C. 558, 4 S. E. Rep. 353, 355, the converse of the present case was presented. It was this: A vendor conveyed "all the right, title, and interest derived by the will of the late J. C. in and to the undivided property, of whatever nature, situated in blocks 99 and 165" in a certain city. It was held that the conveyances did not pass the interest in said lots which had descended to the vendor as heir at law. The principle announced in *Burwell v. Snow*, 107 N. C. 82, 11 S. E. Rep. 1090, is generally to the same effect. It is also substantially laid down in

*Brown v. Jackson*, 8 Wheat. 449, and *Hanrick v. Patrick*, 119 U. S. 175, 7 Sup. Ct. Rep. 147. Our conclusion on this branch of the case is that the interests which the constituents of the powers of attorney had inherited directly or by legal representations from Mary Jane Barr fully satisfied the authority to sell or make releases; and that the interests derived by devise under the will of Robert Barr, deceased, were not included therein, and have not been extinguished or released; and that such devisees, or those succeeding to their rights, are entitled to a decree for such interest or interests. The costs of the cross suit will be divided between the cross complainants and the cross defendants holding and claiming the interests decreed the cross complainants.

### NORTHERN PAC. R. CO. v. NICKELS.

(Circuit Court of Appeals, Eighth Circuit. May 28, 1902.)

No. 49.

**1. MASTER AND SERVANT—CONTRIBUTORY NEGLIGENCE—COUPLING CARS—DISREGARD OF RULE.**

The mere disregard by an employe of a rule of a railroad company in relation to the coupling of cars, when, with the knowledge and acquiescence of the division superintendent of the road, such employe, and others coming under the rule, have constantly and without exception disregarded it, is not such negligence on the employe's part as will absolutely defeat his recovery for an injury caused by the negligence of the company.

**2. SAME—DISREGARD OF RULE—ACQUIESCENCE BY COMPANY.**

Evidence is admissible in such case to show that the rule had been disregarded with the knowledge and acquiescence of the division superintendent, even where the employe had signed a paper which set out the rule, and which contained a notice that all rules of the company would be violated at the risk of the employe, and that all such violations, whether habitual or otherwise, were not consented to or acquiesced in by the company.

**3. SAME—CONTRIBUTORY NEGLIGENCE—EVIDENCE.**

A switchman undertook on a dark night, in accordance with the order of the yard master, to couple a moving freight car propelled by an engine with defective cylinders. He carried his lantern on one arm, and, when the moving car was about eight feet distant from the stationary car, he stepped in between the rails, grasped the link attached to the moving car, and walked back towards the stationary car until he came within about 18 inches of it, when the defective cylinders of the engine emitted such unusual volumes of steam that he could not see anything. He immediately dropped the link, and started to escape. As he did so, he raised his arm, and the deadwoods caught and crushed his wrist. He saw the double deadwoods on the moving car as he stepped in front of it, but, owing to the darkness, could not see them on the stationary car, and did not know that there were double deadwoods on that car until they caught his wrist. *Held*, that the facts did not so clearly prove contributory negligence on the part of the switchman that it was the duty of the court below to give the jury a peremptory instruction in favor of the defendant.

In Error to the Circuit Court of the United States for the District of Minnesota.

Action by H. W. Nickels against the Northern Pacific Railroad Company for personal injuries. Verdict and judgment for plaintiff, and defendant brings error. Affirmed.

*Tilden R. Selmes*, for plaintiff in error.

*F. D. Larrabee*, for defendant in error.

Before CALDWELL and SANBORN, Circuit Judges.

SANBORN, Circuit Judge. H. W. Nickels, who was the plaintiff below, brought an action against the Northern Pacific Railroad Company for personal injury, which he alleged was caused by the corporation's negligence. The defendant corporation denied its negligence, pleaded that the plaintiff, Nickels, had been guilty of negligence that contributed to his injury, and that he had agreed to be bound by, and had then violated, the rule of the company set forth below. The plaintiff had been an employe of the defendant from June 26, 1889, until December 16, 1889, when he was injured, and during this time had served, sometimes as brakeman and at other times as switchman, in the yard at Glendive. On the 12th day of November, 1889, he signed and delivered to the defendant a writing entitled a "personal record," consisting principally of questions and answers relative to his age, residence, former occupations, and general qualifications for the position of brakeman. from which the following is an extract:

"(13) Have you read and do you understand the following abstract from the Book of Rules of the Northern Pacific Railroad Company? Yes. 'Caution as to personal safety. (25) Great care must be exercised by all persons when coupling cars. Inasmuch as the coupling apparatus of cars or engines cannot be uniform in style, size, or strength, and is liable to be broken, and as from various causes it is dangerous to expose between the same the hands, arms, or persons of those engaged in coupling, all employes are enjoined before coupling cars or engines to examine so as to know the kind and condition of the drawheads, drawbars, links, and coupling apparatus. \* \* \* Coupling by hand is strictly prohibited. Use for guiding the link a stick or pin. Each person having to make couplings is required to provide a proper implement for the purpose above specified. \* \* \* All will be held responsible.' (14) Do you agree to comply with all the requirements of the foregoing rule in case you enter into the company's employ? Yes. (15) You are notified that, if you or any other employe chooses to violate the requirements of any other rules contained in the Book of Rules of the Northern Pacific R. R. Company, you do so solely at your own risk. The company expects you and all other employes to comply strictly with all its rules and regulations, and does not and will not in any case acquiesce in or consent to any violation of them. Do you understand that all violations of the rules of the company by you or any other employe of the company, whether habitual or otherwise, are not consented to or acquiesced in by the company? Yes."

Over the objection of the defendant, the court below permitted the plaintiff and others, who had been employed as brakemen by the defendant, to testify that none of the employes of that corporation engaged in coupling cars had, so far as their knowledge extended, ever used a stick or pin in coupling them; that those engaged in this work at Glendive, where the accident happened, had constantly coupled the cars without its use, and that the division superintendent of the corporation, whose office was in the upper story of the depot, in the center of this yard at Glendive, had frequently seen the employes thus coupling without sticks, and made no complaint or objection; and upon this subject the court charged the jury that it was a question of fact for them to determine from all the evidence whether this rule, requiring the use of a

stick or pin in coupling the cars, was in force at the time of the accident, and that if they found it was not in force, the plaintiff could not be deemed guilty of contributory negligence because he failed to comply with this rule.

On the 13th day of December, 1889, plaintiff commenced to work as a switchman in the railroad yard at Glendive, under the direction of the yard master, with an engine that was so defective that unusually large volumes of steam constantly escaped from its cylinders and enveloped the engine and some of the cars. On the next day, and again on the succeeding day, he notified the yard master of this defect, and the danger from it, and protested against working with it. The yard master communicated the notice and complaint to the master mechanic, and requested the plaintiff to continue at his work, promising on one day that he would see if he could get the engine repaired, and on the next day that they should have a new engine very soon. About 9 o'clock in the evening of December 16th, as the yard master's crew was making up a freight train, he directed the plaintiff to couple a car that this defective engine was moving back, about as fast as a man would walk, to a stationary car it was approaching. Both these cars were furnished with double deadwoods, that is, cast-iron projections, 8 inches square, about 8 inches above the draw-bar, and about 18 inches distant from it on each side thereof, so constructed that, as soon as the drawbars of the approaching cars touched, the double deadwoods would strike each other. The night was dark. Plaintiff carried his lantern on one arm, and, when the moving car was about 8 feet distant from the stationary car, he stepped in between the rails, grasped the link attached to the moving car, and walked back towards the stationary car, until he came within about 18 inches of it, when the defective cylinders of the engine emitted such unusual volumes of steam that he could not see anything. He immediately dropped the link, and started to escape. As he did so, he raised his arm, and the deadwoods caught and crushed his wrist. Plaintiff knew that foreign freight cars sometimes had double deadwoods, and that it was his duty to look out for them. He saw them on the moving car as he stepped in front of it, and looked for them on the stationary car, but, owing to the darkness, could not see them when he stepped in and started towards them, and did not see them before the steam blinded him, and did not know there were double deadwoods on that car until they caught his wrist. Cars with double deadwoods can be safely coupled, if there is nothing to obscure the light so that the switchman can see their location, by reaching under them with the right hand to guide the link, and over them with the left hand to drop the pin; but it is far less difficult and less dangerous to couple cars with single deadwoods. The freight cars of the Northern Pacific Railroad Company and of western roads generally are provided with single deadwoods.

On this state of facts defendant's counsel requested the court to instruct the jury to return a verdict for the defendant. This request was refused, plaintiff had a verdict, and this refusal is assigned as error.

It was the duty of the defendant railroad company to use ordinary care to supply its employes with reasonably safe machinery and appliances with which to operate its railroad, and to use due diligence in keeping the machinery furnished in proper repair. There is ample and convincing evidence to sustain the conclusion, to which the jury must have arrived, that the corporation failed in the performance of this duty, and that its culpable negligence in continuing in service this defective engine, after repeated notices of its defects and warnings of the dangers of its use, resulted in the emission from its cylinders of the unusual volumes of steam that enveloped and blinded the plaintiff at the critical instant when the cars came together, and caused the loss of his hand. Indeed, this was conceded on the argument, and the only questions for consideration have reference to the alleged contributory negligence of the plaintiff. Here two questions are presented:

*"First.* Is the mere disregard by an employe of a certain rule of a railroad company such negligence on the part of such employe as will absolutely defeat his recovery for an injury caused by the negligence of the corporation, when, with the knowledge and acquiescence of the superintendent in sole charge of the operation of a great division of a railroad comprising hundreds of miles, such employe, and all others to whom the rule applies, have, prior to the accident, constantly and without exception disregarded it?

*"Second.* Do the facts of this case so clearly prove contributory negligence on the part of the plaintiff that it was the duty of the court below to give the jury a peremptory instruction in favor of the defendant?"

1. Regarding the first question, it must be borne in mind that the plaintiff had acted as brakeman and switchman on defendant's railroad for about six months when this accident happened; that he had constantly disregarded this rule; that he had never used a stick or pin to couple cars; that all the other employes with whom he was associated had constantly disregarded it; that the evidence is that no witness ever saw any one obey the rule or use a stick or pin to couple cars on this railroad in a single instance; that during several weeks this plaintiff had been thus coupling cars without a stick in the railroad yard at Glendive, where he was injured, immediately under the eye of Mr. Marsh, the superintendent of the Yellowstone Division of this railroad, who "was the only officer having control of the operation of that part of the road" upon which the plaintiff was working at Glendive; that the office of this superintendent was in the upper story of the depot building, which stands in the center of the railroad yard at Glendive; and that this superintendent had repeatedly seen these employes coupling cars without sticks or pins to guide the links. Here was competent evidence of the knowledge and acquiescence of this division superintendent, who had sole control of the operation of that part of this road, in the complete disregard of the rule. That his knowledge and acquiescence were the knowledge and acquiescence of the defendant company cannot admit of doubt, for he was the only officer in control of the operation of the road on that great division. The court below submitted the evidence of these facts to the jury as tending to show that this rule was not really in force at the time of the accident, with instructions to the effect that, if they found it was not in

force, its disregard by the plaintiff might not be contributory negligence; but that if they found it was in force, and the plaintiff's disregard of it contributed to his injury, he could not recover. There are some decisions in the books holding that the habitual and customary disregard of such a rule as that in question by brakemen and switchmen is not sufficient to prove a waiver or abandonment of the rule by the corporation, where it was not proved that the officer of the corporation in charge of its enforcement knew of or acquiesced in its disregard. But in the case at bar the utter and total disregard of this rule was proved to be known to the very officer who, if any one was, must have been charged with the enforcement of this rule on his division of this railroad. The disregard or violation of the rule was not merely habitual,—customary,—it was complete. The evidence of the witnesses is that none of them ever saw one instance in which the rule was complied with on the defendant's railroad. To hold that this defendant company could make this rule on paper, call it to plaintiff's attention, and give him written notice that he must obey it and be bound by it on one day, and know and acquiesce without complaint or objection in the complete disregard of it, by the plaintiff and all its other employees associated with him, on every day he was in its service, and then escape liability to him for an injury caused by its own breach of duty towards the plaintiff because he disregarded this rule, would be neither good morals nor good law. Actions are often more effective than words, and it will not do to say that neither the plaintiff nor the jury were authorized to believe from the long-continued acquiescence of the defendant in the disregard of this rule that it had been abandoned,—that it was not in force. The evidence of such abandonment was competent and ample, and the ruling and charge of the court below on this subject were right. *Barry v. Railway Co.*, 98 Mo. 62, 11 S. W. Rep. 308; *Smith v. Railway Co.*, 18 Fed. Rep. 304; *Schaub v. Railway Co.*, (Mo. Sup.) 16 S. W. Rep. 924.

But defendant's counsel contends that evidence of the waiver or abandonment of this rule was not competent or material, because by the writing he signed on November 12, 1889, he had agreed to comply with this rule, and that he would take upon himself alone all risk of its violation. There is some doubt whether this writing, under the evidence in this case, rises to the dignity of a solemn contract, made for a valuable consideration. It is styled "personal record," and consists very largely of questions and answers relative to the qualifications of plaintiff to serve as a brakeman. It is dated November 12, 1889, and is alleged to have been made in consideration of the employment of plaintiff by defendant at a subsequent date, but the evidence discloses the fact that he was employed by defendant June 26, 1889, more than four months before this paper was signed, and that he remained in defendant's service continually from that date until he was injured; so that it would seem that this writing could not be successfully claimed to be proof of anything more than notice to the plaintiff of the existence of the rule in this particular case. But if it was a contract, it is clear that



it could not bar the plaintiff from proving a waiver or abandonment of the rule. This writing was prepared by the defendant. All the plaintiff had to do with it was to answer the questions and sign his name. It contained in it these words:

"The company expects you and all other employees to comply strictly with all its rules and regulations, and does not, and will not in any case, acquiesce in or consent to any violation of them. Do you understand that all violations of the rules of the company by you or any other employe of the company, whether habitual or otherwise, are not consented to or acquiesced in by the company? Yes."

There are at least two parties to every contract, and this provision was a representation and a contract on the part of the defendant that it did not and would not acquiesce in the violation of any of its rules. The plaintiff signed the contract and proceeded with his service. He must have immediately discovered that if there really was any rule about the use of sticks and pins in coupling cars it was constantly violated on this railroad; that the defendant knew of this violation, and acquiesced in it. This uniform and constant acquiescence of the defendant in the violation of this rule, if such a rule was really in existence, was a violation of the contract on the part of the defendant that it did not and would not acquiesce in the violation of any of its rules, and relieved plaintiff from further compliance therewith; and if, on the other hand, the rule was not really in force, if it had been waived or abandoned, the utter disregard of the rule, and defendant's acquiescence therein, were competent evidence of the abandonment. In either case the plaintiff had a right to rely on the conduct of the defendant, and to introduce his evidence in this behalf.

2. The second question for determination is, did the evidence so clearly prove that the plaintiff was guilty of contributory negligence that the court below should have given a peremptory instruction in favor of the defendant? It was plaintiff's duty to exercise reasonable care, commensurate with the dangerous character of his occupation, to protect himself from injury. He could not recklessly expose himself to a known danger, and then recover from the defendant for an injury to which such exposure contributed. The contention of defendant's counsel is that it was the duty of the plaintiff, in the exercise of ordinary care, to examine the stationary car, and know whether there were double deadwoods on it, before he stepped in between the rails to make the coupling; that the plaintiff testified that the first step in coupling cars was to set the pin, and the pin was in the stationary car; that, if plaintiff had first stepped to the stationary car and set the pin, he would have discovered the double deadwoods on that car, and would not have been injured; that in stepping in between the rails and grasping the link of the moving car when it was eight feet distant from the stationary car he was not in the act of coupling the cars or in the line of his duty, but was carelessly exposing himself to injury; and that by this unnecessary and reckless exposure he contributed to his own injury. It is a general rule that, if reasonable and fair-minded men of

ordinary intelligence may differ as to the conclusion to be drawn from a given state of facts, the question of negligence is for the jury to determine from the facts and all the surrounding circumstances. Can it be said that fair-minded men of ordinary intelligence would agree that there was any want of reasonable care on plaintiff's part in stepping in front of the moving car and grasping the link to guide it into the slot when it was only eight feet distant from the stationary car, and the plaintiff had been directed by his superior, the yard master, to make the coupling under the circumstances of this case? Cars cannot be coupled when both are stationary; they cannot be coupled after the moving car strikes the stationary car, save by a renewed endeavor. At some time while one of the cars is moving the link must be seized and guided. This car was moving four miles an hour, and would traverse the space of eight feet in less than two seconds.

Again, defendant's counsel bases his contention that plaintiff was negligent and out of the line of his duty in stepping in and grasping the link before he set the pin upon his testimony that the first thing to do in coupling a car is to set the pin. That statement, however, cannot be held to so conclusively prove that it was negligence to seize the link before setting the pin as to authorize a court to take this question of negligence from the jury on that account. Indeed, the entire testimony of this witness shows that this statement of his was not sufficient to conclusively prove that any prescribed order of handling link and pin was the only careful or the safest method of handling them in coupling the cars. At another time, while testifying, he said:

"Coupling cars, generally you take the link of the moving car. \* \* \* When you leave a car, you leave the pin standing up in the hole, and when you come to make the coupling you take this link, and you place the pin in the other car so it will fall, and then when this link comes in there you raise it up, and direct it this way into the slot of the other drawbar, and when the cars come together the pin falls into the link."

But perhaps the most conclusive answer to defendant's counsel is that, if plaintiff had first stepped to the stationary car and set the pin, and then waited for the coming car, while he would have discovered the double deadwoods on the stationary car, the blinding steam would in all human probability have obscured his vision before the moving car came near enough for him to discover the double deadwoods on that car, and he would have suffered the same, or a much more serious, injury.

Under the evidence in this case no court would be authorized to declare the plaintiff guilty of negligence that contributed to his injury, and the judgment is affirmed.

## CINCINNATI, N. O. &amp; T. P. RY. CO. v. MEALER.

*(Circuit Court of Appeals, Sixth Circuit. June 6, 1902.)***1. MASTER AND SERVANT—PERSONAL INJURIES—PROXIMATE CAUSE—RAILWAY SWITCHMAN.**

A yard switchman in uncoupling cars was walking or running with the train, for the purpose of lifting the pin, when he stumbled over a piece of coke on the track, and his arm was thrown between the deadwoods and injured. *Held*, that the stumbling was the proximate cause of the injury, and evidence as to the defective condition of the drawbar was immaterial.

**2. SAME—FELLOW SERVANTS.**

As it was the duty of the section men to remove coal or coke from the tracks, there can be no recovery for their negligence in failing to do so, since they and the switchman were co-servants.

**3. SAME—DUTY TO INSTRUCT SWITCHMAN.**

The switchman testified that he was about 23 years old, had been employed as such for three weeks, had known the tracks in the yard for three months, and knew all that was necessary to enable him to couple and uncouple cars. It was conceded that at the time of the injury he was uncoupling cars in a necessary and proper manner. *Held*, that it was not necessary for the defendant to show that it had instructed, or offered to instruct, the plaintiff how to couple and uncouple cars.

In Error to the Circuit Court of the United States for the Southern Division of the Eastern District of Tennessee.

Action by Charles Mealer against the Cincinnati, New Orleans & Texas Pacific Railway Company for personal injuries. Verdict and judgment for plaintiff. Defendant brings error. Reversed.

*Lewis Shepherd and Edward Calston*, for plaintiff.

*Fred L. Mansfield and T. M. Burkett*, for defendant.

Before JACKSON, Circuit Judge, and SAGE and SWAN, District Judges.

SAGE, District Judge. Upon the trial of this case the following facts appeared in evidence: On the 28th of October, 1890, the defendant in error, Mealer, was a switchman in the employment of the railway company, plaintiff in error, in its yard at Oakdale, Tenn. Shortly after nightfall a through freight train from the north arrived, and was taken charge of by the night yard master. While it was yet moving, he directed Mealer to cut off the caboose and one car. Mealer went between the cars, which, it is shown by the evidence and is conceded, was necessary and proper, and, finding that the coupling pin was pushed back under the draft timbers, so that he could not pull it out, held to the pin, running along (in another part of his testimony he said "walking") and keeping pace with the motion of the train, was expecting the engine to slack ahead a little, so that the pin would be released from under the end sill, and could be lifted out. Just then the forward car "surged ahead and right back again," and, according to his own testimony, which is the only evidence giving the particulars of the accident, he struck his foot against a piece of coke or coal on the track, and, stumbling, partially fell. That threw his arm down between the deadwoods, there being nothing on the car to hold to. At the same time the rear

car ran up against the car forward, and his arm was caught and crushed between the deadwoods, which were placed, as is usual, on each side of the drawheads, so as to protect the cars and prevent the breaking of the drawbars if a drawbar spring was out of order, or not strong enough to keep the cars apart. He testified that to the best of his knowledge what he struck his foot against was a piece of coke, which had fallen off from the cars they had been coupling, and that if there had been a spring in the drawhead it would not have been driven back under the sill and fastened.

Mealer had been in the employment of the railway company some three months, at first as yard clerk, from which service he was transferred, about three weeks before he was hurt, by the general yard master to the night yard master's department, and set to work as a switchman, without having had experience as such, excepting, as he testifies, that he had switched a few nights at Oakdale, when any man was off. Before engaging in the employment of the railway company, he had been a brakeman on another railroad, but for what length of time does not appear. He was 22 years of age when he received the injury. He testified also that he was not instructed by the night yard master how to couple and uncouple cars, but that he knew how to do that work, and that such instructions were not necessary. He further testified that he had gone over the yard daily, from the time of his first entering the service of the company, and knew its condition; that they hauled about one train of 25 cars of coal or coke there per day; that he had frequently seen lumps of coal and coke fall from the cars, but did not notice any on the track where the accident occurred on that or the previous evening.

The night yard master, called as a witness by Mealer, testified that in switching coke sometime fell off when couplings were made; that that was a usual thing; that he made an examination at the place of the accident immediately after it occurred, and saw pieces of coke on top of the cinders on the track, and that they were "a couple of inches through, or it might have been larger;" also, that when a person is running between the cars he is likely to be thrown off his balance by striking his foot against a small lump of coal or coke.

The uncontradicted testimony of the road master, and the only testimony on that subject, was that it was the duty of the section boss and his hands, (there were eight or nine of them,) to go through the yards daily, and remove all obstructions, including lumps of coal or coke, from the tracks, and keep them cleared up.

All testimony tending to prove that the spring of one of the drawbars was weak or defective, having been admitted subject to exception, was withdrawn from the jury on the motion of counsel for the railway company; the court holding that it was not competent, because there was no complaint of any such defect in the declaration.

When the evidence in the case was all in, counsel for the railway company moved the court to direct a verdict in its favor. The motion was overruled. The case was then argued and submitted to the jury under

the instructions of the court, and a verdict was returned against the railway company for \$4,750.

The court instructed the jury that the employment of a railroad switchman was necessarily dangerous, but that those who enter it, knowing that it is dangerous, assume the natural and ordinary risks and perils involved, as well as all risks of injuries resulting from the negligence of fellow servants; also, that if in this case the tracks were in bad condition, or strewn with lumps of coal or coke, and Mealer was passing over the tracks every day, and saw that they were in that condition, and, continuing in the service of the railroad company, suffered injury therefrom, he had no right to complain. These instructions were entirely correct, and, inasmuch as the only evidence in the case, including the indisputable testimony of Mealer himself, was that he had full and complete knowledge of all the conditions referred to, they should have been supplemented by a direction to the jury to return a verdict against him. But instead, the court proceeded to charge the jury that if they believed that Mealer was without experience or training, that no effort was made by any officer of the company to train him, and that by reason of his inexperience and want of knowledge he was not in a condition to appreciate the dangers of his service, and he suffered injury under the direction of some one placed over him, then he ought to recover; and the court referred to the night yard master, and the chief yard master, each by name, as the representatives of the company placed over and directing and controlling him. There was no evidence in the case warranting any of these instructions. Mealer had been acting as switchman in that yard about three weeks before the accident, and he himself testified that he had known the yard and the tracks three months, and had been over them daily, and that he was so familiar with the mode of coupling and uncoupling cars that he needed no instruction on that subject. More than that, it appears from the testimony, and it is conceded by his counsel in their brief, that he went about the business of uncoupling the cars at the time when he was injured in the manner that was necessary and proper. The testimony was all one way. Instead of directing a verdict, the court allowed the jury to make a finding not warranted in law or by the testimony, and on the same day a motion for new trial was overruled, and judgment for the full amount entered up.

Cases are cited in support of the instructions given the jury with reference to the duty of employers to warn inexperienced servants. The law upon that point is well settled, and needed no verification, but it has no application to this case, as is above shown. Much is said about the drawhead being out of repair and in bad condition, but it is not even pretended that there was any defect, excepting in the spring, and that mainly by inference; and all the evidence with reference to the spring was properly withdrawn by the court from the consideration of the jury. If the motion to withdraw that testimony had been overruled, and it were conceded that it was sufficient to sustain a finding that the drawbar was in bad condition, that would not affect the case, because the only proper conclusion that can be drawn from the evidence is that the

stumbling, from coming into contact with the lump of coke on the track, was the proximate cause of the injury. Mealer testifies explicitly that that threw his arm down between the deadwoods a moment before they came together, and not only testifies to it, but repeats it. It is therefore a matter of no consequence whether the drawbars were in good or bad condition. *Railway Co. v. Kellogg*, 94 U. S. 469. As to the coal or coke upon the track, the only testimony in the record on that subject is that it was the duty of the section men to remove it, and to keep the tracks cleared up. They were Mealer's fellow servants, and he could not recover for injuries resulting from any failure of duty on their part.

Whether the night yard master or the general yard master was a representative of the railroad company as to Mealer is not at all material. The court properly instructed the jury that his entering upon the service of the company as a switchman must be regarded as voluntary. The general yard master was not present, and no instruction was given Mealer by the night yard master on the occasion of his receiving the injury, excepting to uncouple the cars, or, in other words, to render, under ordinary and usual conditions, the very service that he had, by his contract of employment, engaged to render, and the incidental and natural risks of which he had thereby agreed to assume, and which he did assume when he entered upon the employment.

The motion to direct a verdict was rightly made at the close of all the evidence. *Randall v. Railroad Co.*, 109 U. S. 481, 482, 3 Sup. Ct. Rep. 322. The exception taken to the overruling of that motion, and to the portions of the charge above considered, are sustained. The judgment below will be reversed at the costs of the defendant in error.

### BALTIMORE & O. R. Co. v. ANDREWS.

(Circuit Court of Appeals, Sixth Circuit. June 6, 1892.)

#### 1. CIRCUIT COURT OF APPEALS—DATE OF CREATION.

Act March 3, 1891, creating circuit courts of appeals, took effect immediately, as to permit appeals to the new courts to be taken at once. *Railroad Co. v. Bennett*, 49 Fed. Rep. 598, followed.

#### 2. CO-SERVANTS—COLLIDING TRAINS.

A brakeman on one train is a co-servant of the conductor and engineer of another train, and, if killed in a collision caused entirely by the negligence of the latter, the company is not liable. *Railroad Co. v. Ross*, 5 Sup. Ct. Rep. 184, 119 U. S. 877, distinguished.

Error to the Circuit Court of the United States for the Northern District of Ohio.

Action by Samuel P. Andrews, administrator of the estate of Charles Reynolds, deceased, against the Baltimore & Ohio Railroad Company. Verdict and judgment for plaintiff. Defendant brings error. Reversed.

J. H. Collins, for plaintiff.

W. W. Skiles, for defendant.

Before JACKSON, Circuit Judge, and SAGE and SWAN, District Judges.

SAGE, District Judge. The action below was brought to recover damages for the death of Charles Reynolds, alleged to have resulted from the negligence of the defendant below. On the 14th day of February, A. D. 1890, the deceased was a brakeman on west-bound freight train No. 37, on the Chicago division of the railway of the defendant below, and while in the discharge of his duty as such was killed in a collision with east-bound freight train No. 88, near the town of Bairdstown, a station on the line of said road. It appears from the bill of exceptions that upon the trial testimony was introduced on the part of the plaintiff, and also of the defendant, "proving" that train No. 88, on the date named, left Garrett, Ind., with Theodore Cruder acting as conductor, and J. M. Smith as engineer. It "was run under the exclusive orders, direction, and supervision of the train dispatcher and the superintendent of the Chicago division of the defendant's railroad." The train dispatcher gave instructions by telegraph to the engineer and conductor as to the movements of the train, directing when and where it should stop, where it should pass other trains, and all other matters connected with its running and management. While it was at Deshler, a station on the line of said road, a telegram was sent by the train dispatcher, and delivered to the conductor and engineer, ordering them to meet and pass train No. 37 at Bairdstown, but both the conductor and engineer made the mistake of reading "Bloomdale" instead of "Bairdstown," Bloomdale being a station east of Bairdstown, and, so reading the order, ran the train past Bairdstown without stopping, the conductor of train No. 37 having an order from the train dispatcher to meet No. 88 at Bairdstown, and moving his train to that station. The result was that the trains collided, and Reynolds was killed. But testimony having been offered, on behalf of the plaintiff below, tending to maintain an allegation of the petition that the conductor of train No. 88 was incompetent, and the engineer not only incompetent, but of reckless habits, the court suggested to counsel that, as negligence of both the conductor and engineer, in not correctly reading their orders, was conceded, and as, in the judgment of the court, the testimony upon the other issue was not sufficient to support a finding in favor of the plaintiff, the case be allowed to go to the jury upon the sole question of the negligence of the conductor and engineer in not properly reading their orders, for the reason that, in the opinion of the court, that negligence made the defendant liable in law, and it was not therefore material or important that the jury should determine any other question. This suggestion was accepted by counsel, and the court then proceeded to charge the jury. The portion of the charge upon which the questions to be here decided arise is as follows:

"There is no fact to be submitted to you in this case. The defendant, by its counsel, concedes that the conductor did not properly read his instructions, and by such negligence caused the accident complained of. The conductor in this instance, the court instructs you, as a matter of law, represented the defendant. The conductor's negligence, therefore, was the negligence of

the defendant, and, the plaintiff having been without fault, the defendant is liable for the injury sustained. It is therefore solely a question of damages."

The jury returned a verdict for the plaintiff on the 24th of April, 1891, upon which, a motion for new trial having been overruled, a judgment for \$4,000 was, on the 29th day of July, 1891, rendered against the defendant, and the cause was then brought to this court by proceedings in error. The defendant in error objects to the jurisdiction, that the verdict having been found before the 1st of July, 1891, for less than \$5,000, the case could not be brought here by proceedings in error. It was held in *Railway Co. v. Bennett*, 49 Fed. Rep. 598, (decided by this court October 6, 1891, and reported in No. 6 of the advance parts of the United States Courts of Appeals Reports,) that while the then existing jurisdiction of the circuit courts and of the supreme court was preserved up to the 1st of July, 1891, as to all appeals pending or taken before that date, there was also a right of appeal to the circuit courts of appeal from the time the act was passed; and, consequently, that the writ of error in that case, which was taken on the 24th day of June, 1891, was properly taken, and that this court had jurisdiction of the case. The court cited, as sustaining this ruling, *In re Claasen*, 140 U. S. 200, 11 Sup. Ct. Rep. 735. The objection to the jurisdiction is overruled.

There is but a single exception to the charge, and that is a general one. The only question to be considered is whether, upon all the evidence, the verdict and judgment in favor of the plaintiff below should be sustained. More precisely stated, it is whether the plaintiff in error was liable to the defendant in error for the negligence of the conductor of train 88, which it is conceded caused the collision and the death of Reynolds. If so, the judgment must stand; if not, it must be reversed. The facts are not in dispute. The suggestion made by the trial judge that the allegations that the conductor and engineer of No 88 were incompetent, and the engineer reckless, were not sustained by the evidence, was accepted by counsel for the respective parties. The jury was instructed that the conductor represented the railroad company, that his negligence was the negligence of the company, and that, Reynolds having been without fault, the company was liable for damages resulting from his death.

Counsel for defendant in error, in support of this instruction, cite numerous cases to which it may be as well at the outset to refer. *Railroad Co. v. Ross*, 112 U. S. 377, 5 Sup. Ct. Rep. 184, is clearly distinguishable from this case. There the injury to the plaintiff, a locomotive engineer, was received in a collision caused by the negligence of the conductor of the train, to whose orders he was subject. The court held that the railroad company was liable, recognizing a distinction "between servants of a corporation exercising no supervision over others engaged with them in the same employment, and agents of the corporation clothed with the control and management of a distinct department, in which their duty is that of direction and superintendence," and that "the conductor of a railway train, who commands its movements, directs when it shall stop, at what stations it shall stop, at what speed it shall run, and



has the general management of it, and control over the persons employed upon it, represents the company, and therefore that for injuries resulting from his negligent acts the company is responsible." It is insisted for the plaintiff in error that in that case the engineer's train was a regular freight, running on schedule time, while in this case the trains were running under special orders by telegraph, directing every movement and stop. But in the *Ross Case* the conductor was under special order by telegraph to hold his train at South Minneapolis until the gravel train, which was a wild train, should pass, and it was the conductor's neglect of that order which caused the collision. Besides, there is no difference in principle between the regular printed time-table or schedule, and a special schedule or time-table sent by telegraph. In either case the movement of the train is directed by the company, and in both cases the control and management of the train under way, whatever the orders, are vested in the conductor, or generally in the conductor and engineer,—in the latter to the extent of authorizing him to disregard instructions given by the conductor in conflict with the regular schedule or with special orders; but the subordinates on the train are mere servants, entirely subject to the orders and control of the conductor, and not supposed to know the contents of special orders, or even that they exist. As to them, the company speaks through the conductor, who is therefore, in that behalf, so far as they are concerned, the representative of the company. In the *Ross Case*, the conductor failed to show his special order to the engineer, as it was his duty to do, and hence the engineer was in fact altogether a subordinate. In this case Cruder, the conductor of train No. 88, had no supervision or control over Reynolds, brakeman on train No. 37, and there was no negligence on the part of the conductor or the engineer of train 37. The negligence was exclusively that of the conductor of train No. 88. *Railroad v. Ross* is therefore not an authority in favor of the defendant in error.

*Railroad Co. v. Herbert*, 116 U. S. 642, 6 Sup. Ct. Rep. 590, does not apply. That case was decided upon the ground that it was the duty of the railway company to look after the condition of the cars, and see that the machinery and appliances used to move and stop them were kept in repair and in good working order, and that if the person appointed by it, and charged with that duty, neglected it, and injury resulted, the company was liable, because that person, so far as that duty was concerned, was the representative of the company. In that case a brakeman was injured in attempting to set a brake which was out of order. The court held that the railway company could not delegate to a servant its duty to keep its cars and their machinery and appliances in order, so as to exempt itself from liability for injury caused to another servant by its omission. The principle governing that case was recognized also in *Hough v. Railway Co.*, 100 U. S. 217, another case cited for defendant in error, as an exception to the general rule exempting the common master from liability to a servant for injuries caused by the negligence of a fellow servant. *Railway Co. v. Cummings*, 106 U. S. 700, 1 Sup. Ct. Rep. 493, is an authority to the point that if the negligence of the company itself had a share in producing the injury complained of to

one of its servants the company was liable, even though the negligence of a fellow servant was contributory also. But the point does not arise in this case. In *Steamship Co. v. Merchant*, 133 U. S. 375, 10 Sup. Ct. Rep. 397, the supreme court decided that the court below erred in not directing a verdict for the defendant, the plaintiff, the stewardess of the vessel, having fallen overboard because of the giving away of a railing at a gangway, against which she leaned in attempting to empty a bucket over the side of the vessel. The porter and the carpenter, who, the court held, were her fellow servants, had left the railing insecure, knowing that it was so. There is nothing comforting to the defendant in error in that case. In *Railway Co. v. Botsford*, 141 U. S. 250, 11 Sup. Ct. Rep. 1000, the last of the citations from the supreme court reports in the brief, the only question considered or passed upon was whether a court of the United States has the power to order a plaintiff, in an action for an injury to the person, to submit to a surgical examination in advance of the trial, which has not the remotest relation to any question before the court in this case. The citation was probably by mistake or inadvertence. A number of cases from the Federal Reporter are cited, but they need not be referred to in detail. The cases decided by the supreme court, and cited and to be cited in this opinion, will be found to be conclusive upon all the questions involved in this case.

We turn now to *Randall v. Railroad Co.*, 109 U. S. 478, 3 Sup. Ct. Rep. 322, cited for the plaintiff in error. That was the first case in which the court undertook to determine who are and who are not fellow servants; not by a precise and exhaustive definition, for the law is, in its wisdom, chary of such definitions, but by giving a definition sufficient for the decision of the case. The action was by a brakeman for personal injuries received while working a switch by being struck by one of the company's locomotive engines. The court, declining to weigh the conflicting views of the courts of the several states, held that persons standing in the relation to each other occupied by the plaintiff, who was brakeman on a freight train, and the engineman of another train, who, controlling that train, and driving his engine at a speed of about 12 miles an hour, with no light except the headlight, and without ringing the bell or sounding the whistle, caused the injury, were fellow servants, neither working under the order or control of the other, and each, by entering into his contract of service, taking upon himself the risk of the negligence of the other in performing his service; and, therefore, that neither could maintain an action against the corporation, their common master, for an injury caused by such negligence. The relations of those persons, each to the other, were not in any material respect, or in a single essential, different from the relations of the plaintiff below, a brakeman on one freight train, to the conductor and engineer of the other freight train. In the *Randall Case* the engineer was in command, and by his negligence in moving his train caused the injury. In this case the conductor was in command, or, if we say the conductor and engineer were jointly in command, we do not alter the case, and by moving the train in negligent disregard of special orders, caused the injury. It is now easy to answer the question put by counsel for defend-

ant in error, namely, suppose in the collision a brakeman had been killed also on train No. 88, and the administrator of his estate had brought suit to recover. Under the rule in the *Ross Case*, the court would direct a verdict for the plaintiff for such sum as the jury might award, instructing the jury that the conductor, by reason of his control and management of the train, represented the company, and that his negligence was the negligence of the company. Next comes on the case of the defendant in error. Upon what theory, ask counsel, could the court instruct the jury in that case that the conductor of train 88 was not the representative of the company, but only a fellow servant? This is a fair test question, in effect calling upon the court to reconcile the *Ross Case* and the *Randall Case*. They are not at variance. The expression "representative of the company" was used by the supreme court in the *Ross Case* in a limited sense, having reference to the conductor's relations to those subject to his orders, and not in an absolute or unlimited sense, which is the sense necessary to give point to the question. The court said, referring to the conductor: "In no proper sense is he a fellow servant with the fireman, the brakemen, the porters, and the engineer. The latter are fellow servants in the running of the train under his directions; as to them and the train, he stands in the place of, and represents, the corporation." Applying the expression relatively, as it was applied by the supreme court, the conductor of train 88 was the representative of the company as to the engineer, the fireman, and the brakemen on that train, because they were under his direction. But the conductor of train 88 occupied no such relation to the employes on train 37. He had no authority over them. They were entirely independent of his direction or control, being subject to the conductor of their own train, and therefore the plaintiff below was not entitled to recover. The charge was erroneous because of the failure of the trial judge to recognize the distinction above pointed out. Under the authority of the *Randall Case*, the jury should have been instructed that the plaintiff below and the conductor of train 88 were fellow servants, and a verdict directed accordingly. As it was, the conductor was recognized as the representative of the company, not only as to its employes over whom he was placed, but also as to those over whom he had no authority whatever, and was not, actually or constructively, or in any sense, a representative of the company.

The law controlling this case is well stated in *Railway Co. v. Devinney*, 17 Ohio St. 198, as follows:

"A railway company is not liable in damages to a brakeman on one of its trains for injuries sustained by him in a collision of his train with another train of the same company, where the collision occurred by means of the negligence of the conductor or engineer, or both, of such other train, unless it appear that the company was guilty of a want of ordinary care in the selection and employment of an incompetent conductor or engineer, through whose negligence the collision occurred."

The exception to the charge upon the trial below was well taken. The judgment will be reversed, with costs.

UNITED STATES *v.* TURNER *et al.*

(District Court, D. South Carolina, W. D. February 20, 1892.)

## 1. SUFFICIENCY OF SUMMONS—ACTION ON DISTILLER'S BOND.

In an action on a distiller's bond for the performance of certain duties, to recover for breach of some of its conditions, a summons which gives notice that, in case of default, plaintiff will pray judgment for the relief demanded in the complaint, is in good form.

## 2. SAME—AMENDMENT.

A summons issued out of the district court, and bearing the seal of the district court, but the teste of the chief justice, instead of the district judge, as required by Rev. St. § 911, is defective in the latter particular, but is not a void process and is amendable. Rev. St. § 954.

At Law. Motions in arrest of judgment.

*Abial Lathrop*, U. S. Atty.

*M. F. Ansel*, for defendant.

SIMONTON, District Judge. This action was on a bond given by Turner, with Peek and Hughes as sureties. Summons and complaint were issued against them jointly, and judgment was had by default; the court hearing the cause and ordering judgment. Subsequently, Hughes, coming in by counsel, without objection, moved for a new trial. The motion was refused. The case now comes up on motion in arrest of judgment by each surety severally. The grounds of the motion are the same in each case, that the original summons issuing out of the district court bore the teste of the chief justice, and not of the district judge, and that the summons gives notice that, in case of default, plaintiff will pray judgment for the relief demanded in the complaint; and the complaint demands judgment for a sum of money certain.

The last ground will be disposed of. Under the rule of court in force at the date of this summons, when the complaint is on a liquidated demand, the summons should state that, in case of default, judgment would be asked for the sum liquidated. In all other cases the notice in the summons should be that, in case of default, judgment would be asked for the relief demanded in the complaint. In this case the action was on a distiller's bond for the performance of certain duties. It was not on the penalty, but for the nonperformance of some of the conditions, of the bond. The demand was not liquidated, and the form of notice in the summons was correct. The complaint set out the parts of the condition which were broken, and the money penalty for each, and properly asked judgment for the aggregate. This ground for arrest of judgment is overruled.

The more serious ground is the one first stated. The act of 1792 (Rev. St. § 911) requires all process issuing from the district court to bear the teste of the district judge, or, when that office is vacant, of the clerk thereof. Our rule requires every summons, execution, or other process to conform to this section. This renders unnecessary any discussion of the question whether in this district the summons is process. It is not process in the state courts. The summons in this case bears

the teste of the chief justice. It is defective. Is this fatal? Section 954, Rev. St., provides that "no summons, writ, etc., in civil cases, in any court of the United States, shall be abated, arrested, quashed, or reversed for any defect or want of form." Judge CHOATE, in *Brown v. Pond*, 5 Fed. Rep., at page 40, says that this power of amendment can only be exercised in cases where the court has acquired jurisdiction over the defendant, or he has submitted himself to the jurisdiction; or, as Judge BLATCHFORD puts it in *Dwight v. Merritt*, 4 Fed. Rep. 614, the power is power to amend a defect in process. But there must first be a process to be amended,—something to amend and to amend by. The summons in this case bears the seal of the district court, and issued from the court. This gives us something to amend and to amend by. *Peaslee v. Haberstro*, 15 Blatchf. 472. See, also, *Chamberlain v. Bittersohn*, 48 Fed. Rep. 42. This being the case, the irregularity can be amended, as the summons was sufficient to bring the defendant into court. Indeed, there can be no question as to Hughes; for when he came in by attorney, and moved for a new trial, he submitted himself to the jurisdiction. The motions in arrest of judgment are refused.

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WEBER *et al.* v. SPOKANE NAT. BANK *et al.*

(Circuit Court, D. Washington, E. D. May 27, 1892.)

1. NATIONAL BANKS—LIMITATION OF INDEBTEDNESS—CONSTRUCTION OF STATUTE.

Rev. St. § 5202, providing that national banks shall not contract liabilities in excess of their paid-up capital stock, except upon notes of circulation, accounts for deposits, etc., does not intend that such items of liability shall be excluded in determining whether the indebtedness of a bank exceeds its paid-up capital stock at the time it incurs a liability as guarantor.

2. SAME—DEFENSES—ESTOPPEL.

In an action against a national bank and its receiver on a promissory note, defendants may avail themselves of the defense that the note was executed in violation of Rev. St. § 5202, providing that national banks shall not contract liabilities in excess of their paid-up capital stock. The note being void as to the bank, it is not estopped to set up the defense in question.

3. SAME—NOTICE TO CREDITOR—PRESUMPTIONS.

A business man, accepting the note of a national bank, is presumed to know the financial condition of the bank, and that at the time of the execution of the note it had already incurred indebtedness in excess of the limit prescribed by law.

At Law. Action by C. F. Weber & Co. against the Spokane National Bank and H. L. Chase, receiver, upon three promissory notes. Jury instructed to find for the defendant. Motion for a new trial denied.

The other facts fully appear in the following statement by HANFORD, District Judge:

The notes in suit were drawn in favor of the plaintiffs, as payees, and signed by Charles Hussey, as maker. The defendant the Spokane National Bank is an anomalous indorser, having signed the notes upon the backs thereof before delivery. Said notes were given in payment of an account for bank furniture and fixtures supplied by the plaintiffs for a

building owned by said Hussey, and occupied by said defendant as his tenant. The receiver defends on the ground that the bank is not primarily liable as a maker of the notes; that it could not legally become bound as a surety; and, if bound, inasmuch as the principal debtor has not been proceeded against, and no reasons are assigned for not having collected from him, nor for the failure to join him as a party defendant, its liability as a guarantor of the notes cannot be enforced in this action. It was shown by the evidence that the furniture was supplied at the instance of the officers of the bank, and that credit was given by the plaintiffs to the bank, and not to Hussey, but, as between the bank and Hussey, said furniture and fixtures belonged to Hussey, and the same are not assets of the insolvent bank in the hands of the receiver. The receiver in his answer also pleads, as a special defense, that at the times of the making of the notes, and sale of the furniture in consideration for which they were given, the bank had already incurred indebtedness, and become liable for amounts aggregating a sum much greater than the amount of its paid-up capital stock; so that by section 5202, Rev. St., it was then prohibited from becoming liable upon said notes, either as maker or guarantor, or upon an account as purchaser of the furniture upon credit. The case was tried by the court and a jury, and, after introduction of the evidence for both contesting parties, the receiver's attorney moved the court for a peremptory instruction to the jury to render a verdict for the defendants, which motion was granted, and under instructions from the court the jury returned a verdict for the defendants. A motion for a new trial was interposed and submitted upon the arguments made upon the motion to instruct.

*Forster, Wakefield & Wikoff, for plaintiffs.*

*P. H. Winston, U. S. Atty., H. M. Herman, and J. W. Feighan, for receiver.*

HANFORD, District Judge, (*after stating the facts as above.*) The evidence introduced upon the trial was sufficient to have warranted the submission of the case to the jury upon the question whether the bank was in fact the purchaser of the furniture, and liable as the principal debtor and maker of the notes, or a mere guarantor; but, in my opinion, the special defense pleaded by the receiver is fully sustained by the evidence, and there was no error in the instruction given to return a verdict for the defendants. The bank was fully organized and in operation more than a year before the inception of the indebtedness constituting the consideration for the notes, and it was at that time liable to its depositors and creditors for sums amounting in the aggregate to at least four times the amount of its capital stock; and by section 5202, Rev. St.,<sup>1</sup> its powers

<sup>1</sup>Rev. St. § 5202, provides as follows: "No association shall at any time be indebted, or in any way liable, to an amount exceeding the amount of its capital stock at such time actually paid in and remaining undiminished by losses or otherwise, except on demands of the nature following: *First*, notes of circulation; *second*, moneys deposited with or collected by the association; *third*, bills of exchange or drafts drawn against money actually on deposit to the credit of the association, or due there to; *fourth*, liabilities to the stockholders of the association for dividends and reserved profits."

were so limited that it could not become legally bound for any additional sum, either upon an open account or as maker or guarantor of these notes. The section of the statute referred to is not ambiguous, and I find no warrant for the construction of it contended for by counsel for the plaintiffs. I cannot assent to the proposition that congress has, in fixing a limitation of indebtedness, intended to exclude from the computation thereof liabilities upon notes of circulation, accounts for deposits, and for moneys collected, bills of exchange drawn against actual credit, and surplus accumulations belonging to stockholders, and to authorize the incurring of liabilities for other purposes equal to the entire capital, leaving no surplus whatever as a margin for safety or basis for confidence. The plaintiffs insist that the violation of the statute by contracting debts in excess of the limit is not a defense available to the bank or the receiver who represents it. The receiver, however, represents, not only the bank, but also all of its creditors and the government of the United States as well. If the government can, by any proceeding, enforce this law, the receiver can in this suit apply its provisions for the protection of the innocent depositors. Furthermore, there is no ground for estoppel, even against the bank. Contracts of corporations creating debts in excess of limitations fixed by their charters are void, and such debts are not collectible by law. *Crompton v. Zabriskie*, 101 U. S. 601; *Davies Co. v. Dickinson*, 117 U. S. 657, 6 Sup. Ct. Rep. 897; *Litchfield v. Ballou*, 114 U. S. 190, 5 Sup. Ct. Rep. 820, and 7 Amer. & Eng. Corp. Cas. 378, note. Business men are presumed to know the financial condition of corporations to whom they give credit, and, if one voluntarily becomes a creditor for an additional amount after a statutory limit has been reached, his position in a court of law is no better than that of one who knowingly becomes a party to an illegal contract. 15 Amer. & Eng. Enc. Law, 1138. Motion for a new trial denied.

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WALKER *et al.* v. COLLINS *et al.*

(Circuit Court of Appeals, Eighth Circuit. May 23, 1892.)

No. 48.

1. JURORS—DISQUALIFICATION—PRIOR SERVICE AS TALESMAN.

Under Rev. St. § 812, as amended by Act Cong. June 30, 1879, § 2, a juror called as a talesman is not subject to challenge merely because he has served as a talesman in another cause in the same court and term.

2. SAME—ADOPTING STATE PRACTICE.

Act Cong. 1872, requiring federal courts to conform to state practice "as near as may be," only adopts such rules of state practice as are not inconsistent with any act of congress upon the same subject; and hence Code Civil Proc. Kan. § 270, enacting that prior service as a talesman in the same court and term shall be sufficient ground for challenge, is not binding on federal courts, it being otherwise provided by Rev. St. U. S. § 812.

3. OPINION EVIDENCE—VALUE OF GOODS.

The purchaser of a stock of goods is competent to testify as to its value in an action against a marshal for wrongful attachment, where it appears that the purchaser had assisted in taking the invoice at the time of the purchase, and had been selling from the stock three days at the time of the seizure, and subsequently sold the balance not seized.

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4. **WRONGFUL ATTACHMENT—DAMAGES.**

A *bona fide* purchaser of a stock of goods fraudulently sold by an insolvent debtor is entitled to all the goods purchased and paid for; and where a portion of the stock has been wrongfully attached by a marshal as the property of the vendor, the marshal cannot defeat an action for damages by showing an adjudication of a state court that after the seizure the goods still retained by the purchaser were of sufficient value to reimburse him for the purchase price actually paid.

5. **SAME—REBUTTAL—EVIDENCE.**

Evidence as to the amount realized by the purchaser from the goods not seized, and the incidental expenses of the sale, may be introduced in rebuttal, for the purpose of meeting the claim of the marshal that the value of such goods was so largely in excess of the price paid as to show want of good faith on the purchaser's part.

6. **SAME—EVIDENCE—ADMISSIBILITY.**

A wholesale merchant sold goods to a retailer, and the latter afterwards sold his whole stock to a third person. The merchant then sued for the price, and attached part of the stock as the property of the retailer, on the ground that his sale thereof was in fraud of creditors. *Held* that, in an action by the third person against the marshal for wrongful attachment, it was immaterial whether the purchase from the merchant was fraudulent, as by the form of his action he had affirmed the retailer's title; and the only question was whether there was such fraud in the sale to the third person as prevented title from passing to him.

7. **FRAUDULENT CONVEYANCES—PURCHASER'S KNOWLEDGE—INSTRUCTION.**

On a question as to whether the purchase from an insolvent debtor for \$6,000 of a stock of goods invoiced at \$12,000 was in fraud of creditors, it is error to charge that to invalidate the sale the purchaser's knowledge of the vendor's fraud must be shown by circumstances or otherwise, without stating that, if the circumstances were such as to put the purchaser on inquiry, he would be chargeable with all the facts which due inquiry would have developed.

**In Error to the Circuit Court of the United States for the District of Kansas.**

**At Law.** Action by E. Collins and W. H. Bretch, trading as Collins & Bretch, against R. L. Walker, James McMurray, Charles Howard, and A. J. Partridge, for damages for wrongful attachment. Verdict and judgment for plaintiffs. Defendants bring error. Reversed.

*W. E. Brown and Willard Kline*, for plaintiffs in error.

*C. S. Bowman and C. Bucher*, for defendants in error.

Before CALDWELL and SANBORN, Circuit Judges, and SHIRAS, District Judge.

SHIRAS, District Judge. From the record in this cause it appears that in the spring of 1890, and previous thereto, one Henry Cannon was engaged in the mercantile business at Newton, Kan. Becoming insolvent, he sold his entire stock of goods to the firm of Collins & Bretch, they agreeing to pay therefor 50 cents on the dollar of the cost marking. The goods invoiced about \$12,000 at the cost price, for which the purchasing firm gave their check in the sum of \$6,000. E. H. Van Ingen & Co., creditors of said Cannon, brought an action, aided by attachment, in the circuit court of the United States for the district of Kansas, for the purpose of recovering the debt due them from Cannon, and caused the writ of attachment to be levied upon part of the stock transferred to Collins & Bretch, who thereupon sued the marshal and his deputies for the damages caused them by such taking of the goods. The case was tried in the circuit court for the district of Kansas, and a verdict and judgment were rendered in favor of the plaintiffs, to reverse which the present writ of error was sued out from this court.



The principal question discussed by counsel in support of the errors alleged arises upon the ruling of the trial court in overruling a challenge made for cause by plaintiffs in error to a juror called as a talesman, the ground of challenge being that the person so called had, during the same term of said court, served as a talesman on the trial of another cause, and was therefore subject to challenge under the provision of section 270 of the Kansas Code of Civil Procedure, which enacts that service as a talesman on the trial of any cause in the same court and term is ground for challenge. The question for decision is whether this section of the Kansas statute is applicable to cases pending in a federal court of that state. The argument is that the act of congress of 1872 makes the state practice the rule for the guidance of the federal courts. If there was no legislation by congress upon the subject-matter, the argument might be conclusive; but it is well settled that the practice act of 1872 does not put in force the state statutes in regard to matters touching which congress has legislated. In that event, courts of the United States are bound to look to the act of congress as their guide, and the provisions of the state law are deemed inapplicable. Thus in *Ex parte Fisk*, 113 U. S. 713, 5 Sup. Ct. Rep. 724, it is said:

"But the act of 1789, which made the laws of the states rules of decision, made an exception when it was 'otherwise provided by the constitution, treaties, or statutes of the United States.' The act of 1872 evidently contemplates the same exception by requiring the courts to conform to state practice as near as may be. No doubt it would be implied, as to any act of congress adopting state practice in general terms, that it should not be inconsistent with any express statute of the United States on the same subject. There are numerous acts of congress prescribing modes of procedure in the circuit and district courts of the United States at variance with the laws of the states in which the courts are held. Among these are the modes of impaneling jurors, their qualifications, the number of challenges allowed to each party. \* \* \* We think it may be further added, in the same direction, that if congress has legislated on this subject, and prescribed a definite rule for the government of its own courts, it is to that extent exclusive of any legislation of the states in the same matter."

Section 812 of the Revised Statutes of the United States declares that—

"No person shall be summoned as a juror in any circuit or district court more than once in two years, and it shall be sufficient cause of challenge to any juror, called to be sworn in any cause, that he has been summoned and attended said court as a juror at any term of said court held within two years prior to the time of such challenge."

By the provisions of section 2 of the act of June 30, 1879, it is enacted that no person shall serve as a petit juror more than one term in any one year, thus shortening the time named in section 812. Section 812 declares that "it shall be sufficient cause of challenge to any juror called to be sworn in any cause that he has been summoned," etc.; thus including all persons called to be sworn, whether they are members of the regular panel or are called as talesmen. Thus we find that congress has by legislation determined when a person called to serve upon a jury may be challenged upon the ground of previous service in that capacity, and the rule prescribed by the state statute cannot, therefore, be made appli-

cable in the federal court. As it is not claimed that the juror who was challenged had been summoned and attended at any term prior to that at which he was called as a talesman, no ground of challenge existed under the provisions of the statutes of the United States, and the trial court did not err in overruling the challenge in question.

Several assignments of error are based upon the fact that Collins and Bretch, the plaintiffs in the action, were permitted to testify to the value of the goods taken by the marshal; the ground of objection being that it did not appear that they were qualified by previous experience to testify on the question of value. Both witnesses stated that they knew the character of the goods taken, and had been selling from the stock for a few days before the seizure by the marshal, and thought they knew the fair value thereof. From the evidence it appeared that these parties had aided in taking the invoice of the goods at the time of the purchase. They had been in possession, selling the goods, for three days before the levy by the marshal, and they had sold out the balance not taken under the writ of attachment, and hence it appeared that they had some means of knowing the value of the goods. Their testimony was therefore competent, the jury being the judges of the weight thereof, and the trial court did not err in admitting the same.

It was shown by the evidence that, after the levy of the attachment by the marshal, certain other creditors of Cannon had sued out a writ of attachment in the state court, and levied the same upon the remainder of the stock not seized by the marshal; that Collins & Bretch had replevied these goods in the state court, stating in an affidavit filed in such case that the goods so replevied were worth \$6,000; that in the trial court judgment in the replevin suit was rendered in favor of Collins & Bretch.

In the case at bar the defendants below offered evidence tending to show that no appeal had or would be taken from the judgment thus rendered in the state court. Upon objection the court ruled that such fact was immaterial, and rejected the evidence. Error is assigned on this ruling. The argument in favor of the admissibility of the evidence is that it is well settled that a *bona fide* purchaser of goods fraudulently sold by an insolvent debtor is only protected to the extent of the payment made up to the time of notice of the fraud by the vendor, and therefore in this case it was competent to show that the goods replevied from the sheriff were worth \$6,000, and had been finally adjudged to be the property of Collins & Bretch. The premise does not justify the conclusion. If the purchase made by Collins & Bretch was valid, or, in other words, if they were *bona fide* purchasers for value, they became the owners, legally and equitably, of the goods transferred to them, and their interest therein cannot be limited to the amount paid by them. Under the rule claimed to be applicable to the case, it is not held that the *bona fide* purchaser for value is not the owner of and entitled to all the goods purchased in a given case; but if he receives notice of the fraud before completed payment of the purchase price is made, then he is required to withhold payment for the benefit of the creditors of the fraudulent vendor.

The facts of this case did not justify the application of the rule contended for, and hence the court did not err in rejecting the evidence offered.

It is further claimed that the trial court erred in admitting evidence showing what sum had been realized from the sale of the goods remaining after the marshal had made his levy, together with evidence of the expenses connected with the sale thereof. The theory upon which this evidence was admitted was that it would throw some light upon the question of the actual value of the goods sold by Cannon to Collins & Bretch. That question was certainly a material one in the case, for the adequacy or inadequacy of the price paid was a circumstance to be weighed by the jury in determining whether the purchase was or not made in good faith. The evidence tended to show that the goods were sold by Collins & Bretch in the ordinary way of business, and that due effort was made to realize their fair value, and the result thereof would certainly be some evidence upon the question of the fair market value of the goods thus disposed of; and, as we have already said, this value was a matter to be weighed by the jury in determining the validity of the sale to Collins & Bretch. The evidence objected to was introduced in rebuttal for the purpose of meeting the claim of defendants that the value of the goods sold was largely in excess of the price paid, and it was not error to admit it.

Several assignments of error are based upon the refusal of the court to give a number of requests submitted on behalf of the defendants. A radical error exists in all these requests, due to the fact that they are not applicable to the issues actually on trial before the court and jury. It will be borne in mind that E. H. Van Ingen & Co. had not sought to rescind the sale made by them to Cannon on the ground of fraud practiced on them, but had affirmed the sale, and had brought suit to recover the price of the goods sold, aided by attachment. The issue of fraud on trial in this cause, therefore, did not arise out of the facts of the purchase made by Cannon of Van Ingen & Co., but out of the sale made by Cannon to Collins & Bretch. No matter how much fraud existed in the purchase made by Cannon from Van Ingen & Co., if the latter did not choose to rescind the sale, but on the contrary affirmed it, then Cannon owned the goods by good title, and had the same right to sell the same as he had to sell the other portions of his stock. Holding the title thereto, the sale to Collins & Bretch passed the title to the latter, subject to the right of creditors to impeach such sale on the ground that it was in fraud of their rights. To show the theory involved in the instructions requested by defendants, it is only necessary to quote the third and fifth of the series, which are as follows:

*"Third.* If Cannon bought the goods in question, or any part of them, on the strength of false and fraudulent statements, and then sold and disposed of the same, and then used the money so obtained for the same to pay debts other than those incurred in the purchase of the goods, then such sale would be in law fraudulent, and the law would imply that it was made for the purpose of defrauding creditors."

*"Fifth.* If Cannon, by reason of false statements as to his financial standing, obtained the goods in question, or any part of them, and then sold them

for a sum less than sufficient to pay the debt incurred, on the strength of such false statements, and knew at the time, or had reason to believe, that he would not have money enough to pay for such goods, so obtained by false statements, then such sale would be in fraud of creditors, and such creditors would have the right of possession of such goods, unless they had passed into the hands of *bona fide* purchasers for value, without notice."

As already said, if Van Ingen & Co. did not assert a right to rescind the sale of the goods made by them, but on the contrary affirmed it, then the goods so purchased were the property of Cannon, and he had the right to make any lawful disposition thereof that he might choose, and if he sold the same, and applied the proceeds in the payment of debts owing by him, such sale would not, as a matter of law, be held to be fraudulent as to creditors; nor, under such circumstances, would the fact that the goods had originally been obtained by fraud from Van Ingen & Co. entitle the creditors of Cannon to the possession of the goods, as is claimed in the fifth request. It is clearly apparent that counsel for the defendants, in all the requests submitted, mistook the issues involved, and treated the case as though Van Ingen & Co. had rescinded the sale made by them, which is not true; and hence all the instructions asked were properly refused, and none of the assignments of error based on the refusal of the court to give these requests are well taken. The trial court rightly apprehended the issue that was involved, and rightly instructed the jury that the matter at issue was whether the sale and transfer made by Cannon to Collins & Bretch was fraudulent and void as to the creditors of the former.

The next question arising on the errors assigned is whether the court correctly instructed the jury on the question of good or bad faith on the part of Collins & Bretch in connection with the purchase made by them. The ninth instruction given by the court, and excepted to by the defendants, fairly presents the question, the instruction being as follows:

"No. 9. Even if you should find that it has been shown by the greater weight of evidence that, in making this sale to the plaintiff of the goods in question, Cannon intended to defraud his creditors, as the defendants claim, but that the plaintiffs had no knowledge or notice of such fraud, then in that case you are to find for the plaintiffs upon the propositions I have explained to you. In other words, to render this sale void, both the seller and buyer must have been acting in bad faith; and, if the plaintiffs bought from Cannon in good faith, they took a good title, whatever may have been the intention of Cannon; that is, in the absence of knowledge upon their part of any fraud or misrepresentations made by him."

The evidence introduced tended to show fraud on the part of Cannon, and this instruction, assuming that the jury might find the sale to be fraudulent on part of Cannon, then instructs the jury that they must find for the plaintiffs, if it appears that the plaintiffs had no knowledge of such fraud; and, further, that whatever may have been the intention of Cannon, the absence of knowledge upon their part of fraud or misrepresentation on part of Cannon would validate the sale to them. In the fifth instruction given by the court the jury were further instructed "that the evidence must show in some way, either by circumstances or

otherwise, to your satisfaction, that plaintiffs had knowledge of the fraud." In our judgment, these instructions are misleading, in that the jury must have understood therefrom that to defeat the sale on the ground of fraud actual knowledge of the fraudulent purpose of the vendor must be brought home to Collins & Bretch. True, it is stated that knowledge might be proved by circumstances, but still actual knowledge, proved directly or circumstantially, is the criterion furnished the jury for determining whether the vendees could be held to be participants in the fraud of the vendor. The jury was not instructed that if the purchase was made by Collins & Bretch under such circumstances as that the purchasers were thereby put upon inquiry as to the purposes of Cannon in making the sale to them, and instead of making inquiry they avoided doing so, then the jury would be justified in holding them chargeable with all the facts due inquiry would have developed. That such is the recognized rule in Kansas is settled by repeated decisions of the supreme court of that state. *Gollob v. Martin*, 33 Kan. 255, 6 Pac. Rep. 267; *Waser v. Bank*, 46 Kan. 597, 26 Pac. Rep. 1032. See, also, *Jones v. Simpson*, 116 U. S. 609, 6 Sup. Ct. Rep. 538. A full and very clear statement of the general rule applicable to a question of this character is found in the opinion of CALDWELL, J., in *Singer v. Jacobs*, 11 Fed. Rep. 559. The facts of the case now before the court are such that the jury could not fairly decide the issue before them unless they viewed the facts in the light of the principle stated, and the court was therefore called upon to instruct the jury in regard thereto. The omission to properly instruct the jury in this particular made the instructions given and excepted to misleading, and therefore erroneous; and, as the error touches a vital issue between the parties, the judgment below must be reversed, and the cause be remanded to the circuit court, with instructions to grant a new trial.

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UNITED STATES v. PERRY, Dist. Atty.

(Circuit Court of Appeals, Eighth Circuit. May 23, 1892.)

No. 56.

1. DISTRICT ATTORNEYS' FEES—MILEAGE.

A district attorney is entitled to mileage for travel by the most convenient and practicable routes in the discharge of his official duties, though such routes are not the shortest routes.

2. SAME—DISCRETION OF DISTRICT ATTORNEY.

A district attorney is entitled to mileage from his place of abode to the place of any examination, before a commissioner, of a person charged with crime, and to his *per diem* for the examination of such person before such commissioner, in any case where, in his judgment, it was necessary for him to attend, and he did actually attend, such examination.

3. SAME—MILEAGE TO OFFICIAL HEADQUARTERS.

Where the district attorney actually and necessarily travels from the place of his abode to the place for an examination, before a commissioner, of a person charged with crime, in the discharge of his official duty, he is entitled to mileage for such travel, notwithstanding such place of examination is at the official headquarters of such district attorney.

**4. SAME—COMPENSATION—SUNDAYS AND LEGAL HOLIDAYS.**

The *per diem* compensation allowed by Rev. St. § 824, to a district attorney attending court elsewhere than at his place of abode, in the discharge of his official duties, cannot be paid to him for Sundays or legal holidays occurring during the term of the court, because prohibited by the proviso to the appropriation act of March 3, 1887, (24 St. at Large, p. 541,) which to that extent amends Rev. St. § 824.

Appeal from the Circuit Court of the United States for the District of Kansas.

Action by William C. Perry, district attorney, against the United States, to recover mileage and fees. From a judgment for plaintiff, the United States appeals. Reversed.

J. W. Ady, for the United States.

W. C. Perry, W. H. Rossington, and Chas. Blood Smith, for appellees.

Before CALDWELL and SANBORN, Circuit Judges, and SHIRAS, District Judge.

SANBORN, Circuit Judge. William C. Perry, the appellee, was United States district attorney for the district of Kansas from July 14, 1885, until November 9, 1889, and during all this time resided with his family at Ft. Scott, in that district. He brought this action in the United States circuit court for that district to recover mileage, fees, and emoluments under the provisions of chapter 359, 24 St. at Large, p. 505, and a judgment was rendered in his favor below, from which the United States appeals. In the performance of his official duties he traveled from his place of abode to the various places of holding the United States courts, and to the various places of the examinations, before a judge or commissioner, of persons charged with crime, by the usual, most convenient, and only practicable routes, but these routes were not the shortest routes. He was paid his mileage for this travel by the shortest routes, and the court below held that he was entitled to recover the difference between the amount of the mileage reckoned on the basis of the shortest routes and the amount reckoned on the basis of the only practicable and most convenient routes. This holding of the court is assigned for error. The appellee, in the performance of his official duties, necessarily traveled at various times from his place of abode to the places of examinations, before a judge or commissioner, of persons charged with crime. His mileage for this travel and his *per diem* for attendance were disallowed by the accounting officers of the government, but the court below held he was entitled to recover them, and this is the second error complained of. Mr. Perry necessarily traveled at various times from his place of abode to Topeka, Kan., to attend such examinations before United States commissioners, and the accounting officers of the United States disallowed this mileage because Topeka was the official headquarters of the district attorney, but the court below held he was entitled to recover it, and this ruling is the third error assigned. Mr. Perry charged in his account the five dollars *per diem* allowed by section 824, Rev. St. U. S., for 11 days, between October 15, 1888, and September 16, 1889, each of which transpired during the session of the United States court, and was a Sunday

or legal holiday, and on each of which days he was necessarily away from his place of abode, and in attendance upon that court in his district. The court below held that he was entitled to recover \$55 on this account, and this holding is the only other error of which complaint is made.

The statute itself disposes of the first three errors assigned. So far as it is material to the questions presented by these assignments, it reads:

"Sec. 823. The following and no other compensation shall be taxed and allowed to attorneys, solicitors, and proctors in the courts of the United States, to district attorneys, clerks of the circuit and district courts. \* \* \* Sec. 824. \* \* \* For examination by a district attorney, before a judge or commissioner of persons charged with crime, five dollars a day for the time necessarily employed. \* \* \* For traveling from the place of his abode to the place of holding any court of the United States in his district, or to the place of any examination before a judge or commissioner of a person charged with crime, ten cents a mile for going, and ten cents a mile for returning."

1. Under this statute it is not only the privilege, but the duty, of the district attorney to travel by the most convenient and practicable routes in the discharge of his official duties, although such routes are not the shortest routes, and when he has so traveled he is entitled to ten cents per mile for going, and ten cents a mile for returning, over the routes he has actually traveled. His compensation is not limited to mileage on shorter, but impracticable and inconvenient, routes he does not travel. Any other rule would work great detriment to the public service. The shortest traveled route between two towns is often so poorly supplied with means of quick and rapid transit that to follow it, in the exigencies of the public service, would so delay the officer that his services would become useless. The most convenient and practical route of travel is the usual route of travel, and it is such because business and professional men, who are looking with keen vision to their own interests and to the accomplishment of the largest results in the shortest space of time, universally take that route, and thus make it the usual route. If the district attorney in his service of the government selects the routes of travel chosen by the shrewd travelers who visit the towns and cities of this land in the interest of private gain; if he selects, as the record in this case proves he did, the usual, most convenient, and practicable routes, in the performance of his official duties, and is paid under the statute for the miles he actually travels on such routes,—his time and ability will thus be made most useful to the government, and the letter and spirit of the statute will be complied with.

2. A district attorney is entitled to his mileage from his place of abode to the place of any examination before a commissioner of a person charged with crime, and to his *per diem* for the examination of such person before such commissioner in any case where, in his judgment, it was necessary for him to attend, and he did actually attend, such examination. No authority or argument is presented in support of the claim that his mileage and *per diem* were improperly allowed by the judge below. In the assignment of error it is stated that this allowance should not have

been made "until the comptroller's office was satisfied that the nature and importance of the examinations demanded the presence of the district attorney." The district attorney is charged with the duty of attending these examinations, and conducting them on the part of the United States, whenever the attendance of an attorney is needed. When a person is charged with crime before a judge or commissioner, he must determine whether his presence is necessary at the examination, and act upon his own judgment. There is neither law nor reason for the suggestion that his compensation is dependent upon the opinion of the comptroller on the question of the necessity of his attendance. The statute is plain and unequivocal, and it has been held not only that it entitles him to the *per diem* compensation while he is actually engaged in the examination before the commissioner, but also for his time while he is necessarily engaged in the investigation of an offense in co-operation with the commissioner before the arrest is actually made. *Stanton v. U. S.*, 37 Fed. Rep. 252.

3. When the district attorney actually and necessarily travels from the place of his abode to the place of an examination before a commissioner of a person charged with crime, in the discharge of his official duty, he is entitled to mileage for such travel, notwithstanding such place of examination is at the official headquarters of such district attorney. There is no finding or evidence in the record that Topeka, where these examinations before the commissioner to which Mr. Perry traveled were held, was the official headquarters of the district attorney; but the court below finds that he actually attended these examinations, and actually and necessarily traveled from his place of abode to Topeka to attend them, and the statute is imperative that he should be allowed mileage in such cases "from his place of abode."

4. The *per diem* compensation provided for a district attorney attending court elsewhere than at his place of abode, in the discharge of his official duties, by section 824, Rev. St. U. S., cannot be allowed or paid to him for Sundays or legal holidays occurring during the term of the court, because the proviso contained in the act making appropriations for sundry civil expenses, approved March 3, 1887, found in 24 St. at Large, p. 541, prohibits such allowance or payment, and to that extent amends the Revised Statutes. Compensation was provided for the district attorney for attendance upon the United States courts by section 824, Rev. St., in the following words:

"For each day of his necessary attendance in a court of the United States when the court is held at the place of his abode, five dollars; and for his attendance when the court is held elsewhere, five dollars for each day of the term."

In the act making appropriations for sundry civil expenses, approved March 3, 1887, is found, just subsequent to the appropriation of \$225,000 for payment of United States district attorneys, the following proviso:

"Provided, that hereafter no part of the appropriations made for the payment of fees of United States marshals or clerks shall be used to pay the fees of



United States marshals or clerks upon any writ or bench warrant for the arrest of any person or persons who may be indicted by any United States grand jury, or against whom an information may be filed, where such person or persons is or are under a recognizance taken by or before any United States commissioner, or other officer authorized by law to take such recognizance, and requiring the appearance of such person or persons before the court in which such indictment is found or information is filed, and when such recognizance has not been forfeited, or said defendant is not in default, unless the court in which such indictment or information is pending orders a warrant to issue; nor shall any part of any money appropriated be used in payment of a *per diem* compensation to any attorney, clerk, or marshal for attendance in court except for days when court is open by the judge for business, or business is actually transacted in court, and when they attend under sections five hundred and eighty-three, five hundred and eighty-four, six hundred and seventy-one, six hundred and seventy-two, and two thousand and thirteen of the Revised Statutes, which fact shall be certified in the approval of their accounts."

Sections 583, 584, 671, and 672 relate to terms of court at which the judge cannot be present, and court may be adjourned by his written order, or by the clerk, and section 2013 relates to a term opened under the federal election law. It is urged by the appellee that this proviso has no application to this case, because the *per diem* compensation he seeks is not for "attendance in a court of the United States when the court is held at the place of his abode," but for his attendance when the court is held elsewhere; and that in the latter case, as he was entitled under section 824 to five dollars "for each day of the term," whether he was in court or not, the prohibition in the proviso of the use of any of the appropriations "for attendance in court, except when the court is open by the judge for business, or business is actually transacted in court," was not intended to and cannot apply to the payment of his *per diem* compensation "for each day of the term" when he was attending elsewhere than at his place of abode. Such a construction of the proviso is too narrow and technical, and cannot be sustained. Under section 824, district attorneys were not entitled to any *per diem* compensation for Sundays and holidays in term time when the court was held at their respective places of abode; so that, if the proviso does not apply to cases where they attend away from their places of abode, it has no effect whatever on the *per diem* compensation of district attorneys. If the proviso was ambiguous, and the construction contended for by appellee thus makes it nugatory as to district attorneys, who are expressly named therein and manifestly intended to be affected thereby, while to hold that it applies to cases of attendance of district attorneys away from home makes the proviso reasonable, practical, and effective, the latter construction must be adopted; but, in our opinion, it is plain and unambiguous, and was intended by the congress to prohibit the payment of any *per diem* compensation to the marshals, clerks, and district attorneys for attendance upon court at any place, on any day except when the court is open by the judge for business, or business is actually transacted in court, or they attend under the sections of the Revised Statutes there specially mentioned. That this is the proper construc-

tion more clearly appears when we consider the course of legislation and decision upon this subject. The appellee also claims that this proviso was temporary in its effect, and had reference only to the appropriations made in the act in which it is found. This contention cannot be sustained. Under section 824, and a similar provision in section 829, relative to marshals, a custom had grown up and received the sanction of the accounting officers of allowing this *per diem* compensation for Sundays and legal holidays occurring while court was in session during the term. *Marshal's Sunday Per Diem Case*, 5 Lawrence, Comp. Dec. 329. In the act making appropriations for sundry civil expenses, approved August 4, 1886, (24 St. at Large, 253,) a proviso was inserted prohibiting the use of any money appropriated by that act for the payment of *per diem* compensation to clerks or marshals for attendance in court in exactly the same terms as in the proviso of 1887. It is perfectly evident that the purpose was to stop for one year at least the payment of the *per diem* compensation to these officers for Sundays and holidays. The next appropriation act includes the district attorneys, and makes the prohibition general and permanent. It does not prohibit the use of any money appropriated by that act, but reads:

"Provided, that hereafter no part of the appropriation made \* \* \* shall be used \* \* \* nor shall any part of any money appropriated be used, in payment of a *per diem* for attendance in court, except when the court is open by the judge for business, or business is actually transacted in court."

It was perfectly competent for the congress to increase, diminish, or in any way change the compensation of these officers. It was the congress that fixed their former compensation, and it is clear that congress intended by this proviso to change, and by apt and plain words has changed and diminished, the compensation fixed by section 824. That this law is found in an act making general appropriations will not authorize the courts to disregard or explain it away. For many years it has been a common practice of the congress to enact general provisions of law in the acts making appropriations, until there is now little, if any, presumption that such provisions are not intended to be permanent and general. The provision which deprived United States commissioners of docket fees in certain cases was part of an act making appropriations, and certainly not as plain and positive in its terms as is this statute, but it was held to repeal the general statute allowing docket fees. 24 U. S. St. 274; *Faris v. U. S.*, 23 Ct. Cl. 374; *McKinstry v. U. S.*, 40 Fed. Rep. 813; *Goodrich v. U. S.*, 42 Fed. Rep. 393; *Calvert v. U. S.*, 37 Fed. Rep. 762; *Crawford v. U. S.*, 40 Fed. Rep. 446. This proviso is plain and unambiguous. The intent of the congress is clear from the course of decision and legislation that led up to the prohibition contained in it, and it must be held that the court below erred in allowing this \$5. *Converse v. U. S.*, 26 Ct. Cl. 6-11; *McMullen v. U. S.*, 24 Ct. Cl. 39. The appellee has presented and argued several questions relative to claims he made in the court below which were disallowed. As he has taken no appeal, we do not feel at liberty to consider them. U. S. .

*Ewing*, 140 U. S. 142, 150, 11 Sup. Ct. Rep. 743; *U. S. v. Hickey*, 17 Wall. 9. The judgment is reversed, and the cause remanded, with instructions to proceed therein in accordance with this opinion.

## UNITED STATES v. BASHAW.

(Circuit Court of Appeals, Eighth Circuit. May 23, 1892.)

No. 25.

## 1. DISTRICT ATTORNEYS—COMPENSATION IN REVENUE CASES.

Under Rev. St. § 838, a district attorney who has rendered services in the examination of violations of the internal revenue laws, referred to him by the collector, is entitled to compensation therefor upon a certificate of the judge before whom such cases are triable, although no proceedings may have been instituted. 47 Fed. Rep. 40, affirmed.

## 2. SAME—PRACTICE OF DEPARTMENT.

A ruling of the secretary of the treasury, and the practice of the department from 1885, supported by an opinion of the attorney general, from which the solicitor of the treasury dissented, to the effect that district attorneys were not entitled to compensation for such examinations unless followed by prosecutions, is not binding upon the courts, especially in view of a contrary decision by a district court in 1885.

## STATUTES—AMENDMENT—CONSTRUCTION.

Where an amendment changes the phraseology of a former act, it will be presumed that it was the intention to make a corresponding change in its meaning.

Appeal from the Circuit Court of the United States for the Eastern District of Missouri.

Petition by Thomas P. Bashaw against the United States to recover for services rendered as a district attorney. Judgment for plaintiff. 47 Fed. Rep. 40. The United States appeals. Affirmed.

*George D. Reynolds*, for the United States.

*Thomas M. Knapp* and *Thomas R. Harris*, for appellee.

Before CALDWELL and SANBORN, Circuit Judges, and SHIRAS, District Judge.

SHIRAS, District Judge. At the September term, 1890, of the circuit court for the eastern district of Missouri, the appellee brought an action against the United States to recover compensation for certain services rendered by him during the years 1887 and 1888 in the capacity of district attorney for the United States in said eastern district of Missouri. The petition contained five counts, the second and third being based upon services rendered by the district attorney in examining into a number of alleged violations of the internal revenue laws of the United States, and which had been referred to him for examination by the collector of the district, under the provisions of section 838, Rev. St. The trial court found in favor of the plaintiff on these counts, and from this ruling and the judgment based thereon the United States has appealed to this court.

The question at issue, as stated in the first, second, and fourth assignments of error, is that the court below erred in receiving any testimony

in support of the causes of action set forth in the second and third counts of the petition, for the reason that the facts therein stated did not show any cause of action against the United States. These facts, briefly stated, are that the collector of internal revenue for the first collection district of Missouri, during the years 1887 and 1888, reported to the plaintiff, as district attorney, that violations of the internal revenue laws had been committed in a number of cases; that the plaintiff, as required by law, examined into these cases and the facts thereof, and after such inquiry and examination he reported that proceedings therein could not probably be sustained, and that the ends of justice did not require prosecutions therein; that the services thus rendered were reasonably worth the sum of five dollars in each case; that plaintiff duly made out his claim for expenses and services incurred and rendered in these cases, and submitted the same to the district judge for the eastern district of Missouri, who duly allowed and certified the same; that said claim, so certified, was presented to the treasury department of the United States, and that the defendant wrongfully neglects and refuses to pay the same.

The question for determination is thus narrowed down to the single proposition whether, under the provisions of section 838 of the Revised Statutes, the district attorney is entitled to compensation for services rendered in cases in which no prosecution is instituted; the theory of the government being that to entitle the district attorney to recompense for services of this nature suit must be brought. Section 838, Rev. St., reads as follows:

"It shall be the duty of every district attorney to whom any collector of customs or of internal revenue shall report, according to law, any case in which any fine, penalty, or forfeiture has been incurred in the district of such attorney, for the violation of any law of the United States relating to the revenue, to cause the proper proceedings to be commenced and prosecuted without delay, for the fines, penalties, and forfeitures in such case provided, unless upon inquiry and examination, he shall decide that such proceedings cannot probably be sustained, or that the ends of public justice do not require that such proceedings be instituted; in which case he shall report the facts in customs cases to the secretary of the treasury, and in internal revenue cases to the commissioner of internal revenue, for their direction. And for the expenses incurred and services rendered in all such cases the district attorney shall receive and be paid from the treasury such sum as the secretary of the treasury shall deem just and reasonable, upon the certificate of the judge before whom such cases are tried or disposed of: provided, that the annual compensation of such district attorney shall not exceed the maximum amount prescribed by law, by reason of such allowance and payment."

The section in express terms makes it the duty of the district attorney to examine into every case of supposed violation of the internal revenue laws referred to him by the collector, for the purpose of determining whether proceedings for fines and penalties can be sustained, and whether public justice requires the institution of proceedings; and in the cases wherein the conclusion is in the affirmative, to institute the proper proceedings, and in the cases wherein the conclusion is against the propriety of proceeding therein, then the district attorney must report the

facts to the commissioner of internal revenue. Thus it is made the duty of the district attorney to examine into and take action, either by institution of proceedings or by report adverse thereto to the commissioner, in every case of alleged violation of the revenue laws referred to him by the collector, and then the section declares that "for the expenses incurred and services rendered in all such cases the district attorney shall receive and be paid from the treasury," etc. What cases are included within the words "in all such cases?" Do not these words clearly refer to the cases previously mentioned in the section, to wit, the cases reported by the collector to the district attorney for examination? If the reference is to the cases reported by the collector for examination, and in our judgment no other construction is admissible, then the section clearly enacts that the district attorney is entitled to be paid for expenses incurred and services rendered in all cases reported to him for examination by the collector, regardless of the results of such examination. Unless compelled to do so by clear and unambiguous language, we ought not to hold that the congress of the United States in the enactment of a statute clearly intended to protect the individual citizen, as well as the United States, against the institution of proceedings not called for in the furtherance of justice, warned the district attorneys of the United States that they could not expect compensation for the expenses incurred and the services rendered by them in making the examinations provided for in the statute, unless they should find cause for the institution of proceedings. Such a construction would not only tend to defeat the very purpose of the enactment, but it would, in effect, place the government in the attitude of making the question of compensation for the services rendered depend, not upon the fact of the rendition of the services, but upon the fact that the conclusion reached was in favor of the claim asserted by the government. That which is demanded of the district attorney by the section in question is examination into facts and a determination of what public justice requires, which services are certainly judicial or *quasi* judicial in their nature, and it is repugnant to all just principles that compensation for judicial services should ever be made dependent upon the results of the decision rendered.

The position taken on behalf of the United States is clearly and briefly stated in a ruling made by Secretary Folger in 1884, and cited in the brief of counsel, in which he states:

"I am of the opinion that the secretary can have no jurisdiction and hence no power to make an allowance under that section, unless there is a judge's certificate, and that no judge can give the required certificate except in cases that have been 'tried or disposed of before' him as judge."

We agree in the view that the basis for the action of the secretary of the treasury is the certificate of the proper judge, but we do not concur in the proposition that no certificate can be properly made except as to cases actually tried or disposed of before a judge. The section provides that the attorney shall "in all such cases,"—that is, in all cases reported to him for examination,—be paid such sum as the secretary of the treasury shall deem just upon the certificate of the judge "before whom such

cases are tried or disposed of." Section 838 includes "violations of any law of the United States relating to the revenue." These violations may occur in a state, a territory, or in the District of Columbia. The name or description of the judge before whom persons charged with violating the provisions of the statutes of the United States in regard to customs, internal revenue, and the like, are triable depends upon the locality wherein the offense may have been committed. Instead of defining by official name or description the different judges who are authorized to give the certificate when the offenses reported on have been committed in a state or in a territory or in the District of Columbia, the section covers the whole ground by declaring that the certificate shall be given by the judge "before whom such cases are tried or disposed of;" in other words, the judge who is competent to try "such cases" is competent to grant the certificate.

It will be remembered that the facts to be certified to are not matters arising on the trial of cases before the certifying judge. The services for which compensation is sought under this section are all rendered before any proceedings in court are instituted, and the facts upon which the certificate is based must be proven before the certifying judge, without regard to the question whether a trial has been had or not, because the evidence adduced on the trial would not show whether the attorney had or had not incurred expenses or rendered service in examining into the case before the institution of proceedings. In other words, it is not necessary, in order to enable the judge to give the proper certificate, that the cases should have been tried before him, because all that he could learn on such trial would not give him the information upon which his certificate must be based, and therefore no weight can be given to the argument that compensation cannot be made to the attorney for services in cases not brought to trial, because such trial is needed in order to enable the judge to make the requisite certificate. If this limited view of the section is correct, it would follow that if a district attorney had rendered services in cases reported to him by the collector, had brought suits thereon, and had tried the causes, but before his account had been certified to by the trial judge the latter had died or resigned, the attorney could not recover compensation because he could not furnish the certificate of the trial judge, although his successor in office might certify to all the necessary facts.

It is also urged in argument on behalf of the United States that the prior action of the treasury department should be given controlling weight in the construction of this section, on the familiar principle that in cases of ambiguity the construction put upon the statute by the department charged with its execution, and which has been received and acted upon, should not subsequently be changed by judicial interpretation, except for cogent reasons. The facts of this case do not bring it within the rule invoked. Parties have not acted, nor have rights been acquired, upon the faith or foundation of any ruling by the treasury department upon this question of the right of the district attorney to compensation for services rendered; nor can it be properly said that there is

any settled departmental rule adverse to the claim made by the district attorney. The section requires action to be taken primarily by the judge of the proper district in certifying to the account of the attorney. In 1885 this question was carefully examined by Judge TREAT, then occupying the position of district judge for the eastern district of Missouri, and he held that the district attorney was entitled to compensation for services rendered, regardless of the question whether proceedings were or were not instituted therein. See *In re Account of Dist. Atty.*, 23 Fed. Rep. 26. The conclusion then reached by Judge TREAT has been recognized as the correct interpretation of the statute in the eastern district of Missouri from that day to this. Furthermore, in the opinion given by Attorney-General Garland in 1885, and cited by counsel for the United States, it is stated that the solicitor of the treasury accords with Judge TREAT in the construction of the statute; thus showing that there was not agreement upon the matter in the departments at Washington. The fact that the secretary of the treasury since 1885 has been guided by the opinion then given by the attorney general, contrary to the views of the solicitor of the treasury, is not sufficient to prove an established departmental rule, in view of the further fact that the ruling of the attorney general was adverse to that made and adhered to by the judges of the eastern district of Missouri when called upon to adjudge the question. On the contrary, from the record before us, it appears that this question has been an open one from the beginning, and that there is no just ground for holding that the district attorney is debarred from demanding at the hands of the court an interpretation of the statute, regardless of the action of the treasury department in refusing payment of his account. In support of the position taken by the United States, the case of *Stanton v. U. S.*, 37 Fed. Rep. 252, is cited, wherein Judge SHIPMAN held that if section 838 was the only one which relates or has related to the question, the construction claimed by the district attorney would seem to be correct; but that as section 838 was an amendment in 1873 of the seventh section of the act of July 18, 1866, and as the latter act expressly declared that compensation should be given for expenses incurred and services rendered in prosecutions for such fines and personal penalties, it must be assumed, notwithstanding the change in the words used in the two statutes, that congress, in the enactment of the amendment, only intended to include internal revenue cases with customs cases, and did not intend to change the provisions of the act of 1866 in regard to compensation to the attorney. It is a fundamental rule of construction that, if possible, force must be given to all the words used therein, and also that, when a previous statute is amended by an alteration of the terms used therein, it is to be presumed that it was the intent to alter the meaning of the previous act in that particular. If it was the intent of congress, in passing the amendatory act of 1873, to leave the question of compensation to the attorney unchanged, why was it that congress struck out the words "for expenses incurred and services rendered in prosecutions for such fines and personal penalties," etc., and inserted the words found in section 838? The

natural presumption is that the phraseology of the statute was changed in order to change its meaning. The very fact that the prior act is amended demonstrates the intent to change the pre-existing law, and the presumption must be that it was intended to change the statute in all the particulars touching which we find a material change in the language of the act. If, according to the theory of the *Stanton Case*, the only purpose of congress in adopting the amendment of 1873 was to add internal revenue cases to the class of cases which might be reported to the district attorney for his examination and action thereon, why change the language of that clause of the act of 1866 which limited the right of compensation to expenses incurred and services rendered in prosecutions for fines and penalties? It is admitted in the opinion in the *Stanton Case* that the language found in section 838 justifies the construction put thereon by the district attorney. This is tantamount to saying that this clause of section 838, if construed by itself, does not mean the same thing as the corresponding clause in the act of 1866. Is it not then a forced construction of section 838 to hold that the difference in the language must go for naught, upon the assumption that congress only intended to enlarge the statute of 1866 by including within its provisions cases arising under the internal revenue laws? In our judgment, the change in the language used in the amendatory act of 1873 must be given its legitimate force, and the fair and natural meaning of the words used in the section ought not to be narrowed in the attempt to make its meaning conform in this particular to the previous statute.

There cannot be any doubt of the burdens placed by the section upon the district attorney. It is plainly made his duty to examine into every case reported to him by the collectors of customs or of the internal revenue, and to determine whether they should or should not be prosecuted. No less direct and unequivocal is the declaration of the section that "for the expenses incurred and services rendered in all such cases the district attorney shall be paid." The question of payment or no payment is not left open by the statute. It is not left to the discretion of the secretary of the treasury or of a judge to determine whether payment shall be made. The statutory declaration is that in all such cases the district attorney shall be paid such reasonable sum as the proper judge shall certify, and shall be approved by the secretary of the treasury. The right to compensation is acquired by the rendition of services in the examination of cases reported to the attorney for examination by the collectors of customs and of revenue. The amount to be paid is to be ascertained by proving the facts before the proper judge, obtaining his certificate and the approval of the secretary of the treasury. The purpose of the statute being clearly shown by a consideration of all its provisions, this purpose is not to be defeated because there are to be found in the statute some words or expressions which, if literally construed, would militate against the meaning given the statute as a whole. In such cases courts are required to give to such words or clauses not a literal construction, but one which will give effect to the clear intent of the legislature as the same is gathered from the entire statute.- Thus it



is said by the supreme court in *Heydenfeldt v. Mining Co.*, 93 U. S. 634: "If a literal interpretation of any part of it would operate unjustly, or lead to absurd results, or be contrary to the evident meaning of the act taken as a whole, it should be rejected." See also *Church of the Holy Trinity v. U. S.*, 143 U. S. 457, 12 Sup. Ct. Rep. 511.

In our judgment, section 838, taken as a whole, clearly declares that the district attorney is entitled to compensation for services rendered in all cases reported to him for examination under its provisions, regardless of the question whether suits are in fact instituted or not; and this clearly expressed purpose is not to be changed or modified by reason of the ambiguity created by the phrase "upon the certificate of the judge before whom such cases are tried or disposed of." These words can be construed so as to give an harmonious meaning to the entire section, and the literal construction of the particular clause must yield to the broader meaning demanded by the section as a whole.

In view of this conclusion, the judgment of the court below must be and is affirmed.

### TAYLOR v. PENNSYLVANIA Co.

(Circuit Court, N. D. Ohio, E. D. May 9, 1892.)

No. 4,787.

#### 1. CARRIERS—INJURIES TO PASSENGERS—NEW TRIAL—WEIGHT OF EVIDENCE.

In an action against a railroad company for injuries to a passenger due to the pressure of a crowd passing through its gates to a train, plaintiff and another witness testified that but one of the five gates was open. Several witnesses for defendant testified that all the gates were open, but they had other duties to perform at the train which would interfere with their observation on this point, and the gate keepers and policemen stationed at the other four gates were not examined. Held, that a finding by the jury that but one gate was open would not be disturbed on motion for new trial.

#### 2. SAME—INJURIES AT STATIONS—DEGREE OF CARE.

A carrier is held to the highest degree of care as to the condition of its engines, cars, bridges, and other appliances, because negligence as to them involves extreme peril to passengers; therefore, as a passenger's detention at a depot, or his exit to the train, is not attended with the hazards pertaining to the journey on the cars, the degree of care is justly lessened to the extent that at such a time and at such a place the carrier is bound to exercise only a reasonable degree of care for the protection of its passengers.

#### 3. SAME—CROWDING AT STATIONS—NEGLIGENCE.

Where, on account of the failure of the railroad company to use such sufficient means of prevention, a passenger is jammed against a railing, and sustains injuries to her spine, which result in paralysis of her legs, and disability for life, a verdict for \$5,500 damages is not excessive.

#### 4. SAME—DAMAGES.

Where, on account of the failure of the railroad company to use such sufficient means of prevention, a passenger is jammed against a railing, and sustains injuries to her spine, which result in paralysis of her legs, and disability for life, a verdict for \$5,500 damages is not excessive.

At Law. Action by Sarah E. Taylor against the Pennsylvania Company to recover damages for personal injuries. A verdict was rendered for \$5,500, and defendant now moves for a new trial. Denied.

John M. Stull, F. E. Hutchins, and Robert B. Murray, for plaintiff.

J. R. Carey and W. C. Boyle, for defendant.

RICKS, District Judge. The plaintiff instituted this suit to recover

damages for a serious injury sustained by her in the Union Depot in Pittsburgh, while she was about to pass out of one of the exit gates through which passengers were required to go to reach the cars. The depot was under the control of the defendant company, and the plaintiff, when injured, was a passenger going to the train which was operated by the defendant, and destined for Niles, Ohio, where she resided. She had purchased an excursion ticket on that day good for one trip from Niles to Pittsburgh and return, and with a very large number of people had visited the latter city on the occasion of the Allegheny Bicentennial Celebration. The defendant company, and other railroads centering in Pittsburgh, had extensively advertised this celebration, and each of them had industriously solicited people to attend. It continued for three days, and the testimony shows that during each of these days a greater number of passengers had been received and discharged from the Union Depot than ever before. The plaintiff was one of this unprecedented crowd. She had left Niles in the morning, transacted her business in Pittsburgh, and returned to the depot about 4 p. m., and there awaited the proper opportunity to pass from the depot to the corridor and exit gates to her train. While so waiting in the depot reception room she heard some person announce the train for Youngstown, when she proceeded to the large door leading from the vestibule to the corridor, and, having shown her ticket to some officer having a badge upon his coat, he passed her out into the vestibule, which was then nearly full of people. She took her place as one of the passengers waiting for the gates to open so that she could proceed to her train. The crowd increased in numbers rapidly, and soon was so closely packed behind and around her as to make it impossible for her to retreat or to move in any direction. She described the jam as so dense that she almost suffocated, and said she was from 10 to 15 minutes in passing from the reception room to the gate. As soon as it opened, the crowd began to move, and she moved with it, and, when she reached the iron railing constructed to turn people to the narrow exit of the gateway, she was, by a sudden surging of the throng, forced and jammed against the railing, and so injured in her spine as to paralyze her lower limbs, and permanently disable her. The case was submitted to a jury, and a verdict returned for the plaintiff, assessing her damages in the sum of \$5,500. The defendant has filed its motion to set aside this verdict, and for a new trial.

That the accident occurred substantially as above described is clearly established by the evidence. The two important issues of fact submitted to the jury were: *First*, did the defendant exercise ordinary care in providing a suitable force of officers and employes to properly control and direct the movement of the unprecedented throng which it was advised would crowd through its depot rooms, vestibule, corridors, and gates to reach its trains? and, *second*, did the defendant, regardless of the unusual crowd to be cared for and controlled, undertake to force it through one exit gate to the trains, and thereby cause unnecessary jamming and jostling and violence, and, without fault on the plaintiff's part, force her against the railing, and injure her, as already stated?

The defendant had so constructed its depot that from the spacious corridor, in which this large crowd congregated, five exit gates were provided through which passengers could go to their different trains. The plaintiff and one other witness testified that but one gate was open at the time the accident occurred, and that all the vast crowd was forced through that single gate. Four witnesses for the defendant testified that all five of the gates were open. The only gate keeper whose testimony was taken was the one stationed at the center gate, about which there was no dispute. The other gate keepers, and policemen stationed with them, at the other four gates, were not examined; and it was argued with some force to the jury that their absence was suspicious, and that the witnesses who testified that those four gates were also open had other important duties to perform, and did not observe the gates closely enough to know whether in fact they were open or not at the time of this accident. There was no special finding as to these facts, and I am therefore not advised as to what the conclusion of the jury was as to this issue. It may have been in favor of defendant's contention, and yet the jury may have concluded that upon the other issue, as to the exercise of ordinary care to provide plaintiff a safe exit, the defendant was negligent in not providing a sufficient force to control the crowd. But assuming that the jury found that the gates were not all open at the time of the accident, and that thereby the results before stated followed, such finding is not so clearly against the weight of evidence as to justify me in disturbing it.

The only remaining question, therefore, is, did the defendant exercise ordinary care in providing a suitable force to properly control and direct the movements of the unprecedented crowd then in its custody? The evidence offered by the defendant was that it made application to the chief of police of Pittsburgh for an extra force of patrolmen, and got all it wanted, and that at the time of the accident it had from 20 to 40 policemen, and, with its own employes, had about 100 men in and about the depot to direct and control the crowd in its approach to the depot, while in the depot, and while going to the trains. Upon the subject of the defendant's duty to care for this crowd, the jury were given the following instructions:

"The plaintiff was injured within the depot inclosures of the defendant, and while she was making her way to her train, as one of a very large crowd of passengers. The first important question to determine is, what was the kind and degree of care and protection which the defendant owed to her under the circumstances shown in evidence and at the time of the injury? A passenger while in actual progress on his journey is necessarily exposed to innumerable hazards; is wholly under the care of the carrier; and in view of these dangers, which he can in no respect control, the law imposes upon such carrier the greatest possible vigilance as to the passenger's safety, and holds it responsible for the slightest negligence. This degree of care is fixed not solely because of the relation of carrier and passenger; it is measured by the consequences which may follow the want of care. A carrier is held to this highest degree of care as to the condition of its engines, cars, roadway, bridges, and other appliances, because negligence as to any of them involves extreme peril to passengers, against which they cannot protect themselves. But a rule properly ceases with the reason for it. Therefore, as a passenger's

detention at a station, or his exit to his train, is not attended with the hazards pertaining to the journey on the cars, running at a rapid rate of speed, the degree of care above defined is justly lessened to the extent that in such a place and at such a time the carrier is bound to exercise only a reasonable degree of care for the protection of its passengers. This reasonable and ordinary care depends largely upon the circumstances of each particular case, and is such care as a person of reasonable and ordinary prudence and skill would usually exercise under the same or similar circumstances. Now, apply this rule to this case. The defendant was bound to use such reasonable care, as above indicated, in providing for the safety and protection of its passengers while in its inclosures, and while being conducted to its trains, with due regard to the numbers and character of those on its premises, and with due reference to the risks and dangers to which they were exposed. It was bound to provide a suitable number from its own officers and employes, or from the city police furnished, to assist it in properly controlling said crowd, and protecting men, women, and children in it from violence because of the unruly character or boisterous conduct of any members thereof. But it was not bound to do this to the extent of furnishing a guard of policemen for every passenger, or for every small group of passengers, to protect them from physical injury because of the violence of some of their own number. It was only bound to furnish such suitable number of officers and guards as would insure order, and preserve the peace, and keep the crowd in proper control, so as to direct their movements towards the train. Whether such suitable number of officers and guards was furnished in this case is for you, gentlemen of the jury, to determine from the circumstances as they existed at and about the time of the accident. What was the temper and character of the crowd? Was it boisterous and unruly, composed of drunken or excited men, bent on violence and disorder, or was it a good-natured, orderly crowd, willing to be controlled and directed in its movements? The witnesses for the plaintiff characterize the crowd as orderly and jolly. If this was its spirit and disposition, was there a sufficient number of guards and officers to direct and control it? You have heard the evidence as to the number of these employes of the defendant, of the extra force on duty, and of the detail of city police, as to how they were stationed, what duties were assigned to each, and how they discharged those duties. The defendant was as much obligated to protect passengers from pickpockets and roughs as from violence from the sudden movements of their passengers. If you think the special and extra precautions taken by defendant were proper and sufficient to control and direct that crowd collectively, and to insure to them as a body that kind of care which I have defined, then the defendant would not be liable for an injury inflicted upon the plaintiff by a sudden and unexpected jam or surging of some of the passengers about the plaintiff, who were not within the immediate control or reach of defendant's employes or the police, so that they could have anticipated it and guarded against it. As I have stated, the defendant could not be held to that degree of diligence that called for a guard for every passenger. It was not bound to provide a policeman for each person, to protect and defend him or her from violence of fellow passengers. But it was bound to furnish a suitable number of its own officers or police to properly control, as a body, such a crowd of passengers to the extent already stated. If you find it did this, then it discharged its duty to the plaintiff, and cannot be held liable for this injury."

These instructions correctly state the law as applicable to the case. The degree of care to which the defendant was held in its relation and duty to the plaintiff at the time of the accident was just. Under these instructions, the jury must have found that the defendant did not use such ordinary care in its precautions and preparations to control that crowd

as the emergency and circumstances demanded. In reaching this conclusion, they doubtless took into consideration the fact that the crowd was very much greater in numbers than the defendant was ever before called upon to control and transport. They were there, however, by defendant's solicitation. It had all the means within its power necessary to keep it advised of the rapid increase in the numbers of passengers coming on every train and from every direction. Its capacities and facilities for handling crowds were well known, and had been theretofore repeatedly tested. The people who started on their journey from every town and city within reach of Pittsburgh could not measure the volume of the crowd they were to meet when they reached that city, and could not, therefore, intelligently calculate the risks they were to assume when they became a part thereof at the depot to which they were all transported. The defendant's passengers were therefore not chargeable with knowledge of the dangers incurred by accepting its invitation and its inducements to visit Pittsburgh on this occasion. They had the right to suppose that the precautions to be taken for their safety and protection would be commensurate with the increased dangers confronting them. Of these increased dangers, the defendant had the first and most trustworthy warning. I am disposed, under these circumstances, to hold it to the full measure of care defined in my charge. The defendant took her place in the open space in close proximity to the exit gates to await her opportunity to go to her train. This space, and the vestibule within the depot, were sufficient to safely and comfortably hold the travelers ordinarily in defendant's care. It may even be conceded that the spaces named were sufficient for extraordinary occasions. But they were so packed and jammed on this day as to make the dangers greater than ever before. The crowd immediately surrounding the gates, waiting to be passed through, was permitted to become too dense for proper control or safe exit. The police and guards, as they were stationed, were unable to keep the crowd back. Whether because they were not stationed at the most suitable places, or because they were not active and energetic enough, is not for me now to determine. The jury found want of ordinary care in some of these respects, and I am not justified in saying such a conclusion is not supported by sufficient evidence. The jury were certainly not moved by passion or prejudice in reaching their conclusion. The amount of the verdict indicates that very conservative influences controlled them in their deliberations. The plaintiff has been a great sufferer, and is totally disabled for life. The damages assessed are, under these conditions, as reasonable as the defendant could expect, and indicate that the jurors were not governed by excitement or undue sympathy.

The result may have a wholesome effect. If railroads make prodigious efforts, by offering low rates, and by extended and captivating advertisements, to secure a greater number of passengers to travel over their lines than they can safely and reasonably care for at their terminal points, and accidents follow, they must answer for the risks thus assumed. The traveling public may be justly subject to criticism for going in such

vast numbers, and voluntarily assuming the extra hazards thereby incurred, but the railroad companies are nevertheless bound to take precautions commensurate to the risks they have imposed on the unprecedented crowds thus invited. What would constitute ordinary care in precautions taken for a crowd of 5,000 people might not be ordinary care in case the crowd numbered 10,000. The traveler, as one of 10,000 passengers, is entitled to the same degree of care that is due to him as one of 5,000. If the carrier which has solicited the 10,000 passengers to travel over its road cannot give to them this proper measure of care, and an injury thereby follows, it is responsible. It cannot invite and undertake to transport more passengers than its capacity justifies, and then excuse itself by claiming an unprecedented crowd, and that ordinary care as to the passengers in its depot was used. For these reasons I am not disposed to disturb the verdict as found by the jury.

The motion will therefore be overruled, and judgment entered.

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### SMITH v. MISSOURI PAC. RY. CO.

(Circuit Court, W. D. Missouri, W. D. March 7, 1892.)

#### PLEADING—AMENDMENT—LIMITATIONS.

Where, in an action against a railroad company for causing the death of an employe, the original petition proceeds entirely on the ground of the company's negligence in employing an engineer of known incompetence, an amendment which claims on the ground of the engineer's negligence merely, introduces a new cause of action, and does not relate back to the filing of the original petition, so as to escape the bar of the one-year limitation prescribed by Rev. St. Mo. § 4429.

At Law. Action by Kate Smith against the Missouri Pacific Railway Company for damages for causing the death of her husband. Heard on demurrer to the amended petition. Overruled as to the first count, and sustained as to the second.

*Warner, Dean & Hagerman*, for plaintiff.

The original petition was founded on the second section of the damage act, being section 4425, Rev. St. Mo. 1889. The cause of action stated in the second count of the petition is the same cause of action as that stated in the first count, being the killing of the husband of the plaintiff through the negligence of the servant of the defendant in running and managing its locomotive engine. Both counts of the petition are founded on the same section of the statute, the measure of damages being the same in each. It is not the substitution of another and new cause of action, but an amendment. In *Scott v. Glasner*, 79 Mo. 449, Judge PHILIPS, in delivering the opinion of the court, says: "Two tests by which we determine whether a second petition is an amendment or a substitution of a new cause of action are: (1) That the same evidence will support both petitions; (2) that the same measure of damages will apply to both. If both of these fail, the pleading is not an amendment." See, also, *Lottman v. Barnett*, 62 Mo. 159; *Gourley v. Railway Co.*, 35 Mo. App. 87; *Land Co. v. Minge*, (Ala.) 7 South. Rep. 666; *Kuhns v. Railway Co.*, 76 Iowa, 67, 40 N. W. Rep. 92; *Dougherty v. Rail-*

road Co., 97 Mo. 647, 654, 655, 11 S. W. Rep. 251; *Davis v. Railroad Co.*, 110 N. Y. 646, 17 N. E. Rep. 733; *Railroad Co. v. Denson*, (Ga.) 9 S. E. Rep. 788; *Railroad Co. v. Kitchens*, Id. 827; *Harris v. Railroad*, 78 Ga. 525, 3 S. E. Rep. 355; *Carmichael v. Dolen*, 25 Neb. 335, 41 N. W. Rep. 178; *City of Bradford v. Downs*, (Pa. Sup.) 17 Atl. Rep. 884; *Railway Co. v. Davidson*, (Tex. Sup.) 4 S. W. Rep. 686; *Railway Co. v. Chapman*, (Ala.) 3 South. Rep. 813; *Silver v. Railway Co.*, 21 Mo. App. 5, as explained in *Sims v. Field*, 24 Mo. App. 557, 567.

*Elijah Robinson*, for defendant.

PHILIPS, District Judge. The amended petition herein is demurred to on the ground, principally, that the cause of action is barred by the one-year limitation prescribed by section 4429, Rev. St. Mo. It raises the question as to whether or not the new matter set out in the amended petition is in the nature of a continuation of the original cause of action, stated merely in different form, or whether it, in effect, states a new and different ground of recovery. As the injury occurred in 1881, and the amended petition was not filed until 1889, the action would be barred, if the amended petition in fact presents a new cause of action. This is conceded. The *gravamen* of the original cause of action is the imputed negligence of the defendant railroad company in taking and retaining in its employ a servant of known inexperience and incompetency. The injury is charged to have resulted from this negligent act. It is furthermore quite apparent that the framer of the petition, first drawn in 1882, had in mind the fact that under section 4425, Rev. St. Mo., on which the cause of action is based, it had been ruled by the supreme court (*Proctor v. Railroad Co.*, 64 Mo. 112) that a railroad company was not liable for the death of an employe resulting from the negligent act of a fellow servant, unless the company was chargeable with negligence in employing an unskilled and incompetent servant, from whose act the injury ensued, or was negligent in providing insufficient machinery and the like. Hence the pleader proceeded upon the theory that the injured party was a fellow servant, and that the company was guilty of culpable negligence in employing an incompetent coemploye, by whose negligent act the death occurred. Under the original petition it devolved on the plaintiff, in order to a recovery, to establish by evidence the two facts: *First*, that the engineer in charge of the train was unskilled and incompetent, and that this fact was known to the defendant at the time of the injury, or might have been known to it by the exercise of due diligence; and, *second*, that the injury was traceable to this incompetency. *McDermott v. Railroad Co.*, 30 Mo. 115.

So far as the first count of the amended petition is concerned, it may be conceded, to plaintiff's contention, that it but states the same cause of action relied on in the original petition, by a simple variation in the averments, with others *sui generis*, affecting the demand already in issue; and therefore the new matter has relation back to the time of filing the original suit, and is no more amenable to the plea of the statute of limitations than was the original action brought within the year. *Buel v. Transfer Co.*, 45 Mo. 563.

But the second count of the amended petition presents the principal controversy. This count negatives the idea that the deceased was a fellow servant of the engineer in charge of the train. It also entirely omits the allegation of the original petition, and that of the first count of the amended petition; as to incompetency of the engineer, but proceeds upon the theory that the injured person was not a fellow servant of the person doing the injury, and that the death resulted solely from the want of due and proper care and vigilance by the engineer. Had the plaintiff gone to trial on the original petition, her action would have wholly failed, without proof of the two facts,—that the engineer was an unskilled or incompetent person, intrusted with the management of the engine at the time of the injury, and that this fact was known to the defendant company, or could have been known to it by the exercise of proper diligence. And had she attempted such proof, and made out a *prima facie* case, the defendant might have defeated her action by satisfactory countervailing proof, either that the engineer was a person of recognized skill and experience, or that the defendant in employing him had used every reasonable exertion to ascertain his fitness, and was satisfied thereof, before intrusting him with the management of its locomotive; whereas, by the amended petition, no such burden is assumed by the plaintiff. She concedes the fitness of the engineer for the duty imposed upon him by the defendant, and shifts the ground of contest to that of the want of due care and vigilance on the part of the engineer in managing and running his locomotive. Not only that, but she attempts by this amendment to escape the implied concession of the original petition that the deceased was at the time of the injury a fellow servant—a co-employee—of the engineer. Thus it is apparent that the issues are materially different. The defendant must rearrange its lines of defense; the evidence, which under the original petition would have been quite sufficient to acquit it, would be of no avail under the issues presented under the amended petition. It does seem to me to be a misapplication of terms to say that such a state of facts presents a case of continuation of the same cause of action.

It will be found on examination of the authorities cited in the brief of counsel for plaintiff, as a rule, that the new matter injected into the amended petition is but an enlargement of the acts of negligence which are germane to the original ground of recovery. They do not change the issues by escaping proofs requisite under the first petition, nor take away from the defendant weapons of defense which would have annihilated the plaintiff's cause. I stand by the principle of the rule established in *Scovill v. Glasner*, 79 Mo. 449. And the more especially ought such rule to be applied to actions like this. What becomes of the intended protective provision of said section 4429, limiting the right of action for such deaths to one year after the injury, if the amendment in this case be approved? It was doubtless in recognition by the legislature of the fact that the principal witnesses to such accidents are most liable to be lost to the defendant companies, exposed, as they are, to daily dangers to life, coupled with their migratory habits, that it im-



posed, as a condition to the benefits of the new right of action given by this statute to the surviving widow or children, promptness in instituting the suit, so that living witnesses to the transaction might not be lost. For seven years after this injury occurred the complaint made of record by this plaintiff was that her husband's death resulted from the negligence of the defendant in failing to have in charge of its engine a skilled and competent engineer, to protect her husband against the carelessness and awkwardness of his coemployee. The defendant was thus notified by the plaintiff that that was the issue to be met; that the witnesses, the evidence to be looked after and preserved, were such only as it might be advised by counsel would be necessary to disprove this issue. Now the defendant for the first time is notified that the plaintiff places her right of recovery on other and different ground; that the evidence which would prevent a recovery on the first-stated ground is wholly insufficient to prevent a recovery on the newly chosen field of action. The witnesses to the tragedy, by whom defendant might have disproved the imputed acts of negligence in the amended count, defendant might well have permitted to scatter, and pass out of view, as it was not essential to defeat the action to join issue on anything save that the engineer was a prudent and skilled person, or that defendant, after the most diligent inquiry, was honestly led to believe that he was suited to the work; for, being a fellow servant of the person killed, the company was not liable, unless the engineer was so unsuited for the charge of the engine that this fact was known, or might have been known, to the company; whereas, under the amended count, if the engineer has since died or departed to parts unknown, or other witnesses to the act have died or gone out of the country to places unknown, the former reliance of defendant is taken away, and it might be at the mercy of the plaintiff after a sleep of seven years. If such practice is to prevail, it will not be necessary for the pleader to ascertain within the year what the facts are entitling him to a recovery under this statute, or even to set them up when he files his petition; but he may let the case drag along for seven or ten years, and then file an amended petition, shifting his ground of recovery, and present an entirely different class of facts; escaping pitfalls before him at a trial of the first cause of action, and putting his adversary to rout when his witnesses have in the mean time died or passed beyond reach. No such abuse of the right of amendment ought to be recognized by any court. The demurrer to the second count is sustained, and overruled as to the first count.

DAVIS *et al.* v. SHAFER *et al.*

(Circuit Court, W. D. Missouri, S. D. May 16, 1892.)

## 1. CONSTRUCTION OF CONTRACT—JOINT AND SEVERAL LIABILITY.

A contract for the building of a creamery and cheese factory, which purports to be between the contractors, as parties of the first part, and the undersigned subscribers, as parties of the second part, whereby the parties of the first part agree to do the work, etc., for the sum of \$6,850, and the parties of the second part agree to furnish at their own expense the necessary land and water for such building, and receive a credit on the contract therefor of \$200, and the subscribers agree to pay the above amount on the completion of the building according to specifications; and the parties of the second part, the subscribers, agree as soon as the above amount is subscribed, or in a reasonable time thereafter, to incorporate under the laws of the state, fixing the aggregate amount of stock at not less than \$6,850, to be divided into shares of \$100 each, said shares to be issued to the subscribers in proportion to their paid-up interest therein, to which is attached a heading for the subscribers, thus: "Names of Subscribers. No. of Shares. Amount of Stock after Incorporation,"—which was signed by the defendants, as such subscribers, for various shares. *Held*, that this was a contract, *inter partes*, between the parties of the first part and the subscribers of the second part, whereby the subscribers became jointly and severally bound to the parties of the first part for the payment of the sum of \$6,850.

## 2. SAME—WRITTEN CONTRACT—PAROL EVIDENCE.

The contract being plain and unambiguous, parol evidence as to the intention of the subscribers in signing it, or their understanding of its terms, is not admissible to vary its expressed terms. Nor are any statements made by the soliciting agent of the party of the first part, made while soliciting subscribers, as to the meaning and effect of the contract, in the absence of fraud or deceit, competent evidence.

## 3. SAME—AMBIGUOUS PHRASES—INTERPRETATION BY PARTIES.

Where the contract employs words and phrases of doubtful or ambiguous meaning and application, the construction placed upon it by the parties thereto by word and acts, especially where such construction has been acted on by the parties, should prevail over any mere technical, grammatical, or logical interpretation; but where the contract is free from ambiguity, and its meaning is clear in the eye of the law, such mode of construction is inadmissible.

## 4. SAME—AGREEMENT TO FORM CORPORATION.

The provision of the contract respecting the organization of the subscribers into a corporation in no wise affected the assumption of the subscribers of the payment of the sum of \$6,850. That was a matter subsequent, *inter sese*, as to the subscribers, as to how their interests in the joint property afterwards should be held and managed.

## 5. ALTERATION OF CONTRACT.

When said contract was signed by the first four subscribers it provided for the payment in cash of the sum subscribed upon the completion of the work. Afterwards, to meet the requirement of subsequent subscribers, the provision was interpolated, allowing the subscribers to pay one third in cash, one third in 60 days, and one third in 4 months after the completion of work; the deferred payments to bear 8 per cent. interest from date. *Held*, that where there are several parties to an instrument, some of whom have executed it, and in the progress of the transaction it is altered as to some who have not signed it, without the knowledge of the first signers, but not in a part affecting the liability of the latter, and is then executed by the others, the contract is good as to the first signers, according to the terms agreed upon by them, and is good as to the subsequent signers, with the *adendum* obligation.

## 6. WAIVER AND ESTOPPEL.

Where the first signers of the contract are the managing committee of the property, with whom a copy of such contract, after all the subscribers have executed it, is left, and this committee afterwards accept the property from the contractor as completed according to contract, and certify that the contractors are entitled to their pay, retain and mortgage the property as that of the creamery company, *held* that all the subscribers are deemed to have waived such alteration, or, at least, are estopped from asserting such alteration.

**7. SAME—ALTERATION OF MEMORANDUM.**

The following memorandum, placed opposite the name of one of said subscribers, "Only responsible for 8 shares," is to be regarded as a part of his undertaking, and qualifies the contract so as not to bind him for a greater sum than three shares. Its subsequent alteration without his consent would discharge him. And, having paid the sum subscribed by him, he is not estopped by the subsequent acceptance of the work from pleading such alteration.

*(Syllabus by the Court.)*

At Law. Action by Davis & Rankin against L. W. Shafer and others to recover money under a contract. Judgment for plaintiffs.

*Mann & Talbutt*, for plaintiffs.

*Goode & Cravens*, for defendants.

PHILIPS, District Judge. This is an action by plaintiffs, a firm doing business at the city of Chicago under the name of Davis & Rankin, to recover a balance due on the following contract:

**"CONTRACT AND SPECIFICATIONS FOR COMBINED BUTTER AND CHEESE FACTORY OF CENTRIFUGAL POWER AND MACHINERY.**

"We, Davis & Rankin, party of the first part, hereby agree with the undersigned subscribers hereto, party of the second part, to build, erect, complete, and equip for said party of the second part a combined butter and cheese factory, at or near Greenfield, Dade county, Missouri, as follows, to wit: Said building shall be constructed and finished in substantial accordance with the specifications hereon, in a thorough and workmanlike manner. The engine, boiler, and all other machinery and fixtures shall be properly set up, and shall be in good running order, before the party of the second part shall be required to pay for said factory. The parties of the second part do hereby agree to furnish at their own expense suitable land for said building, together with sufficient water on said lot for the use of the business, and they shall be credited therefor, as a payment on this contract, the sum of two hundred dollars, (\$200.00); and it is further understood that, in case the said second party shall fail to furnish said land and water within ten days after the execution of this contract, then the said Davis & Rankin, at their option, may furnish the said land and water. Davis & Rankin further agree to provide and keep hired at the expense of the stockholders an experienced butter and cheese maker for one year, if desired. The above building is to have a capacity for handling 16,000 to 20,000 pounds of milk per day. Said Davis & Rankin agree to erect said butter and cheese factory as set forth by the above specifications for sixty-eight hundred and fifty (\$6,850) dollars payable in cash, or note as follows: One third cash when factory is completed; one third in secured notes, due sixty days after factory is completed; one third in secured notes, due sixty days after factory is completed. Notes to draw 8 per cent. interest from date. We, the subscribers, agree to pay the above amount for said butter and cheese factory when completed according to said specifications. Said building to be completed in ninety days or thereabout after the above amount (\$6,850) is subscribed. As soon as the above amount of (\$6,850) is subscribed, or in a reasonable time thereafter, the said subscribers agree to incorporate under the laws of the state, as therein provided, fixing the aggregate amount of the stock at not less than \$6,850.00, to be divided into shares of \$100 each, said share or shares as above stated to be issued to the subscribers hereto in proportion to their paid-up interest herein. It is hereby understood that Davis & Rankin will not be responsible for any pledge or promise made by their agents or representatives that do not appear in this contract, and made a part thereof either in printing or writing. For a faith-

ful performance of our respective parts of the contract we bind ourselves, our heirs, executors, administrators, and assigns.

"Executed this, the third day of August, 1889.

"Names of Subscribers.	No. of Shares.	Amount of Stock. after Incorporation."
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The aggregate of the sums subscribed was about \$7,000. Over \$4,000 of this subscription was paid to the plaintiffs, and on the failure to pay the balance of the \$6,850 this suit was brought.

The answers admit the execution of the contract, and its completion and performance by the plaintiffs according to the specifications, and its acceptance by the defendants, who still hold and are operating the plant, as a voluntary association, without having incorporated as the contract contemplated. They interpose as a special defense: *First*, that the contract is only several, and that both by its terms and the understanding of the parties thereto the subscribers were to be bound only to the extent of the sums subscribed by them, which sums varied from one to three hundred dollars. And, *second*, that the contract when signed by them had in it a blank space between the words, "sixty-eight hundred and fifty dollars, payable in cash," and the words following, "We, the subscribers, hereto agree to pay the above amount," etc.; and the following words: "Or note as follows: One third cash when factory is completed, one third in secured notes due sixty days after factory is completed, one third in secured notes due four months after factory is completed, notes to draw 8% interest from date,"—are alleged to have been inserted in this blank space after the execution of the contract. And, *third*, that plaintiffs, by their declarations and acts, treated the contract as several, and not as a joint obligation. And, *fourth*, that the defendants afterwards, for a valuable consideration, executed a release to the defendants from their joint obligation to pay the whole of the contract price on condition of their paying the single amount of their respective subscriptions. And the defendants Jacobs & Co. plead further that at the time of making their subscription they wrote after the "\$300," subscribed by them, the words, "only responsible for 3 shares." The replication took issue on the new matters thus pleaded. By stipulation of parties a jury was waived, and the case submitted to the court for trial.

The first question of prime importance is as to the purport of the contract. Does it impose a joint and several obligation on the subscribers to pay the whole contract price, or are they bound only severally to the extent of the sums respectively subscribed by them? To answer this question is only to read the contract. It declares in the opening paragraph that it is an agreement of "Davis & Rankin, parties of the first part, \* \* \* with the undersigned subscribers hereto, parties of the second part." Then: "The parties of the second part do hereby agree to furnish at their own expense suitable land for such building, together with sufficient water on said lot for the use of the business, and they shall be credited therefor, as a payment on this contract, the sum of \$200." This provision clearly shows that it was a joint undertaking.

The subscribers, the parties of the second part, as one act, at the expense of all, were to furnish the land and water, and as one person were to receive credit for the \$200, and not each an aliquot part, proportionate to the amount by him subscribed. Then comes the following clause: "We, the subscribers, agree to pay the above amount for said butter and cheese factory when completed according to specifications." There is no ambiguity, no conceivable uncertainty about it. It is a plain, explicit, unconditional promise, for an expressed valuable consideration, to pay to Davis & Rankin "the above amount," which is \$6,850. It could not well be more direct and positive. And by express provision of the statute the contract is joint and several. Rev. St. Mo. § 2384. Upon what recognized principle of law, then, can defendants stand for their contention that it was the intent and understanding of the parties that the defendants were to be bound only to the extent of the amount of subscription set opposite their respective names? It is elementary and unyielding law that "when parties have deliberately put their engagements into writing, in such terms as import a legal obligation, without any uncertainty as to the object or extent of such engagement, it is conclusively presumed that the whole engagement of the parties, and the extent and manner of their undertaking, was reduced to writing; and all oral testimony of a previous *colloquium* between the parties, or of conversation or declarations at the time when it was completed or afterwards, as it would tend in many instances to substitute a new and different contract for the one which was really agreed upon, to the prejudice, possibly, of one of the parties, is rejected." 1 Greenl. Ev. § 275.

Phillips thus succinctly states the rule:

"It is a general rule that extrinsic evidence cannot be admitted to contradict, add to, subtract from, or vary a written instrument." 2 Phil. Ev. (Edw. Ed.) 637.

Nor is it competent for either of the parties to prove *aliunde* how a written contract was understood by either of the parties in an action at law in the absence of vitiating fraud. *Bunce v. Beck*, 43 Mo. 266; *Bigelow v. Collamore*, 5 Cush. 226; *Harper v. Gilbert*, Id. 417; *Gould v. Lead Co.*, 9 Cush. 338-345; *Michael v. Insurance Co.*, 17 Mo. App. 23; *Burress v. Blair*, 61 Mo. 133. The observation of Judge Taylor in *Smith v. Williams*, 1 Murph. 430, is quite applicable:

"The first reflection that occurs to the mind upon the statement of the question, independent of any technical rules, is that the parties, by making a written memorial of their transaction, have impliedly agreed that, in the event of any future misunderstanding, that writing shall be referred to as the proof of their act and intention; that such obligations as arise from the paper by just construction or legal intendment shall be valid and compulsory on them, but that they will not subject themselves to any stipulations beyond the contract, because, if they meant to be bound by any such, they might have added them to the writing, and thus have given them a clearness, a force and direction, which they could not have by being trusted to the memory of a witness."

No statements made by agents while soliciting parties to sign the contract as to how they understood its provisions, or even had they gone

so far as to say that the subscribers would not be required to pay more than the sum subscribed by each, could in this action control the explicit provision of the written instrument binding them for the payment of a given sum. *Wakefield v. Stedman*, 12 Pick. 562; *Hakes v. Hotchkiss*, 23 Vt. 232; *Paddock v. Bartlett*, (Iowa,) 25 N. W. Rep. 907; *Manufacturing Co. v. Hale*, (Kan.) 17 Pac. Rep. 601. The subsequent provision of the written contract respecting the organization of the concern and its erection into a business corporation under the state law in no wise affected the liability of the defendants for their already expressed assumption of payment of the contract price of \$6,850. That was a matter subsequent, *inter sese*, as to the subscribers, as to how their interests and rights in and to the joint property thus acquired should be secured, fixed, and managed. It was upon the basis, among themselves, as stockholders to the extent of the sums paid by them in the corporate property and its earnings. On its organization the stockholder would become liable for the debts subsequently contracted by it to the extent only of his unpaid stock. Failing to organize as a corporation, the promoters of the scheme—the subscribers—would, *inter se*, be a joint stock association, and, as to creditors of the concern, they might be held as partners. *Martin v. Fewall*, 79 Mo. 401; *Smith v. Warden*, 86 Mo. 382; *Pettis v. Atkins*, 60 Ill. 454; *Bigelow v. Gregory*, 73 Ill. 197; *Wells v. Gates*, 18 Barb. 554. The heading to the subscription list appended to the contract is significant. "Amount of stock *after* incorporation," shows that the subscriber did not become such stockholder until after incorporation, and that the subsequent act depended upon himself, beyond the control of the plaintiffs.

Strenuous effort was made at the trial by defendants to show that by the subsequent acts and declarations of plaintiffs' agents, while trying to collect the subscription, in taking notes from individual subscribers for the amount of their subscriptions and the like, they placed upon the contract their own interpretation, that it was not designed to hold the subscribers for a sum greater than the amount of stock subscribed. Such evidence would be competent if suited to the case. Where the contract in question employs words or terms of doubtful or ambiguous meaning and application, the meaning and application given them by the parties to the contract and acted on by them should prevail over any technical, grammatical, or logical interpretation of the words and phrases. But where the contract is free from ambiguity, and "its meaning is clear in the eye of the law," such evidence is clearly incompetent. *Railroad Co. v. Trimble*, 10 Wall. 367; *Michael v. Insurance Co.*, 17 Mo. App. 23; *Chrisman v. Hodges*, 75 Mo. 413; *Miller v. Dunlap*, 22 Mo. App. 97. Rightfully understood, there was no legal or moral incompatibility in the claim of plaintiffs that these defendants are bound for the unpaid balance of the debt, and their efforts to collect the individual subscriptions by taking notes or otherwise as best they could. The circumstances attending the organization of such an enterprise contemplate that its success depends upon the subscription of enough stock to pay for the plant, without which no single subscriber would enter into it. It interests the

contractors, therefore, to obtain the requisite amount of subscription; and the usual course of proceeding in inaugurating such enterprises is for the contractors to collect and receive such subscriptions to an amount sufficient to pay the contract price. This course accommodates the subscribers. The conduct of the subscribers, indeed, invited the plaintiffs to this course. The correspondence in evidence between the plaintiffs and their agent on the ground at Greenfield shows that up to the day when the work was completed, and the same was accepted by defendants' committee as satisfactory, no complaint was made by defendants, or any objection made to the payment of the sums subscribed by them. This correspondence, which is a part of the *res gestæ*, shows that when pay day came trouble came. Some paid, while the minority shirked, skulked, and refused. It was the policy, as it was to the interests of plaintiffs, who were largely engaged through the country in inaugurating like industrial enterprises, to avoid friction, delay, and litigation. The letters show that plaintiffs, from their business house in Chicago, were solicitous that their collecting agent should settle with the subscribers on any reasonable terms which would obtain the money due them, and even submitted to delays and discounts. For defendants now to take shelter in these acts to escape their expressed undertaking, is to seek to take advantage of their own wrong.

As to the alteration of the contract. It is important to ascertain the facts pertaining to this issue before discussing the law, as it will eliminate some of the propositions contended for by counsel. Without reviewing in detail this evidence, the conclusion reached on the whole evidence and attendant circumstances is that, when the contract was signed by the first four subscribers, L. W. Shafer, Jacobs & Co., Harper & Co., and John A. Davis, the words alleged in the answer to have been written in the blank space were not then written therein, (the other parts of the contract being on printed form;) but they were inserted before the other parties signed it. I base this conclusion upon the fair and reasonable deduction from Mr. Davis' testimony. He undertook to assist plaintiffs' agent in securing the names, and went around with him to solicit and influence subscribers. He testified that at once they encountered the objection to the provision in the contract for a cash payment, and he stated to the agent that in the condition of the people (generally farmers) to whom they must look, cash payments would be an obstacle, and provision should be made for time, etc.; and it was a fact quite noticeable to the court at the trial that many of the unadvised defendants on the witness stand testified about something being said by the agent as to part cash and time on the balance, while denying that it was in the contract. And Mr. Jacobs stated on cross-examination that the writing was not in the contract when he signed it, and that he first noticed it in there after three or four had signed it. Superadded to which, is this potential fact: For what conceivable reason, consistent with business sense and the instinct of self-interest, could plaintiffs or their agent have inserted such a clause after the parties had signed the contract? As it then stood they were obligated to pay in cash on the

completion of the work, whereas by the interpolation they would be required to pay only one third cash, and have 60 days and four months extension on the balance. With or without the provision, any subscriber could pay the cash, and with it he could have time if desired. No advantage to the obligees is apparent, and no wrong to the obligors was done by the imputed insertion. There is the absence of any reasonable motive for plaintiffs to make said interpolation without defendants' knowledge or consent. Furthermore, the evidence shows that the subscribers committed the matter of the contract and this property to the management of an executive committee composed of four of their number, three of whom—Davis, Shafer, and Harper—were the parties who signed the contract before the interlineation was made. When the subscription list, in its present form, was completed, a copy thereof was left with defendants' committee, where it has ever since remained. In August of that year this committee, on behalf of the association, certified to the plaintiffs that they had selected and procured the tract of land upon which to erect "the combined butter and cheese factory," and recommended the plaintiffs "to proceed to erect said combined butter and cheese factory thereon according to our contract with you." On November 1, 1889, after they had this copy of the contract of subscription, this same committee, "for Greenfield Butter & Cheese Factory Company" certified to the plaintiffs, "in behalf of and for the stockholders of the Greenfield Butter & Cheese Factory Company of Greenfield, state of Missouri," that the plaintiffs, contractors as aforesaid, had "completed the same according to contract and specification, so far as we, with our inexperience, are able to ascertain. And we do hereby accept the same, and recommend that Davis & Rankin, contractors, be paid for same according to the terms of contract with them, as soon as a practical test shall be made showing the manufacture of butter and cheese, and 136 feet of additional piping for pump shall be furnished." These conditions having been complied with on the part of the plaintiffs, on the 18th day of November, 1889, this committee issued to plaintiffs an unconditional certificate, stating that they had "completed the same according to the contract and to our satisfaction, and we do hereby accept the same, and recommend that Davis & Rankin, contractors, be paid for same in accordance with our contract with them." This committee for the subscribers thereupon took possession of the property, have ever since held it, and have mortgaged it for debt. The only objection ever interposed by any of them up to the time when called upon for settlement was that they wished to be released individually from any further liability on payment of their respective subscriptions; and, among them, they have since paid over \$4,000 of this sum. If the question were *res integra*, it would be difficult to discover any sound reason or ethics for discharging either the first or second set of subscribers from their obligation to pay. The second set are clearly individually bound, because the insertion antedated their subscription; the first four signers, because the interlineation was neither intended to defraud them, nor did it work to them any harm, nor did it secure any



advantages to the obligees. The contract, as signed by them, was complete, unconditional, binding them to pay cash on the completion of the work. That right remains to them, and the only effect of the added provision was to give them the option of other terms of payment. No such change, made without evil intent, and working no injury to the obligee, and securing no advantage to the obligor, ought, in my judgment, to be deemed material. The rule of *damnum absque injuria* ought to be applied to such case. The authorities in this state are otherwise. But courts have, from sheer force of reason and common sense, (which is the surest basis of justice,) felt constrained to temper the rigor of the rule against alterations to the extent that "where there are several parties to an indenture, some of whom have executed it, and in the progress of the transaction it is altered as to those who have not signed it, without the knowledge of those who have, but yet in a part not at all affecting the latter, and then is executed by the residue, it is good as to all." 1 Greenl. Ev. par. 568; 1 Add. Cont. par. 389; *Doe v. Bingham*, 4 Barn. & Ald. 672; *Hibblewhite v. McMorine*, 6 Mees. & W. 208; *Hall v. Chandless*, 4 Bing. 123. So it has been held that, where a mortgagor altered a mortgage after it was signed by his comortgagor, without the latter's knowledge or consent, by inserting therein a description of other property, the mortgage was valid as to both. It was good as to the first mortgagor as to the property described therein when he signed it, and it bound the second mortgagor as to the additional property as well as to the other property. *Van Horn v. Bell*, 11 Iowa, 465. So here the contract was complete when the first four subscribers signed it, but in the progress of its execution an alteration was made to meet the requirements of other parties, which merely extended to them the privilege of other terms of payment without affecting any existing right of the first obligors. It seems to me that it is a fit case for the application of the maxim *ubi eadem est ratio, eadem est lex*. But, waiving this proposition of law, the facts hereinbefore recited, as to the acceptance of the property upon the completion of the contract, the retention of the property and dealing with it as their own, clearly constituted a waiver and estoppel combined. Shafer, Harper, and Davis waived it when they accepted the building, machinery, and work. They ratified the contract through the executive committee, to whom the matter was intrusted by the subscribers, when they took possession of the building for the association, and they created a fatal estoppel by occupying it, treating and dealing with it as their own. As said by CHITTY, J., in *Re Chesham*, 31 Ch. Div. 473:

"A man shall not be allowed to approbate and reprobate. If he approbate, he shall do all in his power to confirm the instrument which he approbates. \* \* \* If a man approbate his obligation, he is confined to his adopting the instrument as a whole, and abandoning everything inconsistent with it."

See *Evans v. Foreman*, 60 Mo. 449; *Bibb v. Means*, 61 Mo. 289; *Guffy v. O'Reiley*, 88 Mo. 429; *Austin v. Loring*, 63 Mo. 22, 23; *Green v. Railroad Co.*, 82 Mo. 653-659; *Brown v. Wright*, 25 Mo. App. 54; *Imboden v. Insurance Co.*, 31 Mo. App. 321; *Mayor v. Sonneborn*, 113 N.

Y. 423, 21 N. E. Rep. 121; *Walker v. Mulvan*, 76 Ill. 18; *Rapalee v. Stewart*, 27 N. Y. 310; *Duff v. Wynkoop*, 74 Pa. St. 300; *Rau v. Little Rock*, 34 Ark. 303.

There is amply sufficient in the pleadings to present this issue. The petition avers and the answers admit the acceptance of the work. And it is specifically pleaded in the reply that said alteration in the contract was "there at the time defendants accepted the said creamery, took the deed to said property, and assumed the control of the same, and that the same was well known to the defendants." It is the legal effect of the facts pleaded, rather than the designation given them by the pleader, on which the law administers relief. *Greenwood v. Insurance Co.*, 27 Mo. App. 417; *Olden v. Hendrick*, 100 Mo. 534, 13 S. W. Rep. 821.

There is no inconsistency in fact or law between plaintiffs' denial of making the alleged alteration in the contract, and then alleging that defendants by their conduct and acts had waived or ratified the act, or had created an estoppel. The contrary rule is a relic of barbarism in practice, by which justice was subordinated to form. *Nelson v. Brodhack*, 44 Mo. 598; *Patrick v. Gaslight Co.*, 17 Mo. App. 462; *McCormick v. Kaye*, 41 Mo. App. 263. The observation of SHERWOOD, J., in *Bank v. Armstrong*, 62 Mo. 65, is to be understood with reference to the state of facts under consideration. The reply only tendered the issue of no alteration, without pleading any fact which would constitute a waiver or estoppel.

As to the release pleaded in the answers, it is only necessary to state the facts to show that it is without merit. After the plaintiffs had kept and performed the contract on their part, the duty and obligation devolved on defendants to pay the contract price. They declined to do so, however, unless plaintiffs would yield to their contention that the undertaking was that each subscriber was bound only to the extent of the stock subscribed, and unless the plaintiffs would also waive their right to file a mechanic's lien. Even had the agent been authorized thereto, the release would be inoperative. It is not predicated of any new, valuable consideration, and as such it is a mere *nudum pactum*. When a contract "has become executed wholly or in part by the passage of a consideration it cannot be discharged by a simple agreement, but only by performance of its terms, by a release under seal, or by an accord and satisfaction." *Foster v. Dauber*, 6 Exch. 839; 3 Amer. & Eng. Enc. Law, p. 890, § 56. "It is an old rule of the common law that the payment of a sum less than that which is due cannot operate as a satisfaction of the debt." *Id.* p. 895, § 67. The facts of this case do not bring this release within the bounds of the rule respecting the compromise of doubtful claims or the settlement of rights in a disputable contract. Aside from this, the agent, Burr, had no authority from plaintiffs to execute such a paper. By the contract itself it is stipulated "that Davis & Rankin will not be responsible for any pledge or promise made by their agents or representatives that do not appear in this contract, and made a part thereof, either in printing or writing." Parties are presumed to know the law. A collecting agent possesses only lim-

ited authority. As such he has no implied power to compromise debts or execute such a release. *Corning v. Strong*, 1 Cart. (Ind.) 329; *Ward v. Evans*, 2 Ld. Raym. 928; *Sykes v. Giles*, 5 Mees. & W. 645; *Miller v. Edmondston*, 8 Blackf. 291; *McHany v. Schenck*, 88 Ill. 357; *Pratt v. U. S.*, 3 Nott & Hunt. 106; *Story, Ag.* (9th Ed.) § 99; *Buckwalter v. Craig*, 55 Mo. 71; *Greenwood v. Burnes*, 50 Mo. 52. The managing committee for defendants were advised by this agent when they demanded such release that he had never done such a thing, and that he would communicate with his principals. Accordingly he did write to them on the 8th day of November, 1889, in which he stated that the company had had a meeting and advised the subscribers not to pay until the machinery was tested, and until plaintiffs would give them something to show that they would look to each subscriber for what he subscribed and no more, and unless the plaintiffs would not file a lien on the building. To this letter plaintiffs replied on the 11th day of November, 1889, in which the agent was authorized to concede the defendants the release against a mechanic's lien, "as they [defendants] are amply responsible, and, if they would force us to give it to them before they would settle, it would not be worth anything anyhow." No authority was given the agent to execute a release beyond the matter of the mechanic's lien. Instead of demanding to see the agent's written authority, after being advised that he would write to the plaintiffs, the committee accepted the mere parol statement of the agent. They could not thus bind the principals. *Story, Ag.* § 72; *Wilson v. Railroad Co.*, 114 N. Y. 487, 21 N. E. Rep. 1015; *Gair v. Tuttle*, 49 Fed. Rep. 198, (opinion recently filed in this court.) Neither the agency nor the extent of authority can be established by proof of the imputed agent's declarations and acts. *Anderson v. Volmer*, 83 Mo. 406; *Fougue v. Burgess*, 71 Mo. 389.

The only remaining issue is the defense interposed by Jacobs & Co., as to the allegation of the memorandum placed opposite their name on the subscription list. I credit the testimony of Mr. Jacobs, to the effect that at the time of the execution of the instrument the words "only responsible for 3 shares" were written in pencil just after the figures "300," which represented the value of the shares subscribed by them. Such memorandum or *addendum* belongs to the "four corners" of the instrument, and is as much an integral part of it as if it had been inserted in the body of the contract. "If such memoranda are at the foot or on the back of a note or other instrument when executed, they constitute a part of the contract." *Bay v. Shrader*, 50 Miss. 330; *Warrington v. Early*, 2 El. & Bl. 763; *Wait v. Pomeroy*, 20 Mich. 425; *Wheelock v. Freeman*, 13 Pick. 165; *Railroad Co. v. Atkison*, 17 Mo. App. 494; *Railroad Co. v. Levy*, Id. 504, 505; *Burchfield v. Moore*, 25 Eng. Law & Eq. 123. These words, then, are to be construed as if they had been inserted immediately after the chief clause obligating the parties of the second part to pay the contract price of \$6,850. What, then, would be their legal import? For what purpose were they employed, except to qualify the extent to which Jacobs & Co. proposed by their signature to be bound? It would be strained and overtechnical to say that as

they used the words "3 shares" they intended only to place a limit on their responsibility as shareholders, and, as they would not become such until after incorporation, the term should be restrained to the subject-matter, rather than be extended to the general undertaking in the body of the contract. There could be no motive nor sensible object in employing such words as a limitation alone on their responsibility as to the other shareholders, as in no event could the shareholders be bound *inter se* or to general creditors for a greater sum than the amount of their shares. Mr. Jacobs testified that after reading the contract his apprehension was that it bound each subscriber for the whole sum, and that he so stated to the agent, and wrote the words of qualification for his protection against such construction. When the plaintiffs, through their agents, accepted the paper with this memorandum, they took it as a part of the contract of Jacobs & Co., and are bound thereby. There is no repugnancy between the general clause binding the subscribers to the payment of the entire sum and the limitation as to Jacobs & Co. It was a contract *inter partes*, being executed successively by the parties of the second part. When handed to Jacobs & Co. for signature, the transaction, as to them, is to be viewed as if they had interpolated the words before signing: "But as to Jacobs & Co. it is understood that they are bound only to the extent of \$300." In respect to the alleged alteration of this memorandum, it is sufficient to say that the words are somewhat blurred, but sufficient of them remains to satisfy my mind that they were there. The answer does not aver that plaintiffs made the defacement, nor does the evidence show by whom it was done, or how it occurred. If altered by the plaintiffs, it operated to discharge Jacobs & Co.; if done while in possession of plaintiffs, it devolved on them to explain it. The act of Jacobs & Co. in placing this qualification on their liability is a suggestive answer to the contention of counsel that it was the common understanding of the subscribers at the time of the execution of the contract that they were only to be severally bound to the extent of the shares respectively subscribed by them. The very fact that Jacobs & Co., who were the second signers of the contract, saw the sweeping terms of the obligation before their eyes, and placed such memorandum opposite their name, was sufficient to put every subsequent signer on his guard. It was a warning signboard to them. The argument of counsel that the subsequent signers should be deemed to have regarded this memorandum as equally applicable to themselves is not even plausible. The very reverse is the only reasonable inference. After being thus warned by the precautionary action of Jacobs & Co. in placing their names to the instrument without any qualification, the conclusion is inevitable that they swallowed the whole obligation. It follows that as to all the defendants duly served or appearing hereto, except as to Jacobs & Co., the issues are found for the plaintiffs. Judgment accordingly.

ANDERSON v. EILER *et al.*

(Circuit Court of Appeals, Third Circuit. May 6, 1892.)

## 1. PATENTS FOR INVENTIONS—LICENSE.

A person who had produced mantels of a new design sold two of them to a manufacturer, who avowed an intention to use them as copies. *Held* that, although the sale was at the usual price, it must be considered as equivalent to a consent that the manufacturer might use the design, and the inventor, having subsequently obtained a patent, could not sue the manufacturer or his customers for infringement.

## 2. SAME.

It was immaterial that the inventor sold only upon the manufacturer's assertion that he would purchase elsewhere, it appearing the mantels were on sale by others. 46 Fed. Rep. 777, affirmed.

Appeal from the Circuit Court of the United States for the Western District of Pennsylvania.

In Equity. Suit by William Anderson against Eiler, Breitwieser & Co., for infringement of a patent. The bill was dismissed, and complainant appeals. Affirmed.

*W. L. Pierce*, for appellant.

*James Ayward Develin*, for appellees.

Before ACHESON, Circuit Judge, and BUTLER and GREEN, District Judges.

BUTLER, District Judge. The suit is for infringement of letters patent No. 19,827, granted to William Anderson, June 23, 1890, "for designs for mantels." The mantels sold by the respondents are made after the complainant's design, and are covered by his patent. They were purchased from Mershon, Brown & Co., who made them. Several defenses are set up, among them a license in Mershon, Brown & Co.; and as we think this is sustained by the proofs, we need not consider any other.

It appears that Mershon, Brown & Co., who are manufacturers of mantels, wishing to use this design, (not then patented) purchased from Mr. Anderson (through an agent) two of his mantels, as samples, for this purpose. The agent explicitly informed him of their object in the proposed purchase, as the proofs show, and as he admits. He thus sold the mantels with knowledge that the only object in purchasing was to copy and use his design, and did it without objecting to the use contemplated. The inference is therefore, we think, irresistible that he consented to this use. Whether he actually consented or not, however, the circumstances estop his denial. His silence at the time closes his mouth. If he did not mean to consent he should have said so. Such denial now, and a recovery of damages for infringement, would constitute a fraud. It is true that the sum paid for the mantels was not large; no more than the usual price for their common use. Whether it was disproportioned to the value of the special use mentioned depends upon the question whether a monopoly in the design was then contemplated by either party. Clearly Mershon, Brown & Co. did not contemplate it. They supposed the design was open to the public, and virtu-

ally declared so at the time. Whether Mr. Anderson then intended applying for a patent is not clear. He did subsequently, though somewhat tardily, apply. But whether the sum was disproportioned to the value of the special use is not important, in view of the fact that this use was distinctly in the minds of both parties, and that the money was paid and received on the basis of it.

We do not see any force in the suggestion that Mr. Anderson was constrained to sell by reason of Mershon, Brown & Co.'s assertion that they could and would purchase elsewhere, for the purpose contemplated, if he refused. No deceit or force was employed. The assertion was true; others were selling the mantels. He was left free to sell or refuse. It may be implied from the evidence that he hesitated, and considered the consequences before deciding. He must have known that if he refused, and the samples were obtained elsewhere and his rights violated, the law would afford him protection; and the fact that he did so hesitate and consider before selling lends additional strength to the inference that he consented to the use contemplated, in consideration of the price received.

The decree of the circuit court is therefore affirmed.

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### PAINE v. SNOWDEN.

(Circuit Court of Appeals, Third Circuit. April 20, 1892.)

#### DESIGN PATENTS—NOVELTY—CHAIR BACKS.

Design patent No. 13,405, issued November 14, 1882, to Henry H. Paine for a design for common round bow-back chairs, consisting in the upper part of the bow and rounds provided with a sheet of suitable material, as wood, bent to conform to the curvature of the bow-back and rounds, leaving the rounds between the sheet and seat exposed, is void for want of novelty. Affirming 46 Fed. Rep. 189.

Appeal from the Circuit Court of the United States for the Eastern District of Pennsylvania.

In Equity. Suit by Henry H. Paine against William H. Snowden for infringement of a patent. The bill was dismissed below, (46 Fed. Rep. 189,) and complainant appeals. Affirmed.

*Horace Pettit*, for appellant.

*H. T. Fenton*, for appellee.

Before **ACHESON**, Circuit Judge, and **WALES** and **GREEN**, District Judges.

**ACHESON**, Circuit Judge. This was a suit in equity for the infringement of letters patent dated November 14, 1882, granted to Henry H. Paine, the complainant below and appellant, for a design for chairs. The patent has four claims. The first and leading claim is as follows:

"(1) The improved design for common round bow-back chairs, consisting in the upper part of the bow and rounds provided with a sheet of suitable material, as wood, bent to conform to the curvature of said bow-back and

rounds, leaving the rounds between said sheet and seat exposed, substantially as and for the purpose specified."

The second claim differs from the first only in providing that the back piece or sheet shall be perforated wood. The third claim is like the second, but calls for a perforated wood seat also. The fourth claim is the same as the first, with the addition of "ornamental nails" to secure the "curved perforated back piece" to the bow and rounds. In his specification the patentee states:

"I prefer to curve the bottom of the plate, E, to improve the design; but, if desired, it may be made perfectly straight."

He further says:

"The depth of the plate may be varied, and also its ornamentation; my invention comprehending, broadly, the design when such a plate is arranged on the upper part of the bow and rounds, leaving the lower parts of the same exposed."

The plate, E, is the sheet or back piece mentioned in the claims. The sheet or back piece shown in the patent drawing has a scalloped lower edge, and ornamentally arranged perforations; but it is quite clear that the patent was not intended to be confined, and is not confined, to the configuration or ornamentation there shown. Moreover, as we have seen, the depth of the plate or back piece "may be varied" at pleasure, and, indeed, under the terms of the claims, may be extended any distance down the back of the chair, provided, only, there is some exposure of the lower parts of the bow and rounds. Certainly, as a patent for a design,—a production intended mainly to appeal to the eye,—the patent in suit has a remarkable scope. But the court below having held that, in view of the prior state of the art, the patent was destitute of invention, we will confine ourselves to the single inquiry whether that conclusion was correct.

It appears that prior to 1882 Gardner & Co. manufactured and sold in the city of New York veneers, chairs, and settees. Their illustrative catalogue, issued and distributed in June, 1882, is an exhibit in the case, and it is shown that the cuts therein contained are true representations of the chairs which they manufactured and sold long before the date of Paine's alleged invention. Those chairs were of different forms, styles, and sizes. The variety was great. Some of the chairs had curved backs, to conform to the shape of the human body. The chairs were provided with perforated veneer seats. They also had pieces of perforated veneer, of various shapes and of ornamental appearance, fastened by nails to the backs of the chairs, and in the instances where the backs were curved the back pieces of veneer were fitted so as to conform to the curvatures. Sometimes the veneer back was continuous with the seat, an unbroken piece of perforated veneer being used for the purpose. In other instances the perforated veneer back piece and the seat piece were separate.

Now, it is true that, among the Gardner illustrations, we do not find the common bow-backed chair; but everything else disclosed by Paine's patent is there to be seen. However, the bow-backed chair—that is, a

chair having a continuous piece bent to form the sides and top of the back, both ends being fastened in the seat—was old. Did it, then, in view of what had already been done, require inventive genius, of any order, to apply to the curved back of such a chair a piece of perforated veneer or sheet of other flexible material? The court below ruled that it did not, and in that judgment we entirely concur.

But, besides the proofs already discussed, this record contains as an exhibit a patent, No. 179,721, granted on July 11, 1876, to Michael Ohmer, for an improvement in chairs. The illustrative drawing of that patent shows a common bow-back chair, with a wooden back piece secured by screws against the front of the top of the bow, and leaving the lower parts of the rounds exposed. Under the ruling in *Gorham Co. v. White*, 14 Wall. 511, the conclusion, we think, is well warranted that Ohmer's chair back and Paine's design are substantially identical in appearance. But, at any rate, when the Ohmer chair back is added to the other proofs touching the prior state of the art, it becomes clear, beyond any sort of doubt, that Paine's design possesses no patentable novelty. We are altogether satisfied with the result reached in the court below, and accordingly the decree dismissing the bill is affirmed.

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**CONSUMERS' GAS CO. OF DANVILLE v. AMERICAN ELECTRIC CONSTRUCTION CO., LIMITED.**

(*Circuit Court of Appeals, Third Circuit. April 23, 1892.*)

**1. AFFIDAVIT OF DEFENSE—ACTION ON WRITTEN CONTRACT—PAROL AGREEMENT.**

An affidavit of defense to an action on a written contract to recover the price of an electric light plant alleged that plaintiff had agreed, at the time the contract was made, to execute a satisfactory bond indemnifying defendant against suits for infringement of certain patents, but had failed to execute such a bond. The written contract contained no provision for indemnity, and the affidavit neither alleged that such provision was omitted by fraud or mistake, nor that defendant was induced to execute the written contract by reason of the alleged parol agreement. *Held*, that it must be presumed that the agreement for a bond was verbal, and, as evidence thereof would be inadmissible, the affidavit was insufficient. 47 Fed. Rep. 43, affirmed.

**2. SAME—INFRINGEMENT OF PATENT—CLAIM FOR DAMAGES.**

A purchaser of a machine who has had the undisturbed use and possession thereof cannot, in the absence of fraud, withhold the purchase price because of an alleged liability on his part to a patentee for infringement of his rights in the use of the property. 47 Fed. Rep. 43, affirmed.

**3. SAME—VAGUE AND INDEFINITE ALLEGATIONS.**

The general allegations that plaintiff "had not complied with the contract," and that defendant "had already been put to great delay and exposure and damages, to the amount of ten thousand dollars," were too vague, indefinite, and uncertain to present a sufficient defense. 47 Fed. Rep. 43, affirmed.

Error to the Circuit Court of the United States for the Western District of Pennsylvania.

Action by the American Electric Construction Company, Limited, against the Consumers' Gas Company of Danville. An affidavit of de-



fense was adjudged insufficient, (47 Fed. Rep. 43,) and defendant brings error. Affirmed.

*James Scarlett*, for plaintiff in error.

*C. E. Morgan*, for defendant in error.

Before ACHESON, Circuit Judge, and BUTLER and GREEN, District Judges.

ACHESON, Circuit Judge. An affidavit of defense is insufficient to prevent judgment, unless it sets forth all the facts necessary to constitute a substantial defense. Mere general averments amounting to legal conclusions will not do. The specific facts must be stated, so that the court may draw the proper conclusions. Nothing should be left to conjecture, for that which is not stated must be taken not to exist. These principles have been repeatedly declared and enforced. *Bryar v. Harrison*, 37 Pa. St. 233; *Marsh v. Marshall*, 53 Pa. St. 396; *Peck v. Jones*, 70 Pa. St. 83; *Asay v. Lieber*, 92 Pa. St. 377.

The action here was to recover a balance alleged to be due to the plaintiff below from the defendant upon a written contract, dated July 6, 1888, whereby the plaintiff company agreed to furnish and set up at the works of the defendant company certain machinery and appliances for an electric light plant, and also to construct certain circuits of poles and wires upon specified terms. A copy of the contract was attached to the affidavit of claim, and also a particular statement of the plaintiff's account, with the credits to which the defendant was entitled, and performance by the plaintiff was distinctly averred. The affidavit of claim was complete. It was then incumbent upon the defendant to file an affidavit setting forth specifically, and with reasonable certainty, the grounds of defense. The court below decided that the affidavit of defense filed was insufficient to prevent judgment, and, after careful consideration, we have reached the same conclusion.

As regards the Conard claim, it is quite evident that credit therefor was actually given to the defendant in the plaintiff's statement of account filed, with a slight error in amount, which the court below corrected. This was not seriously controverted upon the argument in this court.

No valid defense was disclosed by the allegations in the defendant's affidavit that, at the time the written contract was entered into, the plaintiff agreed with the defendant to fully indemnify and save it harmless as against any and all demands and claims under or growing out of letters patent of the United States, and against any and all suits for the infringement thereof, by reason of its use of the electric light plant, or any of its parts, erected by the plaintiff under said contract, and to give to the defendant, on demand, a good, sufficient, and satisfactory bond so to do; that the plaintiff, in recognition of this obligation, tendered to the defendant a bond, which was not acceptable to and was not accepted by the defendant, as it was neither good, sufficient, nor satisfactory to indemnify and save harmless the defendant; and that the plaintiff failed, on demand, to give to the defendant such a bond as it agreed to do. No provision whatever for indemnity is to be found in the written contract

sued on, nor is it averred in the affidavit of defense that such provision was omitted therefrom by fraud, accident, or mistake. Now, as it is not alleged that the agreement with respect to indemnity was in writing, it must be taken to have been by parol. A writing will not be assumed to exist, in the absence of express averment of the fact. *Marsh v. Marshall, supra*. Moreover, if the alleged collateral agreement was in writing, the defendant was bound to annex a copy to its affidavit. *Erie City v. Buller*, 120 Pa. St. 374, 14 Atl. Rep. 153; *Willard v. Reed*, 132 Pa. St. 5, 18 Atl. Rep. 921. It follows, therefore, that without any averment of fraud, accident, or mistake, the defendant sought, by means of a parol agreement made contemporaneously with the written contract, and as a part of the transaction, materially to vary the written contract, and to introduce therein an entirely new stipulation, changing the plaintiff's liability under its implied warranty of title, and imposing upon it an additional obligation. Plainly, this defense would contravene the rule, so often enforced by the supreme court of the United States, that, in the absence of fraud, accident, or mistake, it must be conclusively presumed that the written contract contains the whole engagement of the parties. *Brown v. Spofford*, 95 U. S. 474; *Bast v. Bank*, 101 U. S. 93; *Richardson v. Hardwick*, 106 U. S. 252, 254, 1 Sup. Ct. Rep. 213. In Pennsylvania, although there has been some relaxation of this rule, it must nevertheless appear that the party who sets up the oral promise or undertaking was induced thereby to sign the written contract. *Phillips v. Meily*, 106 Pa. St. 536; *Wanner v. Landis*, 137 Pa. St. 61, 20 Atl. Rep. 950; *Sidney School Furniture Co. v. Warsaw School Dist.*, 130 Pa. St. 76, 18 Atl. Rep. 604. But the affidavit of defense here contains no allegation that the defendant was induced, by reason of the alleged parol agreement, to execute the written contract. Under the Pennsylvania decisions, then, the defense set up is clearly inadmissible.

Such being our conclusion, we need express no opinion upon the question whether, under the collateral parol agreement stated, it was enough for the defendant simply to allege that the tendered bond was not good, sufficient, or satisfactory, without assigning any specific reason why it was not. It may be here added that, if the fact of tender could be regarded as an admission against the plaintiff, it would be an admission merely that the defendant was entitled to such a bond as the plaintiff offered and the defendant declined.

That part of the defendant's affidavit which asserts that a certain named patentee has served the defendant with notice of a claim for damages for infringement of letters patent by the defendant's use of the machinery and appliances furnished to it by the plaintiff, and that by such use the defendant is also liable to another patentee, affords no ground of defense to this action. A purchaser of property, who has had the full use and enjoyment of the same, and is in the undisturbed possession thereof, in the absence of fraud, cannot withhold the purchase price because a third person claims to have a superior title thereto, or an adverse right therein, and threatens to bring suit to enforce the same, or because of an alleged liability on the part of the purchaser to a patentee for an

infringement of letters patent, by reason of the use of the property. *Wanzer v. Truly*, 17 How. 584, 585; *Krumbhaar v. Birch*, 83 Pa. St. 426; *Geist v. Stier*, 134 Pa. St. 216, 19 Atl. Rep. 505.

Finally, the general allegations, without further specification, that the plaintiff "has not complied with its contract," and that the defendant "has already been put to great delay and exposure and damages to the amount of ten thousand dollars," are altogether too vague, indefinite, and uncertain, as the authorities cited at the opening of this opinion demonstrate. The court below was entirely right in holding that the affidavit of defense was insufficient, and in entering judgment for the plaintiff.

Judgment affirmed.

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THE ROBERT B. KING.

THE MARY LYMBURNER.

(District Court, D. Massachusetts. May 31, 1892.)

**COLLISION—SAIL VESSELS BEATING—DUTY TO RUN OUT TACK.**

Two schooners were sailing in the same general direction, closehauled on the port tack. The swifter vessel, the K., passed the other, the L., to leeward, and then came about on the starboard tack, and was struck before she had fairly gathered headway. There was sea room enough for the K. to have continued further on her port tack. Held, that the L. had the right to assume that the other vessel would beat out her tack, and that for her failure to do so the K. was liable.

In Admiralty. Cross libels for collision.

*Frederic Dodge* and *Edward S. Dodge*, for the *Mary Lyburner*.

*Thomas J. Morrison*, for the *Robert B. King*.

NELSON, District Judge. These cases are cross libels for collision between the schooner *Robert B. King* and the schooner *Mary Lyburner*. The collision occurred on the afternoon of December 12, 1891, near Bishop and Clerks light, on Nantucket shoals. The weather was fine. They were both small coasting schooners, laden with lumber, with high deck loads, and were bound to the westward. They were running in the same general direction, with all lower sails set, closehauled on the port tack, and were beating into Hyannis harbor against a head wind for shelter, the *King* being to the leeward. The *Lyburner* was going about five knots. The *King* was sailing faster than the *Lyburner*, and having passed her to leeward, came in stays to go about on the opposite tack, thereby ranging across the bows of the *Lyburner* and getting directly in her course. After she began to fill away and before she had fairly gathered headway, she was struck by the *Lyburner* with a square blow at the main rigging on the port side. Upon these facts the conclusion is inevitable that the collision was caused by the *King's* luffing across the bows of the *Lyburner* in such close proximity as to render it impossible for the *Lyburner* to avoid the collision by any change of course.

The claim of the King is that she had passed the Lymburner from a quarter to half a mile before she began to make her tack. But all the circumstances of the case point the other way. The evidence on the part of the Lymburner is that the coming in stays by the King was immediately seen by those in charge of the Lymburner, and her helm was instantly put hard up, and her mainsheet let go, in the hope of causing her to fall off and go under the stern of the King, which was the only possible way of avoiding or lessening the force of the impending blow, and though the Lymburner fell off somewhat, yet there was not time or room to go clear. I am satisfied that this is a correct statement of what occurred, and that the claim of the King that there was sufficient room is wrong. The King further claims that she was then getting into shoal water, and was obliged to go about for her own safety. This belief of her master was undoubtedly the reason of his going about when he did, but he was mistaken. There was ample room for her to proceed much further towards the shore without danger. Her master lacked in experience and was unacquainted with the navigation at this point, and this accounts for the disaster. The men on the Lymburner were familiar with the locality, and had the right to assume that the King would run out her course. The change by the latter was sudden and unexpected, and was without excuse. The libel against the Lymburner is dismissed with costs, and in the libel against the King there is to be a decree for the libelants. Ordered accordingly.

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THE GENERAL G. MOTT.

THE LAURA B.

THE LENA.

THE HOWARD SMITH.

DEMARIS v. THE GENERAL G. MOTT *et al.*

(*Circuit Court of Appeals, Third Circuit. May 24, 1892.*)

**COLLISION—RIVER NAVIGATION—PROPER SIDE OF CHANNEL.**

Two steam tugs, the L. and the M., each with a tow, approached each other nearly head on, by night, in the Delaware river, and each discovered the approach of the other when about a mile apart. Signals of one whistle were exchanged when the vessels were about one-half a mile apart, and both ported their helms. The court found, on conflicting evidence, that the M. was on the proper side of the channel, and could not have gone further inshore, owing to the presence of anchored vessels; that the L. either had gone too far towards the wrong shore before porting her helm, or that she did not port it sufficiently,—and hence held that for the collision between the two tows the L. was solely in fault.

Appeal from the District Court of the United States for the Eastern District of Pennsylvania.

In Admiralty. Libel by Charles Demaris, master of the tug Laura B., and bailee of the barge Lena and her cargo, against the tug General G.

Mott and the schooner Howard Smith, for collision. Decree below dismissing the libel. Affirmed.

*Edward F. Pugh and Henry Flanders*, for appellant.

*John F. Lewis*, for the General G. Mott.

*Alfred Driver*, for the Howard Smith.

Before *ACHESON*, Circuit Judge, and *WALES* and *GREEN*, District Judges.

*WALES*, District Judge. At about 2 o'clock on the morning of July 27, 1889, the tug *Laura B.* with the barge *Lena*, lashed to her port side, and the barge *May*, lashed to her starboard side, both barges being heavily loaded, was going down the Delaware river, and when abreast of the Greenwich piers, on the western side of the river, the lights of a tug with a tow astern were seen nearly ahead, at the distance of about a mile, which lights proved to be upon the tug *General G. Mott*, having in tow the schooner *Howard Smith* astern by a hawser. The night was cloudy, with occasional rain, but lights were easily seen. The tide was high water slack, turning to ebb. The channel at this point is from 300 to 500 yards wide. The tugs discovered each other at the same time, each having the other on its port bow; the *Laura B.* running nearly south by west, and converging on the *Mott's* course, which was northeast by north. The *Mott* was nearly opposite the Gloucester ferry, and on the starboard or eastern side of the channel. A little astern, and on the port quarter of the *Laura B.*, the ferryboat *Peerless* was coming down the river; and a short distance ahead of, and on the starboard bow of, the *Mott*, the ferryboat *Law* was going up the river. On the eastern side of the channel, a little above the ferry, were the regulation anchorage grounds, where two steamers were lying at anchor, and beginning to swing around with the tide. The specific allegations of the libel are that the *Laura B.* was heading directly down the river, and that the *Mott*, with her tow, was heading up the river, a little to the eastward; that when the tugs were about a half a mile apart the red light alone of the *Mott* was visible from the *Laura B.*, about two or three points off the port bow of the latter; that at this time the *Mott* blew one whistle to indicate that she intended to go to the eastward, and that the *Laura B.* replied, with a like signal, that she would direct her course to the westward, at the same time porting her wheel; that both vessels kept on, and that the *Laura B.* had changed her course about two points to the westward, when the *Mott* blew two whistles, indicating that she was going to the westward, and immediately changed her course in that direction; that the vessels were then quite near to each other; that, as soon as the libellant saw this movement of the *Mott*, he blew three short blasts, and rang the bell for the engineer to go full speed astern; that by this time the person in charge of the *Mott* saw his error, ported his wheel, and endeavored to go to the eastward again; that this movement was unsuccessful, for, although the *Mott* herself escaped striking the *Laura B.* or her tow by steering suddenly to the starboard, the schooner *Smith*, coming on at full speed, struck the barge *Lena* on the starboard side, near the bow, tearing her loose from the *Laura B.*, breaking in her side, and sinking her.

The testimony is conflicting, but the weight of the evidence contradicts the allegations of the libel. There may have been, and doubtless was, some confusion of signals, arising from the fact that the Mott had signaled to each of the ferryboats before signaling to the Laura B., but it does not appear that the Laura B. was misled by them, because, after porting her wheel in response to the one whistle from the Mott, she made no further change in her course. According to the libelant's statement the tugs were not more than half a mile apart when the Mott signaled that she was going to the eastward. The vessels were then approaching each other at the rate of 15 miles an hour, and it is difficult to conceive what motive the master of the Mott could have had in attempting to make the erratic movements described in the libel, to say nothing of the improbability of such movements having been actually made within the time and the distance that intervened between the signal and the moment of the collision. The impracticability of a tug with a loaded schooner in tow, at the end of a hawser 60 fathoms in length, making the zigzag movements attributed to the Mott in such a short period of time renders this charge more difficult of belief. Even if the Mott could have turned her own bow so quickly and often, it does not follow that she could have pulled her tow about with equal facility. The Mott was on that side of the channel where she had the right to be, and the effort made on behalf of the Laura B. to show that the latter was on the western side of the channel is an admission that it was her duty to have kept her course on that side, whereas the fact that the Lena sank on the east side of the mid-channel demonstrates that, if the Laura B. had ported her helm sufficiently and promptly, she would have gone further to the westward, and have avoided the collision. Witnesses on board of the Mott, and others who were on the Peerless or on the Law, testified that the Mott continued her course as far to the eastward as was practically safe, under the circumstances, and that she did not make the tortuous movements charged by the libelant. The libelant admits that, if the Mott had kept her original course, there would have been no collision; and the failure to prove that she deviated from it leaves the cause of the collision unexplained, except on the theory that the Laura B. had gone too far to the eastward before porting her helm, or that she did not port it sufficiently. The Mott could not have gone further to the eastward without crowding against the anchored steamers, nor could she have gone around them without endangering her tow. There was ample room for the Laura B. to have gone to the westward, and there was no necessity for or obligation on the part of the Mott to go in that direction. The case against the schooner was not insisted on, as she followed in the wake of her tug. The decree of the district court, dismissing the libel, is therefore affirmed.

DUDLEY E. JONES Co. *et al.* v. MUNGER IMPROVED COTTON MACH.  
MANUF'G Co.

(Circuit Court of Appeals, Fifth Circuit. May 30, 1892.)

No. 6.

**APPEALABLE ORDERS—INTERLOCUTORY DECREE—INJUNCTION IN PATENT CASES.**

A decree sustaining the validity of a patent, directing a perpetual injunction against its infringement, and referring the cause to a master to take an account, is an appealable interlocutory decree, within section 7 of the act of March 3, 1891; and where, on appeal therefrom, the cause is submitted on the merits without objection, and a decree is rendered, it is too late for the appellee to question the court's jurisdiction by a motion for rehearing.

On rehearing. For former report, see 49 Fed. Rep. 61.

Before PARDEE, Circuit Judge, and LOCKE and BRUCE, District Judges.

PARDEE, Circuit Judge. This cause is again brought before the court on an application for a rehearing and upon a motion to vacate all proceedings had in this cause in this court, and dismiss the appeal herein for want of jurisdiction, on the ground that the decree of the court below sought to be reviewed in this case was neither a final decree, from which an appeal would lie to this court under the sixth section of the judiciary act of 1891, nor yet such an interlocutory order or decree that an appeal would lie under the seventh section of the said act. The case was heard in this court upon the merits without objection on the part of the appellee, and without a critical examination on the part of the court as to the character of the decree appealed from. In fact, appellee in his brief expressly states:

"It is the desire of the appellee that this cause be heard upon its merits, and we do not, therefore, wish to take advantage of any irregularities which may have occurred in bringing the case up, or of any omission to assign errors. \* \* \* As the case stands, it must be substantially treated as a rehearing at the circuit, and for this reason the argument is more diffusive than it otherwise would be, as it involves a re-presentation of the entire case, without any direction as to special points or findings by the court below."

An examination of the decree rendered by the court below shows that, while it adjudges the validity of the patent sued on and directs an injunction termed "perpetual" against the defendants as infringers, it refers the matter to a master for taking an account. It is well settled that such a decree is not a final decree from which an appeal could be taken, or of which this court would have jurisdiction, under the sixth section of the judiciary act of 1891. *Iron Co. v. Martin*, 132 U. S. 91, 10 Sup. Ct. Rep. 32, and cases there cited. We are, however, of the opinion that it is an interlocutory decree granting an injunction, from which an appeal would lie under the seventh section of the said judiciary act.

An interlocutory decree is:

"When the consideration of the particular question to be determined, or the further consideration of the cause generally, is reserved till a future hearing." Daniell, Ch. Pr. (5th Ed.) 986.

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Again:

"In fact, till a decree has been enrolled, and thereby become a record, it is liable to be altered by the court itself, upon a rehearing, while a decree which has been enrolled is not susceptible to alteration, except by the house of lords or by bill of review. For this reason it is that a decree which has not been enrolled, although it is, in its nature, a final decree, is considered merely as interlocutory, and cannot be pleaded in bar to another suit for the same matter." Id. 1019.

In the note to page 986, *supra*, the subject is considered at some length, to the effect that the courts have not laid down any satisfactory definition of what is an "interlocutory decree." It is said that the difficulty is in the subject itself, for, by various gradations, the interlocutory decree may be made to approach the final decree until the line of discrimination becomes too fine to be readily perceived. It is further said that the difficulty has been increased by the fact that the definition of a final decree has often been made to turn, not upon the nature of the determination, but upon the construction of the statutes regulating appeals. An allowance of an appeal from an interlocutory order or decree, granting or continuing an injunction in an equity cause under the seventh section of the judiciary act of 1891, is a new feature of the practice in the United States courts. Being of a highly remedial nature, it ought to be construed so as to give full force to the intention of the lawmaker. The mischief to be remedied by the act was that injunctions which deprived parties of the possession and control of property, or compelled enforced action in the use of property, were, under the practice of the courts, frequently rendered long before the final hearing in the case, and operated, to a great extent, in the nature of execution before judgment. This mischief was as great in patent cases, where parties on hearings preliminary to the final decree were enjoined pending long and tedious examinations in the matter solely of accounting, as in any other cases of preliminary injunction. The case of *Richmond v. Atwood*, decided in the first circuit, and reported in 48 Fed. Rep. 910, was a case on all fours with the present one, and therein the court took and exercised jurisdiction, apparently without question. The suit was one for an infringement of letters patent wherein an appeal was taken from a decree sustaining the patent, holding the defendant to be an infringer, awarding an injunction, and ordering an account. This court having jurisdiction of the appeal under the seventh section, and having jurisdiction under the sixth section, if a final decree had been rendered in the circuit court, it would seem to have been competent for the appellee to waive a formal final decree, and submit the cause to this court on the merits. Our conclusion in the matter is that in this case the circuit court of appeals was seized of jurisdiction under the seventh section of the act of 1891, and that, as the appellee submitted the case without objection, it is now too late to question the jurisdiction of the court, even if doubtful. After a re-examination of the case, and a consideration of the briefs lately filed, we find no reason to disturb our former conclusions as to novelty of appellee's patent, or on the question of ap-



pellant's infringement. Our decree, however, was perhaps too broad, and should be modified.

The order of the court is that the motion to vacate the proceedings in this cause, and to dismiss the appeal for want of jurisdiction, be denied; that our former decree, remanding the cause, with directions to dismiss the bill, with costs, be, and the same is, modified so as to direct the cause to be remanded to the circuit court, with instructions to dissolve and dismiss the injunction granted in said court; and that appellee pay the costs, and that the rehearing applied for be denied.

*COULLIETTE et al. v. THOMASON et al.*

*(Circuit Court of Appeals, Fifth Circuit. June 6, 1892.)*

No. 18.

**APPEAL TO CIRCUIT COURT OF APPEALS—TIME OF TAKING—DISMISSAL.**

An appeal taken to the circuit court of appeals more than six months after entry of the decree must be dismissed, under Judiciary Act 1891, § 11.

Appeal from the Circuit Court of the United States for the Western District of Louisiana.

In Equity. Bill by J. Sidney Coulliette and others against Mrs. Mary H. Thomason and L. B. Thomason to recover certain lands and for an accounting. Decree rejecting complainants' demands, and quieting title in defendant Mary H. Thomason, as against them. Complainants appeal. Appeal dismissed.

*Boatner & Lankin*, for appellants.

*Frank N. Butler*, for appellees.

Before PARDEE and McCORMICK, Circuit Judges, and LOCKE, District Judge.

PARDEE, Circuit Judge. The appellees filed a motion to dismiss the appeal in this case because no assignment of errors was filed in the court below, or forms part of the transcript of record. The failure to make an assignment of errors, under rule 11 of the rules of this court, is sufficient ground to refuse to hear counsel, but not, perhaps, in all cases sufficient to dismiss the appeal. In this case, however, we find, not only an omission of the assignment of errors, but a failure to file briefs, and that an examination of the record does not show any plain error in the decree appealed from. And we notice in the record that the decree appealed from in the court below was rendered on the 11th day of October, 1890; that the motion and order for appeal to this court were not made nor granted until September 10, 1891, more than six months after the date of the entry of the decree appealed from; that the order allowing the appeal made the same returnable more than 30 days after the date thereof; and that the citation was made returnable more than 30 days thereafter. The fact alone that the appeal was not taken until

more than six months after the entry of the decree appealed from (section 11 of the judiciary act of 1891) requires the appeal to be dismissed, and it is so ordered.

*In re PASSAVANT et al.*

(Circuit Court, S. D. New York. May 18, 1892.)

**1. BOARD OF APPRAISERS—VALUATION—REVIEW BY CIRCUIT COURT—PRACTICE.**

Where a board of three general appraisers, acting under Act Cong. June 10, 1890, § 13, on reappraisement appraised the value of imported merchandise more than 10 per cent. above the value declared in the importer's entry, and the additional duties provided for in section 7 of the same act thereupon accrued and were exacted by the collector, no appeal from or review of the decision of the collector in assessing such additional duties is provided for under said act.

**2. SAME.**

Whether or not any relief can be secured by an importer where there has been fundamental error in fixing the value, none is to be found under the act of June 10, 1890, by appeal or review in the circuit court.

**3. SAME—QUESTIONS DETERMINED.**

An appeal to or review by the circuit court under section 15 of said act is restricted to questions of law and fact involved in the decisions of the appraisers respecting the classification of merchandise and the rate of duty imposed thereon under such classification.

**At Law.** Motion to dismiss appeal for want of jurisdiction. Granted.

On an importation of leather gloves by Passavant & Co. the value thereof was advanced by the appraiser to an amount exceeding by more than 10 per cent. the value of the same as declared by the importers upon entry. Objection was made by the importers, and a reappraisement was made by one of the general appraisers, and on further objection of the importers the matter was sent to the board of three general appraisers, under the provisions of section 13 of the customs administrative act of June 10, 1890, who examined and decided the case thus submitted, and sustained the increased valuation of the merchandise. The collector of the port of New York thereupon levied and assessed duty thereon at 50 per cent. *ad valorem* under paragraph 458 of the tariff act of October 1, 1890, and also, in addition thereto, (by reason of the increased valuation,) a further sum equal to 2 per cent. of the total appraised value for each 1 per cent. that such appraised value exceeded the value declared in the entry, under and by virtue of the provisions of section 7 of the customs administrative act of June 10, 1890. The importers served a protest upon the collector against his assessment of duty for all excess above 50 per cent., and upon any greater value than the entered value, claiming that no legal reappraisement had been made in accordance with the act of June 10, 1890; that the board of appraisers had declined to receive or entertain evidence offered by the importer as to the true market value of the goods; determined the case upon values given by special agents of the treasury; took and acted upon evidence of persons not experts, who had no personal knowledge of the value of gloves in the markets

of France; gave the importers no opportunity to controvert evidence against them; that in all respects the action of the board was illegal; that the original invoice was correct; and that duties should not be assessed upon any greater amount, or at any different rate, than as appeared upon the invoice and entry. The collector transmitted the protest and papers to the board of general appraisers, who decided that the decision of the board as to valuation was final and conclusive (under section 13, Act June 10, 1890) as to the dutiable value of such merchandise, and that such decision cannot be impeached at all by protest before the collector or the courts. G. A. 899. The importers appealed from this decision to the United States circuit court, under section 15 of said act, and the board filed their return in the court on March 2, 1892.

Assistant United States Attorney Henry C. Platt moved, upon the record, to dismiss the appeal for want of jurisdiction, upon the following grounds: (1) The protest makes no objection that the gloves were wrongfully classified by the collector. Their rightful rate of duty as gloves was at 50 per cent., under paragraph 458, Act October 1, 1890. (2) The gist of the objection is that the collector levied certain additional duties thereon, under section 7 of the act of June 10, 1890, which rate and amount was in excess of the rate and amount (50 per cent.) required by law to be paid under the tariff act of October 1, 1890. (3) The act of June 10, 1890, itself (section 7) imposes this additional duty. The collector can exercise no judgment or discretion about it. (4) This additional duty is imposed by law under the administrative act by reason of increased valuation, and not under the tariff act by reason of classification. (5.) The importers exhausted their remedy on reappraisement, under section 13 of the act of June 10, 1890. The decision of the reappraising board is there made final and conclusive as to the dutiable value of merchandise against all parties interested therein. No further appeal is provided for, as to valuation under that act. (6) The appeal to or review by the United States circuit court, under section 15 of act of June 10, 1890, is confined and restricted to "the law and the facts respecting the classification of merchandise, and the rate of duty imposed thereon under such classification." *Ex parte Fussett*, 12 Sup. Ct. Rep. 295-298; *In re Douillet*, (WALLACE, J., Feb. 17, 1892, unreported.) (7) If there should be fraud or serious legal error in reappraisement proceedings, there might be some legal remedy for the aggrieved party, but no remedy therefor exists by appeal to the United States circuit court in proceedings under the act of June 10, 1890. (8) The want of jurisdiction is patent on an examination of the record, and the court is justified, in advance of the trial on the merits, in acting upon the motion to dismiss. *Semple v. Hagar*, 4 Wall. 431; *Clark v. Hancock*, 94 U. S. 493. *Edward Mitchell*, U. S. Atty., and *Henry C. Platt*, Asst. U. S. Atty., for the motion.

*Stephen G. Clarke*, opposed.

LACOMBE, Circuit Judge. The object of this proceeding is plainly to review the decision of the appraisers as to value. Whether or not any

relief can be secured by an importer where there has been fundamental error in fixing the value, it does not seem to be provided for under the administrative act. Motion to dismiss granted.

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ATLANTA & F. R. Co. *et al.* v. WESTERN RY. Co. OF ALABAMA *et al.*

(Circuit Court of Appeals, Fifth Circuit. June 6, 1892.)

No. 89.

CREDITORS' BILL—JURISDICTION OF FEDERAL COURTS—UNSECURED CREDITOR—STATE STATUTES.

The circuit court has no jurisdiction of a bill in equity to subject the property of an insolvent corporation to the payment of a simple contract debt in advance of recovery of a judgment at law, when such debt is unsecured by lien or mortgage, though a state statute authorizes the bringing of such suit by any three creditors of the insolvent corporation.

Appeal from the Circuit Court of the United States for the Western Division of the Southern District of Georgia.

Suit in equity by the Western Railway Company of Alabama and others against the Atlanta & Florida Railroad Company and others. A plea to the jurisdiction was overruled, and defendant railroad company appeals. Reversed.

*Payne & Tye*, (Thos. J. Semmes, of counsel,) for appellant.

*Culhoun, King & Spaulding*, for appellees.

Before PARDEE and McCORMICK, Circuit Judges, and LOCKE, District Judge.

McCORMICK, Circuit Judge. The appellees, corporations, respectively, of the states of Alabama, Tennessee, and New Jersey, brought this suit in the United States circuit court for the southern district of Georgia against the appellant railroad, a Georgia corporation, and the Central Trust Company of New York, a New York corporation, on three separate simple contract debts not secured by a lien or mortgage, or put in judgment at law, held by the appellees, respectively. They charged that the appellant railroad was insolvent, and was about to put out an issue of second mortgage bonds for purposes and on a scheme that would work an injury to them as unsecured creditors, and they asked for the appointment of a receiver and for an injunction. The bill was presented to one of the judges of the circuit court for the southern district of Georgia, who, after notice to the parties and hearing the appellant's plea to the jurisdiction of the court, and proof offered, held that the court had jurisdiction, and appointed a receiver, and granted a preliminary injunction as prayed for in the bill, from which order this appeal is taken, under section 7 of the act creating this court. The bill alleges that the Atlanta & Florida Railroad Company was, at the time the bill was presented, a resident of the southern district of Georgia, and was a corpo-



ration duly chartered under the laws of Georgia. The appellant pleaded that it was a resident of the northern district of Georgia, and that it was not a resident of the southern district of Georgia; that it was "a corporation created under the laws of Georgia, and a resident of the county of Fulton, state of Georgia, by reason of the fact that its principal place of business established by its charter is in said Fulton county, which said county is not within the jurisdiction of the circuit court of the United States for the southern district of Georgia."

The appellant filed with its petition for appeal the following assignments of errors:

"(1) That the court erred in holding the plea to the jurisdiction filed by this defendant insufficient, and in overruling the same; (2) that the court erred in holding that the showing made by this defendant against the granting of the injunction was insufficient; (3) that the court erred in holding, upon the facts presented, that the injunction should be granted as prayed for."

The appellant has filed in this court additional assignments of errors, as follows:

"(1) The plea to the jurisdiction set forth on pages 30 and 31 of the transcript should have been sustained because of the residence of the appellant the Atlanta & Florida Railroad Company in the northern district of Georgia. (2) The court cannot entertain jurisdiction of a suit in equity to subject the property of the defendant company, [appellant,] in advance of recovery of a judgment at law, to the payment of a simple contract debt, when said debt is not secured by a lien or mortgage, because, under the constitution, the defendant is entitled to a trial by jury. (3) The court erred in granting an injunction to a simple contract creditor without lien or mortgage, and thereby prior to judgment interfering with the possession of the property of the debtor."

In his oral argument counsel for appellant suggests that the errors assigned in this court are only a clearer statement of the errors embraced in the assignment of errors attached to the petition for appeal, and appellees' counsel lay no stress on the matter of the additional assignment of errors filed here. We will therefore treat this additional assignment as a clearer expression of the assignment of errors filed in the court below, and consider the errors assigned as if they had been filed in due time in the circuit court.

It is settled by the decisions of the United States supreme court that the appellant, being a corporation created under the laws of Georgia, is, from its creation through the whole period of its existence, a citizen of that state; that it is a person within the meaning of the law regulating the institution and conduct of suits, and that it cannot emigrate from the state of its creation; and, being found in Georgia, it may well be taken to be a resident of that state. But whether, like the state government, it resides at every point within the boundaries of the state, or its residence is limited to the places where it does business, or to the place designated in its charter as its principal place of business, must depend on the law, general or particular, giving and governing its life; and, if its residence is not coextensive with the state, an issue of fact

arises which requires proof. The record in this case does not disclose what proof was introduced by complainants, (appellees.) It says:

"Upon the close of testimony for the complainants introduced in the above-stated case, on the hearing of application for appointment of a receiver, and the granting of injunction in accordance with the prayers of the bill, the defendant the Atlanta & Florida Railroad Company introduced in evidence the original charter of the Atlanta & Hawkinsville Railroad Company, of date the 9th of July, 1886, signed by the Hon. Henry D. McDaniel, then governor of the state of Georgia, and attested by N. C. Barnett, secretary of state, by which the principal place of business of said company was fixed at city of Atlanta, in the county of Fulton, in said state. Said defendant also called the attention of the court to the act of the general assembly of 1886, found on page 102 of the Georgia Laws of that year, and the act of the general assembly of the state of Georgia of the year 1887, found on page 238 of the Georgia Laws of that year, by which the name of the Atlanta & Hawkinsville Railroad Company was changed to that of the Atlanta & Florida Railroad Company. Upon introducing this testimony the said defendant closed. The court thereupon ruled that it did have jurisdiction of the above-stated bill, and the application for the appointment of a receiver, and the granting of injunction, and did have the jurisdiction to appoint a receiver and grant an injunction, which it then and there did by formal order."

It, however, sufficiently appears from the printed briefs and oral argument of counsel that the appellant railroad is in operation in the southern district of Georgia, and that while Atlanta, which is named in its charter as its principal place of business, is in the northern district, the principal part of its completed and projected road is in the southern district. We have not access to the organic and statute law of the various states, and though we may be charged with judicial knowledge of them, and they do not have to be proved as a fact, it is proper, if not necessary, that counsel should embody in their printed briefs, or append thereto, exact copies of the provisions of the state laws on which they rely, or to which they refer in argument. We find it stated in the brief of appellant's counsel that Code Ga. § 3402, provides that "all civil cases in law shall be tried in the county wherein the defendant resides," and that section 4183 provides that "all bills shall be filed in the county where (?) the residence of one of the defendants against whom a substantial relief is prayed," and that "the constitution of Georgia in section 16, par. 3, is in the same language as contained in the foregoing section 4183. Paragraph 6, same section of the constitution of Georgia, is the same as contained in section of Code § 402." From the same brief we quote that Code Ga. § 3406, provides:

"All railroad companies shall be liable to be sued in any county in which the cause of action originated, by any one whose person or property has been injured by such railroad company, their officers, agents, or employees, for the purpose of recovering damages for such injury, and also on all contracts (made or) to be performed in the county wherein the suit is brought."

This provision of the Code of Georgia the supreme court of that state has declared to be not in violation of the constitution. *Railroad, etc., Co. v. Oaks*, 52 Ga. 410. And the argument seems to have force that when the constitution provides that suit can only be brought in the county

of the defendant's residence, and a constitutional law says that a railroad may be sued on some causes of action in any county where it inflicts an injury, or makes or agrees to perform a contract, that this law must give the railroad a residence in each county where any one of these things is done. And if, for any purpose, the appellant by the laws of Georgia can be sued on certain causes of action in some one of the counties in the southern district of Georgia, it can only be because, by the constitution and laws of Georgia, it has a residence in the said district as well as in the northern district, where its principal place of business is fixed by its charter. And if it has a residence, for any purpose, at any point within the southern district of Georgia, its liability to suit in the national courts in that district cannot be limited by the state law qualifying its liability to suit in the state courts, but must be determined by the national law fixing the place where suits may be brought in the national courts.

We say this argument seems to have force. But in view of the fact that this is an appeal from an interlocutory decree granting an injunction, and the further fact that the proof introduced by the appellees is wholly omitted from the record, we would hesitate to decide the question raised by this assignment of error, even if our view of the second assignment did not render it unnecessary for us to announce more definitely on this first assignment. Can the circuit court entertain jurisdiction of a suit in equity to subject the property of appellant, in advance of recovery of a judgment at law, to the payment of a simple contract debt, when said debt is not secured by a lien or mortgage? It will be found that the case *Terry v. Anderson*, 95 U. S. 628, cited by appellee, by no means answers this question in the affirmative. The bill in that case was against the trustees and stockholders to enforce against the stockholders of the insolvent bank the liability of said stockholders for the unredeemed bills of the bank, some of which bills complainants held. Demurrers, not distinctly raising the question we are considering, were sustained, and the bill dismissed, and, in delivering the opinion of the court affirming the decree of the circuit court, Chief Justice WAITE says:

"The complainants are neither of them judgment creditors of the bank. In a suit instituted by the assignees to close up the assignment, they proved their claims, and the amount due them was found for the purposes of a division. The finding was sufficient for the purposes of distribution, but it has none of the characteristics of a judgment or decree, to be enforced as against anything but the fund which the court was then administering."

At a subsequent day of the term, in overruling a petition for rehearing, he used this language quoted in the brief of appellees' counsel:

"Ordinarily a creditor must put his demand into judgment against his debtor, and exhaust his remedies at law, before he can proceed in equity to subject choses in action to its payment. To this rule there are, however, some exceptions, and we are not prepared to say that a creditor of a dissolved corporation may not, under certain circumstances, claim to be exempted from its operation. If he can, however, it is upon the ground that the assets of the corporation constitute a trust fund which will be administered by a court

of equity, the principle being that equity will not permit a trust to fail for want of a trustee."

The case of *Graham v. Railroad Co.*, 102 U. S. 148, cited by appellees, was a bill by judgment creditors of the railroad to subject certain lands alleged to have been fraudulently obtained from the railroad to the payment of complainant's judgments. The bill was dismissed on demurrer. The question we are now considering was not in the case, and the concluding paragraph of Judge BRADLEY's opinion, quoted by appellees' counsel, does not touch the question as to the appellees here being proper parties to bring the bill they have exhibited against appellants.

Appellees' counsel quotes the second paragraph of the syllabus in the report of the case of *Mellen v. Iron Works*, 131 U. S. 353, 9 Sup. Ct. Rep. 781, which appears to sustain the contention of appellees. In the body of the opinion we note this language:

"It is, however, contended that the furnace company could not rightfully invoke the aid of a court of equity to remove this lien or incumbrance until it had, by obtaining judgment for its debt and suing out execution, exhausted its legal remedies. *Jones v. Green*, 1 Wall. 330; *Van Weel v. Winston*, 115 U. S. 228, 245, 6 Sup. Ct. Rep. 22. But that was one of the questions necessary to be determined in the suit brought by that company, and any error in deciding it would not authorize even the same court, in an original, independent suit, to treat the decree as void. \* \* \* In the view we take of the case, it is not necessary to determine the soundness of any of these propositions; for, if the court erroneously ruled upon any of them, its decree could not for that reason be assailed in a collateral proceeding as void for want of jurisdiction."

And we take it that the supreme court in this case expressly did not decide the question we are now considering. We understood counsel for appellees to say in his oral argument that this bill was exhibited in strict conformity with a statute of Georgia which provided that, in cases of insolvent corporations, any three creditors might sue for the relief these appellees seek. We have not been furnished a reference to the section of the statute, and we have not been able to find it in the edition of the Code we have examined; but, assuming that we correctly understood counsel, we suggest that, to make such statute applicable to the circuit court, each of the three creditors required must be a creditor to an amount exceeding \$2,000, while one of these appellees exhibits a claim of only \$236.72. But we are of opinion that the statute referred to cannot aid the jurisdiction of the circuit court.

In the case of *Scott v. Neely*, 140 U. S. 106, 11 Sup. Ct. Rep. 712, a statute of Mississippi, which authorized creditors in advance of judgment to sue for the relief sought in that case, was greatly relied on to support the jurisdiction; but the supreme court, through Mr. Justice FIELD, in announcing their decision, say:

"Whatever control the state may exercise over proceedings in its own courts, such a union of legal and equitable relief in the same action is not allowed in the practice of the federal courts."



And after a very thorough and critical discussion of the question the opinion concludes:

"It follows from the views expressed that the court below could not take jurisdiction of this suit, in which a claim properly cognizable only at law is united in the same pleadings with a claim for equitable relief."

And so must we say in this case. Therefore the decree granting the injunction must be reversed, and the injunction dissolved; and it is so ordered.

*GRANT et al. v. EAST & WEST R. Co. et al.*

*(Circuit Court of Appeals, Fifth Circuit. May 30, 1892.)*

No. 45.

**APPEALABLE DECREE—DISMISSAL OF AUXILIARY BILL—RETAINING CAUSE FOR MASTER'S REPORT.**

An original bill was filed for the purpose of foreclosing a railroad mortgage. An auxiliary and dependent bill was then filed against complainant in the original bill, the railroad, and others, charging that certain bonds secured by the mortgage were invalid, and not entitled to benefit under the mortgage. *Held*, that a decree dismissing the auxiliary bill, but retaining the cause, and referring it to a master to ascertain the priority and validity of liens on the mortgaged subject, and marshal conflicting claims to the bonds in question, was final as to the auxiliary complainants, and one from which they might appeal.

Appeal from the Circuit Court of the United States for the Southern Division of the Northern District of Alabama.

Suit by Grant Bros. against the East & West Railroad Company of Alabama and others. From a decree for defendants, plaintiffs appeal. On motion to dismiss the appeal. Denied.

*Wager Swayne*, for the motion.

*A. C. King* and *J. J. Spalding*, opposed.

Before *McCORMICK*, Circuit Judge, and *LOCKE*, District Judge.

*McCORMICK*, Circuit Judge. The American Loan & Trust Company of New York, in June, 1888, filed its bill to foreclose the consolidated first mortgage of the East & West Railroad Company of Alabama for the equal benefit of the holders of the bonds secured by said mortgage. To this bill the railroad company and James W. Schley and Joel Brown were made defendants. On the 26th of July, 1888, Grant Bros. had leave to file an auxiliary and dependent bill against the complainant in the original bill and the railroad and William C. Browning, Edward F. Browning, Eugene Kelly, John Byrne, John Hull Browning, and Amos G. West. This auxiliary bill was presented in behalf of complainants therein, and all other bondholders similarly situated, and charged that complainants and others were the innocent purchasers for value before maturity, and without notice of any defect in said bonds, of a considerable number thereof, and that 966 bonds, in which the defendants named in their bill claimed some interest or ownership, were invalid and illegal, and not entitled to benefit under said first consolidated mortgage. The defendants to the auxiliary bill answered individually, and the whole suit proceeded in the usual manner, and came on to be heard on the 22d of October, 1891, "upon

all of the proceedings and pleadings, including the original bill of foreclosure, and the auxiliary and dependent bill of Grant Brothers, and the intervention of James W. Schley, and the several answers thereto, and upon the proofs taken in said several causes, and was argued by counsel." And on the 13th of January, 1892, the decree of the circuit court thereon was filed therein, which, after the usual findings, covering every material issue made by the parties, concluded in these words:

"It is now ordered, adjudged, and decreed that the auxiliary and dependent bill of James and Frederick Grant be, and the same is hereby, dismissed, with costs; that the intervention of James W. Schley be, and the same is, maintained, so far as to recognize the validity of the judgment obtained by him in the circuit court of Cherokee county, in the state of Alabama, as a valid and binding judgment, with a lien upon the property of the said railroad company, but subject and inferior to the lien given by the first consolidated mortgage of the East & West Railroad Company of Alabama, herein declared foreclosed; and as to all other matters said claims and interventions of James W. Schley be, and the same are hereby, dismissed. And it is now further ordered, adjudged, and decreed that this cause be referred to the special master *pro hac vice*, F. S. Ferguson, to ascertain and schedule the mortgaged premises now in the hands of the receiver, under the orders of this court, and to report and determine with all convenient speed the validity and the amount of the liens on the mortgaged premises, and their relative priority, but in marshaling all conflicting claims to said bonds the said special master shall proceed according to this decree and in conformity therewith. And let it likewise be referred to the said master to take an account of what is due to the complainant, or to those for whom complainant claims, for principal and interest on the said mortgage and bonds so found outstanding, and entitled to the benefits of the lien of the said mortgage, and for complainant's disbursements and allowances to counsel for the mortgage, and costs to be taxed. And said master shall, in furtherance of this end, cause advertisements to be published in two newspapers, published one in Alabama and the other in Georgia, which he may think most fit, to the effect that such lien claimants as have hitherto failed to do so shall come in and file their interventions within thirty days thereafter, or, in default thereof, they will be excluded from the benefits of any decree in this suit, and from participation in the proceeds of any sale. And upon the coming in and confirmation of said report, let a decree *nisi* be entered that the defendant the East & West Railroad Company of Alabama have thirty days thereafter in which to pay into the registry of the court, to the credit of the cause, the amount so found due for principal and interest on the said mortgage; but, in default of such defendant's paying what shall so be found to be due by the said railroad company for principal, interest, and costs by the expiration of the time aforesaid, then the said defendant the East & West Railroad Company of Alabama, and the other defendants and interveners claiming through and under said railroad company, shall from thenceforth stand absolutely debarred and foreclosed from all equity or redemption of, in, and to the said mortgaged premises, and every part and parcel thereof. And upon the confirmation of the said report aforesaid, any party, intervener, or interlocutor shall have leave to apply for final decree herein, and for a sale of the mortgaged premises found to be embraced in said mortgage, in the event that the said railroad company shall continue to make default in the payment of the principal and interest, etc., found due on the mortgaged premises as aforesaid."

From this decree Grant Bros. prayed an appeal to this court, which was allowed by the circuit court, and was perfected, and in due time

the record was filed in this court. The appellees now move to dismiss this appeal, "on the ground and for the reason that the said decree is not final, and because the same is not appealable" to this court. Appellees' counsel contend that the cause cannot be divided so as to bring up successively different parts of it, (citing *The Palmyra*, 10 Wheat. 502,) and that appellants will not be injured by denying them an appeal in this stage of the proceedings. The decisive nature of the order is admitted freely, as is also the right of appellants ultimately to have it reviewed here upon appeal; but counsel urge that the appeal has been prematurely taken, and that, when the master's report comes in and is finally acted upon by the court, upon appeal from that decree every matter in dispute will be open to the parties in this court, and may all be heard and decided at the same time; citing *Perkins v. Fourniquet*, 6 How. 206; *Iron Co. v. Martin*, 132 U. S. 91, 10 Sup. Ct. Rep. 32. They contend that the only known qualification of this rule is that, when the decree decides the right to property in contest, and directs it to be delivered up by one party to his adversary, or directs it to be sold, or directs one party to pay a certain sum of money to his adversary, and the adversary is entitled to have such decree carried immediately into execution, the decree must be regarded as a final one to that extent, and authorizes an appeal to this court, although so much of the bill is retained in the circuit court as is necessary for the purpose of adjusting by a further decree the accounts between the parties pursuant to the decree passed. In all the cases cited by counsel in support of this motion, and in all the cases cited and reviewed by Mr. Justice BLATCHFORD in delivering the opinion of the court in *Iron Co. v. Martin* in support of their decision in that case, the decrees, though decisive of the main issue between the parties thereto, still left for further settlement before the master other and dependent issues between the same parties. In this case before us the decree appealed from dismissed the complainants in the auxiliary bill entirely from the case, and also dismissed a number of defendants to that bill entirely from the case. The matters retained for such action of the master as would require confirmation before a decree of sale was to issue were matters between the parties to the original bill, in which the complainants in the auxiliary bill and the defendants not parties to the original bill had no interest as parties, whatever might be their relation to the bonds and stock of the defendant railroad. In *Hill v. Railroad Co.*, 140 U. S. 52, 11 Sup. Ct. Rep. 690, complainant sought to compel a transfer to him of certain shares of the capital stock of the defendant company, and for other relief against numerous defendants, who were alleged to be interested, more or less, in the several contracts and transactions out of which the claim of the complainant arose. The cause came to decree 8th June, 1885, and relief to complainant "upon all matters and things in controversy" thereon was denied, except as to one matter, as to which it was retained against the railroad company and its directors, the only parties defendant interested in that matter. From this decree the complainant prayed an appeal, which was allowed by the circuit court, but was not perfected in due time, and was dismissed for failure to file tran-

script in the supreme court at the next term after the appeal was taken. As to the matter retained, the case proceeded in the circuit court, and came on to be further heard, and to a further decree in January, 1887, from which decree complainant prayed an appeal, which was allowed and perfected. On this appeal all the errors alleged related to the decree made in June, 1885; none were assigned as to the decree of July, 1887; and the question, therefore, was whether on this appeal any of the matters which were determined by the decree of June, 1885, remained open for consideration. On this question the supreme court announce:

"We are of the opinion that the decree of June 8, 1885, was a final decree, within the meaning of that term in the law respecting the appellate jurisdiction of this court, as to all matters determined by it, and that they are closed against any further consideration. It disposed of every matter of contention between the parties, except as to the amount of one item, and referred the case to a master to ascertain that. \* \* \* The fact that it was not disposed of did not change the finality of the decree as to the defendants against whom the bill was dismissed. \* \* \* They were no longer parties to the suit for any purpose. The appeal from the subsequent decree did not reinstate them. All the merits of the controversy pending between them and the complainant were disposed of, and could not be again reopened, except on appeal from that decree," (of June 8, 1885.)

Any further review of the authorities cited and relied on to defeat this motion to dismiss the appeal in this case is unnecessary, as we are of opinion that the case last cited settles the question here made before us, and that the motion should be denied, and it is so ordered.

PARDEE, Circuit Judge, having sat in the circuit court rendering the decision appealed from, took no part in the hearing or disposition of this motion.

### CHEMICAL NAT. BANK v. ARMSTRONG.

(Circuit Court, S. D. Ohio, W. D. June 2, 1892.)

No. 4,389.

#### 1. BANKS—VALIDITY OF LOAN—AUTHORITY OF VICE PRESIDENT—FRAUD.

The C. Bank in good faith advanced money on collateral forwarded to it by the vice president of the F. Bank, and charged the loan to the F. Bank. The vice president of the F. Bank directed that the loan be transferred to his individual credit, which was done, whereupon he fraudulently checked out the same for private purposes. Held, that the vice president had authority to negotiate the loan, and that the validity thereof was not affected by his fraud.

#### 2. SAME—NATIONAL BANKS—INSOLVENCY—BASIS OF DIVIDENDS.

Rev. St. §§ 5235, 5236, which provide, respectively, that the comptroller, on appointing a receiver for an insolvent national bank, shall advertise for proof of claims, and that he shall make a ratable dividend of the moneys paid over to him by the receiver among those who have proved their claims, cannot be construed to fix the date of the suspension of the bank as a date with reference to which all calculations of the amount due to creditors are to be made as a basis of dividends. Therefore, where after such suspension, but before the filing of a claim with the receiver, such claim was reduced by collections from collaterals, it should have been credited with such collections when filed, and the balance then found due used as the basis for ascertaining claimant's dividend.

**3. SAME—BASIS OF DIVIDEND—COLLECTIONS ON COLLATERALS.**

The C. Bank advanced a large sum of money to the F. Bank in March on collaterals, and in June advanced a further sum on further collaterals. The C. Bank collected \$75,000 on the March collaterals after the maturity of the March loan, but entered a general credit thereof to the F. Bank. *Held*, that the collections should have been applied to the March loan, and were properly deducted therefrom in determining the amount which the C. Bank was entitled to receive as a dividend from the assets of the F. Bank after its insolvency.

**4. SAME—LOSS OF COLLATERALS—NEGLIGENCE OF HOLDER.**

Among the collaterals to secure the March loan was a note of W. for \$25,000, indorsed by L. for accommodation of the vice president of the F. Bank. Shortly before maturity of this and other of the collaterals, said vice president requested that they be not presented for payment, but returned, promising that other collateral should be substituted for them, all of which was done, except that the \$25,000 note was not returned. The F. Bank did not order back this note, and shortly afterwards it matured without presentment or notice of dishonor to L., the indorser, who was the only solvent party to the note. *Held*, that the C. Bank, having by its negligence failed to preserve the liability of the indorser, was chargeable with such note as so much received on its claim.

**5. SAME—DEFENSES.**

It was no excuse to the C. Bank that the F. Bank was not a party to the note in question, the C. Bank having received it as security for a loan to the F. Bank under circumstances from which it might naturally infer the note to be the property of the F. Bank.

**6. SAME—AVAILABILITY OF COLLATERAL—ACCOMMODATION PAPER.**

The objection by the C. Bank that the note was made and indorsed merely for the accommodation of the vice president, who was not a party thereto, and that consequently the C. Bank could not have recovered thereon if the indorser's liability had been preserved, could not be maintained, in view of the fact that the indorser had paid three notes, companions to that in question, without objection, and of evidence that he was interested with the vice president in procuring the loan which the note partly secured.

**7. SAME—INTEREST ON DIVIDENDS—ESTOPPEL.**

The C. Bank, having refused an offer of the receiver to pay dividends on \$200,000, which was about the amount due to it on the March loan after deducting collections on collaterals, was not entitled to interest on such dividends on affirmation of the action of the receiver by the court.

**8. SAME—DIVIDENDS—COLLECTIONS ON COLLATERALS.**

A sum collected by the C. Bank on the collaterals after proof of its claim should not be deducted therefrom in ascertaining the amount on which it is entitled to a dividend.

In Equity. Suit by the Chemical National Bank against David Armstrong, receiver of the Fidelity National Bank. Heard on the pleadings and evidence. Decree for defendant.

Statement by SAGE, District Judge:

On the 2d of March, 1887, the Chemical National Bank, of New York, credited on its books the Fidelity National Bank, of Cincinnati, with a temporary loan of \$300,000, at interest, on the faith of a letter from that bank, signed by E. L. Harper, its vice president, dated February 28, 1887, requesting such credit, and inclosing its certificate of deposit No. 345, to the order of E. L. Harper, and by him indorsed in blank.

There were also inclosed with the letter sundry bills receivable as collateral. The letter was signed by Harper, as vice president, but was not copied in the letter book of the bank, and it does not appear that any other officer of the bank knew of its existence. The Chemical National Bank at the time notified the Fidelity Bank that it had placed \$300,000 to its credit. E. L. Harper received the notice, and at once directed that the sum so credited be transferred to his individual account, which was done, and immediately afterwards he checked it out for his private purposes.

In April, 1887, the Chemical Bank sent to the Fidelity Bank two statements of the transactions between the banks in March. In each of these the \$300,000 loan was credited to the Fidelity Bank under date of March 2, 1887, as "loan" or "tem. loan." May 19, 1887, the Fidelity Bank, by telegram, signed with its own name, and by confirming letter, signed "E. L. Harper, V. P.," requested the Chemical Bank not to present any of the paper pledged as collateral for the \$300,000 loan for payment, as payment would be arranged for at the Fidelity Bank, and new paper would be sent on the 20th in substitution for maturing collateral. The letter promised to pay on July 15th, with interest.

On May 21, 1887, the Fidelity Bank, by letter signed by E. L. Harper, V. P., transmitted sundry bills receivable as collateral for the \$300,000 loan, and requested the return of certain of those previously transmitted, which would mature in May or June, and the substitution was made as requested. On June 14, 1887, the Fidelity Bank sent to the Chemical Bank over \$1,000,000 face value of other collateral, and requested other advances, and certain advances were made by the Chemical Bank in response to that request. On June 21, 1887, the Fidelity Bank suspended payment, and on June 27, 1887, the defendant, Armstrong, was appointed its receiver by the comptroller of the currency.

Collections made by the Chemical Bank of the collaterals pledged to it by the Fidelity Bank for the various advances stated above were all credited on the books of the Chemical Bank in one account, regardless of when the collateral was pledged, or in connection with what particular loan; the theory of the Chemical Bank being that it had a lien on all the collateral to secure all the advances. By the fall of 1887 more than enough had been collected upon the collaterals to satisfy all the loans, if applied according to the theory upon which the credits were made. The Chemical Bank thereupon notified defendant, Armstrong, of this fact, and offered to remit to him the surplus cash collected, and return the collateral still uncollected. Armstrong, however, contended that the collateral pledged in June, 1887, was security only for the advances thereafter made, and that the Chemical Bank had no right to apply collections from that collateral to payment of the March loan. Suit was thereupon brought by Armstrong, receiver, against the Chemical Bank, in the United States circuit court for the southern district of New York, for an accounting of the June collateral upon this basis. That suit resulted in a decree in favor of Armstrong for the surplus of the collections from the June collaterals over the June advances, with interest. The case is reported in 41 Fed. Rep. 234. The result was that the loan of March, 1887, was left unpaid, and the Chemical Bank had in its hands the unpaid collateral pledged in March and May, 1887, to secure that loan; also proceeds of collaterals paid, amounting to \$75,000. Thereupon the Chemical Bank made formal proof of claim upon that basis, asking to be enrolled as a creditor for \$300,000, with interest at 6 per cent. from March 2, 1887, and to be paid dividends ratably with other creditors, until the dividends and collections made and to be made from the collateral should equal the amount due upon the loan. The claim as made was rejected, the rejection being accompanied with an offer, in

substance, to pay dividends calculated upon the balance remaining due upon the claim after deducting the collections made, and to be made, from the collateral, and a further sum of \$25,000 which it was claimed was lost through negligence of the Chemical Bank in not taking proper steps to collect a note for that amount held by it as collateral, made by J. W. Wilshire, and indorsed by J. V. Lewis, falling due June 28, 1887.

Thereupon this suit was brought to compel the allowance of the claim as presented by the Chemical Bank, and the payment of dividends on the amount due at the time of the appointment of defendant as receiver, the dividends to cease when, together with the collections from the collateral, they should equal the amount due upon the claim. The answer sets up that the entire transaction was in furtherance of a scheme by Harper to swindle the Fidelity Bank; that the certificate of deposit for \$300,000, which was forwarded to the Chemical Bank by Harper, was not entered on the books of the bank; that Harper had not that sum at that date on deposit in the bank; that the issuing of the certificate was not known to or authorized by the directors of the bank, and that the proceeds obtained from the Chemical Bank were not received by the Fidelity Bank, but were fraudulently appropriated by Harper to his own use. The defendant further sets up that, by reason of the default of the complainant, there was no demand of payment or notice of nonpayment of the collateral note for \$25,000, above referred to, made by Wilshire and indorsed by Lewis, and that therefore the amount of said note was lost, Wilshire being insolvent and Lewis abundantly able to pay, but claiming exemption by reason of said note not having been presented for payment at its maturity, and notice of nonpayment not having been given to him.

The defendant further admits that the complainant presented the claim sued upon to him on the 25th of April, 1890, which was the first presentation thereof, and that he did then in writing offer to admit and pay dividends on the sum of \$200,000; that being about the amount which the defendant believed to be due after making the credits which are set forth in the answer, and to which he claimed to be justly entitled, and further offered to pay said dividends and allow said sum without prejudice to the right of the complainant to sue for the residue of the claim as presented by it, which offer was refused.

The evidence is undisputed that the Chemical Bank was not in any way a party to any fraud attempted and practiced by Harper, but dealt in good faith with the Fidelity National Bank. It further appears from the evidence that of the collateral held by the Chemical Bank as security for the \$300,000 loan at the time of the failure of the Fidelity Bank, only four notes, aggregating \$19,200, and falling due in July and August, 1887, had at any time belonged to the Fidelity Bank. To whom the residue belonged prior to the pledge of the Chemical Bank does not appear. Among the collateral notes pledged in March were four for \$25,000 each, drawn by Joseph W. Wilshire to the order of J. V. Lewis, and indorsed by him, all dated February 25, 1887, and payable, re-

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spectively, at three, four, five, and six months after their date. All these notes were made by the maker and indorser for the accommodation of E. L. Harper, and given to him on their date. The note falling due in May, 1887, was returned in accordance with the request of May 21, 1887. The note falling due in June, 1887, was in the possession of the Chemical Bank at its maturity, and is unpaid. No proper notice of nonpayment was given to Lewis as indorser, and, as already stated, he claims to be discharged. The two remaining notes were paid by Lewis at maturity, and he also paid at maturity another note for \$25,000, made by Wilshire, dated April 28, 1887, and payable five months after date to the order of Lewis, and indorsed by him. This note was among the collaterals substituted in May, 1887.

These payments by Lewis were the only payments made on account of any of the collateral held for the \$300,000 loan prior to the commencement of this suit, but since then compromises have been made by the defendant of the four notes aforesaid of the Champion Machine Company, resulting in a payment of some cash and the substitution of other securities, and upon certain notes drawn by Whitely, Fassler & Kelley, and indorsed by E. L. Harper & Co., these being among the notes pledged in May, to which the Fidelity Bank had no title. There has been paid to the complainant the sum of \$4,481.49 in cash, and the bonds of Whitely, Fassler & Kelley secured by mortgage to the amount of \$9,600. The defendant in his answer avers that the Fidelity Bank was not liable to the complainant for the amount of said \$300,000 loan, and that the complainant is not entitled to prove the same as valid as against the trust estate held by him. The prayer of the answer is that, if the court shall find that the Fidelity Bank was liable for the amount of said loan, all payments made to the complainant from the collateral paper not belonging to the Fidelity Bank, and forwarded by Harper to the complainant as security for said loan, shall be credited thereon; that the amount of the unpaid Wilshire note shall be charged against the complainant, and credited on said loan; and that the balance of the collateral shall be first exhausted, and the proceeds credited on the loan, and the complainant be permitted to prove only the amount remaining due on the loan after said credits have been made.

*Wm. Worthington*, for plaintiff.

*John W. Herron*, for defendant.

SAGE, District Judge, (*after stating the facts as above.*) Conceding that the transaction of the \$300,000 loan was fraudulent as between E. L. Harper and the Fidelity Bank, and that he appropriated the entire proceeds to his individual use, the claim of the Chemical Bank, which dealt in good faith in the transaction, and was innocent of any knowledge or participation in the fraud, is not affected thereby. The negotiation of the loan was within the authority of Harper, as vice president of the Fidelity Bank, and, if he used that authority fraudulently for his own advantage, the bank that enabled him to commit the fraud must suffer the consequences, and not the bank that made the loan and



advanced the money, under the representation and in the belief that it was conducting a fair, legitimate business transaction with the Fidelity Bank.

The only questions to be decided are—

- (1) Upon what sum shall dividends be computed?
- (2) Shall the Chemical Bank be charged with the \$25,000 Wilshire-Lewis note, due June 28, 1887, as if it had been collected?
- (3) Shall interest be allowed the Chemical Bank upon the sum which may be found due to it for dividends?

In *Lewis v. U. S.*, 92 U. S. 618, 623, the principle of equity that a creditor holding collaterals is not bound to apply them before enforcing his direct remedies against the debtor is recognized as settled. The authorities in support of the principle as stated are numerous. So far as it relates to the collaterals yet remaining in the possession of the Chemical Bank, there is no difficulty about its application in this case. The contention arises upon the question whether the sums that have been paid to and received by the Chemical Bank on account of collateral notes pledged to it to secure the loan shall be first credited, and dividends paid on the residue; or, on the other hand, dividends shall be paid upon the entire amount as if those payments had not been made, and then the payments applied. The statutory provisions bearing upon the questions are sections 5235 and 5236, Rev. St. U. S. Section 5235 requires the comptroller, upon appointing a receiver for an insolvent national banking association, to give newspaper notice for three consecutive months, "calling on all persons who may have claims against such association to present the same, and to make legal proof thereof." Section 5236, so far as here material, requires the comptroller to make a ratable dividend of the moneys paid over to him by the receiver—

"On all such claims as may have been proved to his satisfaction, or adjudicated in a court of competent jurisdiction; and, as the proceeds of the assets of such association are paid over to him, shall make further dividends on all claims previously proved or adjudicated."

The contention for the complainant is that the statute fixes one time, with reference to which all calculations of the amount due to creditors are to be made as a basis for dividends, and that that time is the date of the suspension of the bank, at which counsel say the active trust in favor of creditors begins to run. The argument is that it will not do to take the maturity of the claim, for that throws interest out of view altogether, and that the time when the proof of the claim is tendered cannot be taken, for that would introduce variations because of difference in dates of interest, and would permit a creditor having a high rate of interest to get an advantage over others, by postponing his time of proof, and thus swelling the amount due him.

For a similar reason it is urged that the date when the claim is allowed or adjudged cannot be taken. The contention is that the statute necessarily contemplates an estimation of all claims at one and the same instant of time; and that reason, as well as convenience, dictates that time to be the date of the commencement of the trust; that is to say, the date

of the suspension of the bank. In support of this contention *White v. Knox*, 111 U. S. 784, 4 Sup. Ct. Rep. 686, is cited. That case is an authority for the proposition that all creditors are to be treated alike with reference to the payment of interest. White had obtained judgment on the 23d of June, 1883, upon a claim which had remained due and unpaid from the date of the suspension of the bank and the appointment of the receiver, which was about the 20th of December, 1875. Between that date and the judgment, the comptroller had paid to other creditors dividends amounting in the aggregate to 65 per cent. upon their respective claims as of the date when the bank failed. White's judgment included interest to the date of its rendition, and he claimed a dividend on the amount thus obtained. The comptroller paid him a dividend upon the same basis as that adopted for dividends to the other creditors. The difference between that amount and the amount claimed by White as the basis for his dividend was \$21,379.66. Suit was brought to compel the payment of dividends on that difference. The supreme court upheld that rule of distribution, Chief Justice WAITE saying, in the course of his opinion, that, "if interest is added on one claim after that date before the percentage of dividend is calculated, it should be upon all; otherwise, the distribution would be according to different rules, and not ratable, as the law requires."

In none of the cases decided by the supreme court does it appear that any payment on account of the indebtedness of the creditor was made from the proceeds of collaterals, or otherwise, after the suspension of the bank and before the proof of claim. There are two or three cases in Pennsylvania in which the doctrine claimed by counsel for complainant is approved, but the weight of authority is the other way. In *Lewis v. U. S.*, 92 U. S. 618; *Case v. Bank*, 100 U. S. 446; and *Eastern Townships Bank v. Vermont Nat. Bank*, 22 Fed. Rep. 186,—the claim proven was for the entire amount of the principal of the indebtedness as it existed when proven and at the date of the failure of the bank, for nothing had been realized from collateral, and there had been no partial payments, and the question as to the time with reference to which the amount due should be adjusted related exclusively to the payment of interest. In this case a different state of facts exists. After the suspension of the Fidelity Bank, and before the Chemical Bank made any proof of its claim, it realized \$75,000 from the payment of collaterals, to wit, three of the Wilshire-Lewis notes, as follows: \$25,000 on the 23d of July, 1887, \$25,000 on the 24th August, 1887, and \$25,000 on the 1st of October, 1887, the dates at which said notes respectively matured. These payments were entered up on the books of the Chemical Bank at the dates of their receipt to the credit of the general collateral account of the Fidelity Bank. The Chemical Bank treated the collaterals received in March and May and June as all belonging to one and the same account, or, in the language of the cashier of that bank in his testimony, "as massed;" and so with the loans, the bank acting on the erroneous theory, already stated, that it had the right to apply the proceeds of all the collaterals to the payment of all or any part of the indebtedness of the Fidelity Bank. The question

then is how the payment of these amounts, before the filing of the claim of the Chemical Bank with the receiver, is to be regarded. Was the Chemical Bank bound to credit them on its claim, or did it have the right to prove and receive dividends upon the entire claim, holding the amounts received from the collaterals back, to be applied, after the receipt of the dividends, to the residue of the claim? It is urged that the entries of credit ought not to conclude the Chemical Bank, because they were made upon the theory that the loans and the collaterals were to be treated as belonging to one transaction. Conceding that the Chemical Bank is not concluded by the entries, how does the matter stand? The provision in section 5236 of the Revised Statutes is for the payment by the comptroller of ratable dividends "on all such claims as may have been proved to his satisfaction, or adjudicated in a court of competent jurisdiction." The first thing for a creditor to do, then, is to make proof of his claim, and there seems to me to be no escape from the conclusion that the claim must be proven as it exists when the proof is made. What, then, was the true amount of the claim when the proof was made by the Chemical Bank? It had received negotiable securities as collateral. It is stated at page 213 in *Schouler on Bailments* that the rule deducible from the decisions is that "the pledgee of negotiable securities not only has the right, but is bound, in the exercise of ordinary diligence, to make presentment or collection on their maturity, and then apply the proceeds on the pledged account."

In *West v. Bank*, 19 Vt. 403, Judge REDFIELD, on page 409, says: "It is true that if the security had been converted into money, and it is between debtor and creditor, it ceases to be collateral, and operates directly as payment, so that the debt is thereby reduced, and the creditor can only go for the balance." In *Sohier v. Loring*, 6 Cush. 537, the court held that any proof sought to be made by a creditor after he has been paid any part of his claim can be only for the unpaid balance. Judge LOWELL says in *Re Souther*, 2 Low. 320, that in bankruptcy no creditor can prove for more than his actual debt as it exists at the time of the proof, without obtaining an undue advantage over other creditors. It was held by the court of appeals of Maryland in *Bank v. Lanahan*, 7 Atl. Rep. 615, decided January 5, 1887, that a creditor who had realized on collaterals was entitled to a dividend, under an assignment for the benefit of creditors, for only the residue of his claim after deducting the amount realized on the collateral. The court said that it could not be denied that the sum received from the collaterals diminished the indebtedness, and that the creditor had thereby actually received payment to a certain extent. In *Mason v. Bogg*, 2 Mylne & C. 448, Lord Chancellor COTTENHAM said that in equity a party might come in and prove without giving up or affecting his securities, except so far as the amount of his debt may be diminished by what he may receive; and in *Kellock's Case*, 3 Ch. App. 769, Sir WILLIAM PAGE WOOD, in deciding the case, referred to the right of the creditor to stand upon his securities until they are redeemed; and in *People v. E. Remington & Sons*, 121 N. Y., at page 336, 24 N. E. Rep. 793, the court said that the creditor was entitled to

prove against the estate for what was due to him, and receive a dividend upon that amount without deduction on account of collateral securities held by him. In *Wheeler v. Newbould*, 16 N. Y. 392, the court of appeals held that, where negotiable securities are pledged for a loan, "the primary, and, indeed, the only, purpose of the pledge is to put it in the power of the pledgee to reimburse himself for the money advanced when it becomes due and remains unpaid. The contract carries with it an implication that the security shall be made effectual to discharge the obligation." The court further held that it would be presumed, in the absence of express stipulations to the contrary, that it was the intention of the parties to the contract that the creditor should, if he resorted to the pledge instead of the personal liability of the debtor, accept the money upon the hypothecated securities, as it became due and payable, and apply it to the satisfaction of his debt. The general law with reference to the appropriation of payments is that, if the party who pays money does not make a specific application at the time of the payment, the right of application devolves on the payee, and he must then exercise it, or the law will exercise it for him. It has been held that, if money is paid to the pledgee before the maturity of the principal note, he has no right to apply the proceeds to the payment of that note until it matures, and that in such case the money when received is a substitute for the collateral note on account of which it was paid, and is to be held upon the same terms and subject to the same rights and duties as the collateral note. *Garlick v. James*, 12 Johns. 148. But in this case the payments of the collateral notes were made after the maturity of the loan, and it was the duty of the Chemical Bank to apply them at once as credits upon its claim, upon the loan against the Fidelity Bank. A general credit was entered, and it must stand as a credit against that loan. It results that when the Chemical Bank presented its claim there should have been credited upon it the amount realized from collaterals, and the claim for \$300,000, the full amount, was rightly rejected.

The next question is whether the Chemical Bank shall be charged with the \$25,000 Wilshire-Lewis note, due June 28, 1887, as if it had been collected. The facts relating to this branch of the case have already been stated in a general way, but it is now necessary to refer to them more particularly. That note was among the collaterals originally pledged for the payment of the \$300,000 loan. On the 19th of May, 1887, the Fidelity National Bank telegraphed the Chemical Bank: "We send other bills to take place. Will want all returned here without presenting, as we advised parties to arrange payment here." On the same day the Fidelity Bank by letter, over the signature of "E. L. HARPER, V. P.," wrote the cashier of the Chemical Bank as follows:

"Please do not present any of the collateral paper for payment. We have advised parties we would order back and charge up here. We will to-morrow send you new notes to take the place of ones maturing. We will pay the loan July 15th, and will pay interest till that date, if agreeable to you."

The \$25,000 note was not ordered back by the Fidelity Bank, but on the 21st of May, 1887, sundry other bills receivable, which would mature

in May or June, and which were held as collateral, were called home by the Fidelity and others substituted. On the 28th of June, 1887, seven days after the suspension of the Fidelity Bank, and one day after the appointment of Armstrong, as receiver, the \$25,000 note matured. It was then held as collateral by the Chemical Bank. There was no presentment or demand for payment, nor any notice of nonpayment to Lewis, the indorser, who was abundantly able to pay, whereas Wilshire, the maker, was insolvent. The cashier of the Chemical Bank testifies in his deposition that the 28th of June came, and the note had not been returned to Cincinnati, and that night he discovered that fact, and wired Wilshire and Lewis at the place where he supposed they would be found, and where the note was payable, namely, Cincinnati. He says that the loans were in the hands of the loan clerk, who did not call his attention to the \$25,000 note, the note clerk acting on the presumption that the telegram and letter of May 19th were authority; but the cashier, happening that afternoon to have some time, got out the papers, and was looking them over, and, as he says, "was more than surprised to find this piece of paper on hand," referring to the note, and at once—it was then about half past four—"did his duty and notified the parties." He also testifies that he knew of the failure of the Fidelity Bank on the 21st of June, he thinks, or the 22d.

It is urged for the Chemical Bank that it had the right to assume that it was to do nothing with respect to presentment, demand, or notice of nonpayment of this note; that the instructions contained in the telegram and letter of May 19th continued in force until altered by positive directions. Also, that the evidence shows that the Fidelity Bank never was the owner of this note, and that it was an accommodation note for the use of Harper, which the Chemical Bank, as an innocent purchaser for value before maturity, had the right to enforce; but, as far as Lewis was concerned, that right existed only in case the Chemical Bank could not otherwise collect its debt as against him; that the lien of the Chemical Bank extended only so far as necessary for its own protection, and, if Lewis had paid the note, he would have been subrogated to the rights of the Chemical Bank against the Fidelity, and the securities belonging to that bank, after the Chemical Bank had been paid the residue of its claim; also that Lewis was practically a surety for the Fidelity Bank, which was the principal debtor. The argument for the defendant is that it appears from the evidence that the money on the \$300,000 loan was borrowed by E. L. Harper in the name of the bank, but for his own use, without any authority or knowledge of the other officers of the bank, and by the perpetration of a fraud on all the parties concerned; and that the proceeds of the loan were immediately placed to his individual credit, and drawn out for his own use. Counsel say that if Harper had paid that debt, or any part of it, he could not prove the sum so paid as a claim against the Fidelity National Bank, and that the same rule applies to collections from collaterals furnished by him, whether belonging to or only controlled by him.

The argument is further that the complainant had knowledge or

reason to suppose that the collaterals belonged to the Fidelity National Bank; that that would have been naturally and properly inferred by the complainant from the manner in which it obtained possession of them, and the manner in which they were sent to it, and therefore the complainant cannot complain if the same results should follow as would have followed had they actually belonged to the Fidelity Bank.

As to the claim that the Wilshire-Lewis notes were accommodation notes loaned to Harper, and that no consideration was received for them by Lewis and Wilshire, attention is called to the only testimony upon that part of the case,—the deposition of Wilshire,—and to the fact that Lewis, who paid three of the notes as indorser, has neither testified nor made any claim of the kind stated. Harper's name does not appear upon those notes, and, according to Wilshire, nothing was said about paying them or in any way taking care of them. The transaction occurred at Wilshire's house, in Cincinnati, on the night of February 25, 1887, Wilshire, Harper, and Lewis being present, and all taking part in the conversation. Harper stated that he required additional funds to carry on a certain deal which he had on hand at that time, that he did not have the amount of ready money in possession, but that he could use paper, discounted either in his own bank or elsewhere, and Wilshire testifies that notes were made for that purpose, but nothing at all was said as to who was to take up the notes. Harper spoke of the condition of the market, the favorable outlook, and the necessity of having ample money to protect the deal; also, that while the deal was very promising, and the prospects for a successful termination favorable, yet with the opposition at Chicago it was best to be prepared to furnish additional margin when called for; that, although the money was not needed then, it possibly might be later on, and Harper wanted to be prepared for it. Why Lewis was interested in assisting Harper does not appear from Wilshire's deposition. Wilshire himself was Harper's broker. The argument is that, the paper having been made to enable Harper to borrow money upon it, neither Wilshire nor Lewis can plead that it was accommodation paper as against the party who loaned the money on the faith of it; and that, while it is true that the Fidelity Bank did not primarily lend the money on that paper, it did loan its credit, and thus obtained the money and gave it to Harper, thereby accomplishing the object intended by Lewis and Wilshire, and therefore having the same right to protection on its credit as if it had primarily made the loan. I am satisfied that this is the correct view of the transaction, and that, as to the three \$25,000 notes that were paid, inasmuch as Lewis and Wilshire knew that they were to be used to obtain money to aid Harper in a deal in which they were in some way sufficiently interested to furnish \$100,000 of negotiable security, they would not be entitled to prove up any claim against the Fidelity Bank. This brings us back to the question whether the failure of the Chemical Bank to make demand of payment of the \$25,000 note due June 28th was warranted by the telegram and letter of May 19th. My conclusion is that it was not. Those advices were followed by the letter of May 21st, calling home certain of the securities

which would mature in May and June, but not the \$25,000 note. The omission of that note from that call was of itself sufficient to indicate that it was not the intention to order it back to Cincinnati. It remained as collateral in the hands of the Chemical Bank until its maturity. The Fidelity suspended payment on the 21st of June, and that fact was known to the Chemical Bank on that day or the day following. It was clearly the duty of the Chemical Bank to observe the ordinary rules binding upon the holder of negotiable securities as collateral, with reference to presentment for payment and notice of nonpayment. The failure to do so was a neglect which was called an "oversight," and which, when it was discovered by the cashier, it was too late to remedy. The note should have been sent by the Chemical Bank to its correspondent at Cincinnati, where it was payable, in time for presentment and demand, and, in the event of nonpayment, of notice. This not having been done, the claim against the only solvent party to the note was lost, and the amount must be charged to the Chemical Bank as if the note had been paid.

With reference to interest, this court has the right to take judicial notice of the fact which appears in its own records, although it is not shown in evidence in this case, that no interest has been paid upon claims proven against the Fidelity Bank, excepting in cases where claims rejected by the receiver were subsequently affirmed by the judgment of this or some other court of competent jurisdiction. In such cases interest has been allowed from the date when dividends were withheld that should have been paid. There is another consideration which cannot be overlooked. When the complainant proved its claim for the entire amount of the \$300,000 loan, the receiver offered to pay the dividends on \$200,000, without prejudice to the right of the complainant to litigate its claim for the residue. The offer was rejected, with the result to lock up, pending the litigation, the amount which would have been paid in dividends on \$200,000. Applying the maxim that he who seeks equity must do equity, the complainant will not now be allowed interest on the amount which was offered to and rejected by it. The true amount on which dividends should be allowed will be ascertained by adding to the principal of the loan interest thereon from the 2d of March, 1887, its date, to June 21, 1887, the date of the suspension of the Fidelity Bank, and then deducting the \$75,000 realized from the three Wilshire-Lewis notes which were paid, and \$25,000 on account of the \$25,000 Wilshire-Lewis note that was not presented for payment nor protested. The claim of the complainant is subject to a further credit of \$4,481.49, cash realized from the Whitely, Fassler & Kelley notes, and the notes of the Champion Machine Company, but that credit is not to affect the dividends, for the reason that it was realized subsequent to the proof of complainant's claim. Interest will be allowed on the amount of the dividends on the excess of complainant's claim over \$200,000, to be reckoned from the date of the proof of the claim.

## SOUTHWESTERN TELEGRAPH &amp; TELEPHONE Co. v. ROBINSON.

*(Circuit Court of Appeals, Fifth Circuit. May 30, 1892.)*

## TELEPHONE COMPANIES—NEGLIGENCE—SUSPENDED WIRE—ELECTRICAL STORM.

A telephone company which for several weeks permits its wire to remain suspended across a public highway, a few feet from the ground, is liable to a traveler who comes in contact therewith during an electrical storm, and is injured by a discharge of electricity which had been attracted from the atmosphere, since the electricity would have been harmless except for the wire.

In Error to the Circuit Court of the United States for the Northern District of Texas.

At Law. Action by J. B. Robinson against the Southwestern Telegraph & Telephone Company for personal injuries. Verdict and judgment for plaintiff. Defendant brings error. Affirmed.

Statement by BRUCE, District Judge:

Plaintiff in error was sued by defendant in error in the district court of Cooke county, Tex., for damages in the sum of \$12,000. He states his cause of action as follows:

"Your petitioner, J. B. Robinson, a resident of Cooke county, Tex., complaining of the Southwestern Telegraph & Telephone Company, a private corporation incorporated under the laws of the state of New York, but doing business in the state of Texas and having a legal office in Gainesville, Cooke county, Texas, respectfully represents that on or about the 29th day of October, A. D. 1889, the defendant owned and operated a telephone line between the cities of Gainesville and Dallas, Tex., and intermediate points, the connection between said cities being made by a single wire suspended by means of poles in the manner of telegraph wires, usually about thirty feet from the ground; that its said telephone line or wire crossed the public highway between Dallas and McKinney, known as the 'Dallas and McKinney Road,' about five miles south of Plano, in Dallas county; that at said points and over said road on the aforesaid date, and for several weeks prior thereto, the defendant negligently suffered and permitted its aforesaid wires to be and remain suspended over said road within a few feet of the ground, and within such proximity thereto that travelers on the said road unavoidably and necessarily came in contact therewith; that the said wire so suspended over said road, which was a public highway between two large cities, and daily traveled by many people in vehicles and on horseback, all of which was known to the defendant, was a dangerous and unlawful obstruction of said road, and a public nuisance, and that the defendant on the aforesaid date, and long prior thereto, knew of the condition of said wire at said point, or might have known it by the exercise of reasonable care, but nevertheless negligently permitted it to remain in the condition aforesaid; that the said wires are the best known conductors of electricity, and are the only vehicles in general use for the transmission of electric currents, and, during electric or thunder storms, such wires ordinarily become heavily charged with electricity, of power sufficient to inflict death or do great injury to those coming in contact with them, and that from this fact arises the peculiar danger of allowing such wires to remain suspended so low that people will come in contact with them,—all of which was on the aforesaid date and long prior thereto well known to the defendant, or might have been known to it by the exercise of ordinary care; that on the afternoon of the aforesaid date, as plaintiff was traveling on horseback on the



said Dallas and McKinney highway during the prevalence of a heavy thunder storm, such, however, as is usual in that section at that season of the year, he came in contact with the defendant's said wire at the point aforesaid, in consequence of its being suspended so near the ground; that it was a dark, stormy evening, and that the wire was invisible to plaintiff, and plaintiff came in contact with it through no fault or negligence on his part, but through the gross negligence and carelessness of the defendant, as aforesaid, in leaving said wire suspended over a public highway within a few feet of the ground; that at the time said wire was heavily charged with electricity generated by the storm then prevailing, as aforesaid, and, on coming in contact with it, plaintiff received a full charge of the fluid, which knocked him from his horse and completely paralyzed him for the time being, depriving him of the power of speech and locomotion; that plaintiff lay in the road where he had been thrown, in the rain and storm, until picked up by a passerby, and carried to a neighboring house, and there plaintiff was confined to his bed for more than five weeks, suffering during this period severe bodily pain and mental anguish. Plaintiff represents that he is but little past middle age, and before said injuries was of a vigorous mind and robust constitution, and capable of great endurance and physical and mental activity, but that, in consequence of said injuries, his health and mental faculties have been permanently and seriously impaired, and his capacity to pursue his usual avocation practically destroyed, to his actual damages ten thousand dollars. Plaintiff further represents that, on account of said injuries, he has been put to great expense for medical attention, and that his condition is such as to require, for the future, constant medical treatment and the care of his family, who are thus withdrawn from their customary duties, to his actual damages two thousand dollars. Wherefore, plaintiff sues, and prays that the defendant be cited to answer herein, and that on final hearing he have judgment for his said damages, costs, and for further general and special relief."

The case was removed into the circuit court of the United States for the northern district of Texas, and the defendant answered as follows:

"Now comes defendant, and for answer by way of demurrer to plaintiff's cause of action says, first, that the plaintiff ought not to have and maintain this cause, for that his original petition does not state facts sufficient to constitute a cognizable and enforceable demand before the law. Of this he prays the judgment of the court. And for further answer, if such be necessary, defendant says it denies each and singular the allegations in the plaintiff's petition contained, and says it is not guilty of the wrongs, injuries, and negligent conduct charged; and of this it puts itself upon the country. And, answering further, it says if plaintiff was injured in any manner, it was the result of his negligence,—that he failed to exercise that reasonable degree of care, in traveling at the dangerous time in which he alleges he was traveling, and in avoiding contact with defendant's line during a thunder storm, that a reasonably prudent man ought to have exercised under like circumstances. Wherefore, defendant says plaintiff ought not to recover, and of this it puts itself upon the country."

The case was heard, and the demurrer was overruled, to which ruling the defendant excepted, and the trial before court and jury resulted in a verdict for plaintiff in the sum of \$2,500, for which amount, with interest and costs, judgment was afterwards rendered. Motion for new trial was filed, heard, and overruled by the court. The assignment of error is that in the record of the proceedings of the above cause in the trial court there is manifest error, in this, to wit:

"The court erred in overruling the general demurrer of the said Southwestern Telegraph & Telephone Company to the original petition and cause of action of the said J. B. Robinson, as will appear from an inspection of the said petition, demurrer, and judgment of the court thereon."

*John W. Wray*, for plaintiff in error.

*M. L. Crawford*, *W. O. Davis*, and *J. L. Harris*, for defendant in error.

Before PARDEE, Circuit Judge, and LOCKE and BRUCE, District Judges.

BRUCE, District Judge, (*after stating the facts.*) The question and the only question for review here is whether the plaintiff stated a cause of action in his petition, and if the demurrer to the cause of action, as stated by the plaintiff in the court below, was properly overruled. In *Railroad Co. v. Jones*, 95 U. S. 439, it is said negligence is the failure to do what a reasonable and prudent person would ordinarily have done, under the circumstances of the situation, or doing what such a person, under the existing circumstances, would not have done. It would seem too plain to require argument that the allegations of the petition show negligence on the part of the telephone company. Under the facts and circumstances stated the wire was an obstruction upon the public highway. Travelers were liable to collide with it, and injurious consequences to them would follow as the natural and probable result of such contact. Article 622 of the Revised Civil Statutes of Texas provides:

"Corporations created for the purpose of constructing and maintaining magnetic telegraph lines are authorized to set their poles, pliers, abutments, wires, and other fixtures along, upon, and across any of the public roads, streets, and waters of the state, in such manner as not to incommode the public in the use of such roads, streets, or waters."

The duty on the part of the telephone company was clear to prevent its wire from becoming an obstruction on the highway. Under the circumstances shown the defendant in error might have been hurt by coming in contact with the wire of the telephone company, and injuries to the defendant in error might have resulted, independent of the fact that the wire at the time was loaded with a charge of electric fluid from the clouds and storm then prevailing. So that it is difficult to see how this verdict could be disturbed even if the contention of the plaintiff in error is correct, that the electricity with which the wire was charged at the time was the proximate and immediate cause of injury to the defendant in error, for which the telephone company cannot be held responsible. Negligence is a mixed question of law and fact, and is a question for the jury, under proper instructions from the court. It is not claimed here that the court misdirected the jury in its charge on the law of the case, and the verdict is: "We, the jury, find for the plaintiff in the sum of twenty-five hundred dollars." The jury found negligence on the part of the telephone company, resulting in injuries to the defendant in error, and for which they assess his damages at \$2,500. It is not shown that the jury found that the wire of the telephone company was charged with electricity at the time the defendant in error came in

contact with it, and that the electric fluid was the cause of the injury to the defendant in error, and so it is not clear that there was any error in the ruling of the court, even upon the theory of the case insisted upon by the plaintiff in error. No point is made on the question of contributory negligence, and the contention of the plaintiff in error seems to be that the petition states the cause of action to have been the injuries which resulted from the fact that the wire at the time of the contact with it by the defendant was charged with electric fluid, for the creation and existence of which the telephone company was in no sense responsible. Persons, however, must be held to know the ordinary operation of the forces of nature, and to use proper means to avert danger. If the electric fluid with which the wire of the telephone company was charged at the time was an element or the main element in the production of the injuries to the defendant in error, still it is clear that the displaced wire furnished the means of the communication of the dangerous force which resulted in the injury to the defendant in error. Science and common experience show that wires suspended in the atmosphere attract electricity in the time of storms, and when so suspended and insulated are dangerous to persons who may at such times be brought in contact with them, and the petition charges that, during electric or thunder storms, such wires ordinarily become heavily charged with electricity, of power sufficient to cause death or great injury to those coming in contact with them; and whether this is so or not is a question of fact. To say that the agency of the telephone wire in the production of the injury was inferior to that of the electric current, which was the main cause, is not satisfactory. It is, in fact, to admit that the company's displaced wire furnished the means by which the dangerous force was communicated to and injured the defendant in error. True, it was a new force of power which intervened, with the production of which the telephone company had nothing to do, but upon this point, in *Insurance Co. v. Tweed*, 7 Wall. 52, the court say:

"If a new force or power has intervened, of itself sufficient to stand as the cause of the misfortune, the other must be considered as too remote."

The new force or power here would have been harmless but for the displaced wire and the fact that the wire took on a new force, with the creation of which the company was not responsible, yet it contributed no less directly to the injury on that account. In *Gleeson v. Railroad Co.*, 140 U. S. 435, 11 Sup. Ct. Rep. 859, the court held that a landslide in a railway cut caused by an ordinary fall of rain is not an act of God, which will exempt the railway company from liability to passengers for injuries caused thereby while being carried on the railway; and on page 441 (page 861, 11 Sup. Ct. Rep.) of the opinion in that case the court, quoting from an English case, say "that the plaintiff was entitled to a verdict on the ground that, if a person maintains a lamp projecting over a highway for his own purposes, it is his duty to maintain it so as not to be dangerous to persons passing by; and if it causes injuries, owing to a want of repair, it is no answer on his part that he had employed a competent man to repair it;" citing 1 Thomp. Neg. pp. 346, 347. No

case is cited like the one at bar, but the principles upon which cases of this character have been decided sustain the verdict in this case, and the judgment of the court is affirmed.

### TEXAS & P. RY. CO. v. NELSON.

(Circuit Court of Appeals, Fifth Circuit. May 30, 1892.)

No. 25.

**1. CONTINUANCE—ABSENCE OF WITNESSES—DISCRETION OF COURT—STATE PRACTICE NOT FOLLOWED—REV. ST. § 914.**

A continuance because of the absence of material witnesses rests within the discretion of the circuit court, without regard to the practice of the state courts, notwithstanding the statute conforming the practice and procedure of the circuit courts to that adopted in the courts of record of the state where such court is held, because the mode of summoning witnesses and taking testimony in the courts of the United States is regulated by statutes of the United States.

**2. PLEADING—EVIDENCE—ACCIDENT AT RAILWAY CROSSING.**

In an action for personal injuries sustained at a railway crossing, defendant alleged contributory negligence on the part of the plaintiff in failing to stop, look and listen for the approaching train. *Held*, that plaintiff could testify that several people, who were in the wagon with him at the time of the accident, did not make any outcry indicating that a train was approaching.

**3. RAILROAD COMPANIES—MUNICIPAL REGULATIONS—RINGING BELL.**

Under section 80 of the charter of the city of Ft. Worth the city council is empowered "to direct the use and regulate the speed of locomotive engines in said city, or to prevent or prohibit the use or running of the same within the city." *Held*, that the city council were authorized under this section to enact an ordinance prohibiting the running of an engine or car in said city without a bell attached thereto being rung before starting, and all the time the same should be in motion within such city.

Error to the Circuit Court of the United States for the Northern District of Texas. Affirmed.

*W. W. Howe, R. S. Lovett, Henry Finch, and George Thompson*, for plaintiff in error.

*M. L. Crawford*, for defendant in error.

Before PARDEE, Circuit Judge, and LOCKE and BRUCE, District Judges.

PARDEE, Circuit Judge. The defendant in error, B. F. Nelson, instituted a suit in the district court of Tarrant county, state of Texas, against the Texas & Pacific Railway Company, to recover damages for personal injuries suffered by the said Nelson in being run over by one of the locomotives of the railway company at a railway crossing in the city of Ft. Worth. The railway company appeared in the state court, filed a demurrer and answer to the petition, and thereupon, by a proper petition and bonds, removed the case into the circuit court of the United States for the northern district of Texas. After transcript filed in the circuit court, the railway company filed its first amended original answer, wherein it demurred to the sufficiency of the plaintiff's petition, then excepted to the sufficiency thereof, and for special answer said:

"That, if plaintiff received any of the injuries alleged, same were caused and occasioned by reason of his own carelessness and want of care in failing to

stop and look and listen for the approaching train; and defendant avers that said plaintiff had full opportunity to see and observe the approach of the moving train, but it says that, by reason of the said negligence and want of care, plaintiff cannot recover."

This cause came on thereafter for trial before a jury, and resulted in a verdict for the plaintiff and against the defendant railway company in the sum of \$4,500. Judgment was entered on the verdict, and a motion for a new trial was overruled, whereupon the railway company brought the case to this court by a writ of error.

The first assignment of error is waived. The second assignment of error is:

"That the court erred in overruling the application of the railway company for the continuance on account of absence of witnesses, W. P. Burts, J. J. Goodfellow, and J. T. Fields, because said application showed full and sufficient grounds for a continuance."

The bill of exceptions in relation to this matter recites:

"This cause was called for trial on the 20th of January, 1892, whereupon plaintiff announced 'Ready,' and defendant, the Texas & Pacific Railway Company, announced that it was not ready, and moved the court for a continuance until next term. Plaintiff waiving a written motion, but demanding a strict showing for a continuance, defendant, through its attorney, George Thompson, stated that it was not ready for trial, for want of the testimony of W. P. Burts, J. J. Goodfellow, and J. T. Fields; that said witnesses are material, and were absent without the procurement or consent of defendant; that said witnesses resided in Tarrant county, Tex.; that defendant had exercised due diligence to obtain the testimony of said witnesses, in this: that on the 14th day of January, 1892, it caused to be issued out of said court a subpoena for said witnesses, which was duly served upon them, as appeared by said subpoena; that this was the first application of the defendant for a continuance; and that the testimony of said witnesses could be procured by next term of court. Upon fully considering said motion and application, the court determined the same insufficient, and not well taken, in that it did not show that said witnesses had been tendered their witness fees and mileage, the said witnesses by said application being shown to reside beyond the limits of the county in which the court was sitting; and said application was thereupon overruled, and the cause went to trial, to which defendant excepted."

The continuance of a cause at issue is a matter of discretion, and a refusal thereof is not assignable for error. *Woods v. Young*, 4 Cranch, 237; *Sims v. Hundley*, 6 How. 1; *Barrow v. Hill*, 13 How. 54; *Thompson v. Selden*, 20 How. 195; *McFaul v. Ramsey*, 20 How. 523; *Cook v. Burley*, 11 Wall. 659. It is suggested that since the above decisions were rendered the act of June 1, 1872, (Rev. St. U. S. § 914,) has been passed, conforming the practice and procedure of the circuit courts to that adopted in the courts of record of the state where such circuit court is held; and that, therefore, the decisions referred to can have no application to the question here raised. And it is contended that under the practice in the courts of Texas (Rev. St. Tex. arts. 1276, 1277) the granting or refusal of the first application for a continuance is not a matter of discretion where the applicant for the continuance complies with the terms of said article; citing *Cleveland v. Cole*, 65 Tex. 404; *Chilson v. Reeves*, 29 Tex. 279,—

which seem to sustain the contention as to the practice in the courts of Texas. It is, however, to be noticed that the mode of summoning witnesses and taking testimony in the courts of the United States is regulated by statutes of the United States, and therefore the practice in the state courts in relation to such matters does not apply. See sections 876, 877, 914, Rev. St. And the question of diligence in summoning witnesses and procuring testimony should be tested by the laws of the United States rather than by the practice in the state courts. The case of *McFaul v. Ramsey*, *supra*, is cited with approval in the case of *Kennon v. Gilmer*, 131 U. S. 22-24, 9 Sup. Ct. Rep. 696, in which the court says:

"By the statutes of the territory the court may, on good cause shown, change the place of trial, where there is reason to believe that an impartial trial cannot be had therein; and an appeal lies to the supreme court of the territory from an order granting or refusing a new trial, or from an order granting or refusing to grant a change of venue. Code Civil Proc. Mont. 1879, §§ 62, 408; Act Amend. Feb. 23, 1881, § 7. But the statutes of the territory cannot enlarge the appellate jurisdiction of this court. The granting or denial of a change of venue, like the granting or refusal of a new trial, is a matter within the discretion of the court, not ordinarily reviewable by this court on writ of error. *McFaul v. Ramsey*, 20 How. 523; *Kerr v. Clappitt*, 95 U. S. 188; *Railway Co. v. Heck*, 102 U. S. 120. And the refusal to grant a change of venue on the mere affidavit of the defendants' agent of the state of public opinion in the county clearly involves a matter of fact and discretion, and is not a ruling upon a mere question of law."

In the case of *Cox v. Hart*, 12 Sup. Ct. Rep. 962, (decided on the 16th of the current month, and not yet officially reported,) the supreme court again decides generally that the granting or refusing of an application for continuance is not reviewable on error.

In the courts of the United States motions for a new trial are addressed to their discretion, and the decision, whatever it may be, cannot be reviewed on appeal or writ of error. "This is a rule of law established by this court, and not a mere matter of proceeding or practice in the circuit and district courts. *Henderson v. Moore*, 5 Cranch, 11; *Doswell v. De Lanza*, 20 How. 29; *Schuchardt v. Allens*, 1 Wall. 371. It is therefore not within the act of congress of June 1, 1872, and cannot be affected by any state law upon the subject." *Railroad Co. v. Horst*, 93 U. S. 291-301. In *Thompson v. Selden*, *supra*, the chief justice, delivering the opinion of the court, says:

"And, as regards the motion to continue the case, it has often been decided by this court that the refusal of an inferior court to continue a case to another term cannot be assigned for error here. Justice requires that the granting or refusal of a continuance should be left to the sound judicial discretion of the court where the motion is made, and where all of the circumstances connected with it, and proper to be considered, can readily be brought before the court."

We think that the reasoning which applies to motions for a new trial and changes of venue applies with equal, if not more, force to applications for continuance.

Some stress is laid upon the first rule of court, (first rule of the circuit court, northern district of Texas,) as follows:

"All laws and rules of procedure and practice prescribed by the legislature of the state of Texas as they now exist, or as they may be changed and amended from time to time, when the same do not conflict with the laws of the United States, or a rule of the supreme court of the United States or of this court, are hereby adopted as the rule of practice in this court," etc.

A reading of the said rule shows that it is not as broad as the practice act, (Rev. St. § 914,) and we are disposed to think that it need not be considered.

The third assignment of error is based upon the following bill of exceptions:

"Plaintiff, Nelson, testified that he approached the crossing, going from east to west, and that the train which caused the injury was running northerly, and that the street and railway tracks cross each other at right angles; that, while approaching the crossing, and until the time of the injury, he looked and listened and did his best to ascertain whether or not a train was approaching, but that he could not do so because of deep cuts, embankments covered with weeds, and obstructions, shutting out the view. He testified also that one Mrs. Butler and her two children and his wife were in the wagon with him at the time of the injury. Plaintiff's counsel then asked this question: 'State whether or not any of those in the wagon with you made any outcry indicating that a train was approaching.' To this question defendant objected, solely for the reason that the same was incompetent, whereupon the court decided that the same was material, overruled the objection, and allowed the plaintiff to answer that no one made any outcry indicating that a train was approaching."

The plaintiff's petition alleged that when he approached the crossing he did not, nor could he, see said railway track on each side thereof, and especially looking southward; nor did he, nor could he, see said approaching train until he was almost upon said crossing and railway, on account of the high embankments on either side of said crossing, covered with weeds and other growth, fences, houses, and other obstructions to the view. The defendant, by a special answer, put in issue contributory negligence on the part of the plaintiff in failing to stop, and look and listen for the approaching train. In the light of these pleadings, and the testimony showing that at the time of plaintiff's injury other persons were in the wagon with him, we are unable to see any point whatever in the objection made to the plaintiff's stating whether any of those in the wagon with him made an outcry indicating that a train was approaching. If the defendant intended or proposed to offer evidence to show that the plaintiff was warned as to the approach of the coming train, then the evidence was decidedly material. On the other hand, if defendant made no such contention, we fail to see how the answer to the question propounded could at all prejudice the defendant railway company.

The fourth assignment of error is:

"That the court erred in allowing the plaintiff to introduce any evidence over defendant's objection to section 259 of the Revised Criminal Ordinances of the city of Ft. Worth, Texas, prohibiting the moving of an engine within the city limits of the city of Ft. Worth, Texas, without a bell being rung on the same, because it appeared that said ordinance was void and invalid, in that

the said city council of said city had no power to pass such an ordinance under the charter of the said city of Ft. Worth."

The bill of exceptions under which this assignment of error is made shows that the injury to plaintiff occurred within the corporate limits of the city of Ft. Worth; that the train was running at a higher rate of speed than was permitted by the city ordinances. There was testimony that tended to prove that the bell was being rung and the whistle blown. There was also testimony tending to prove that no bell was rung or whistle blown. Section 259 of the Revised Criminal Ordinances of the city of Ft. Worth prohibits the running of an engine or car in said city without a bell attached thereto being rung before starting, and all the time the same shall be in motion therein. Section 80 of the charter of the city of Ft. Worth, among other powers given in relation to the laying and construction of railway tracks, etc., confers the power upon the city council "to regulate or prohibit the blowing of locomotive whistles within the city, to direct the use and regulate the speed of locomotive engines in said city, or to prevent or prohibit the use or running of the same within the city." And section 85 of the same charter provides that—

"The city council shall have power to pass, publish, amend, or repeal all ordinances, rules, and police regulations not contrary to the constitution of this state, for the government, peace, and order of the city; \* \* \* to enforce the observance of all such rules, ordinances, and public regulations; and to punish violations thereof by fines, penalties, and costs."

Under the powers granted in these ordinances, we are of the opinion that this assignment of error is not well taken, for it seems perfectly competent under the power expressly given to direct the use and regulate the speed of locomotive engines in said city, and to prevent or prohibit the use or running of the same within the city, to prevent or to prohibit the running of an engine without a bell attached thereto being rung before starting, and all the time the same shall be in motion. On the whole case, we find no reversible error on the part of the circuit court, and the judgment complained of is therefore affirmed, with costs.

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*ASHER et al. v. CABELL et al.*

(Circuit Court of Appeals, Fifth Circuit. May 30, 1922.)

No. 3.

1. DEATH BY WRONGFUL ACT—ACTS OF SERVANTS AND AGENTS.

Under Rev. St. Tex. art. 2399, giving a right of action for wrongful death, a liability for the acts of agents or servants is confined to common carriers, and all other persons are liable for their own acts alone. *Hendrick v. Walton*, 6 S. W. Rep. 749, 69 Tex. 192, followed.

2. SAME—UNITED STATES MARSHAL—KILLING OF PRISONERS BY MOB—INCOMPETENT DEPUTY.

Under this statute, a United States marshal, who, knowing that certain lawless persons are hostile to a prisoner in his custody, delivers him for transport, shackled, to a deputy, whom he knows to be incompetent and unfit, is liable on his official bond, because of his own negligence, for the killing of such prisoner by a mob, through the deputy's unfitness. *BRUCE*, District Judge, dissenting.



In Error to the Circuit Court of the United States for the Northern District of Texas.

At Law. Action by Venia Asher and her husband, Thomas Asher, against William L. Cabell, formerly United States marshal, and his sureties, for permitting a prisoner to be killed by a mob. Judgment for defendants on demurrer to the petition. Plaintiffs bring error. Reversed.

Statement by PARDEE, Circuit Judge:

This cause was heard in the court below on exceptions to the plaintiffs' second amended original petition, which it seems necessary to give in full, as follows:

"By leave of the court, plaintiffs amend their first amended petition filed herein on the ——— day of February, 1891, so that the same shall read as follows:

"Venia Asher, joined by her husband, Thomas Asher, hereinafter styled 'plaintiffs,' complaining of William L. Cabell, James Moroney, C. W. Terry, J. S. Daugherty, E. M. Tillman, Hugh Blakeny, and Philip Sanger, who are hereinafter styled 'defendants,' respectfully represents:

"That at the time of the institution of this suit, to wit, on the 18th day of January, 1890, the said Venia resided in Young county, Texas, in said district, and was at that time the widow of Alfred Aaron Marlow, who was slain by a mob in said Young county, as will be hereinafter related; that during the pendency of this suit she has intermarried with Thomas Asher, her co-plaintiff, who joins her in this action; and she, with the minor children, hereinafter named, of herself and her deceased husband, now resides with her present husband, the said Thomas Asher, in the Indian Territory.

"The above-mentioned defendants are all residents and citizens of the county of Dallas, in said northern district of Texas.

"Plaintiffs sue for actual damages on account of injuries causing the death of said Alfred Aaron Marlow, and seek a recovery on the official bond of the said William L. Cabell as United States marshal, such action being brought and such recovery being sought for the benefit (1) of said Venia, formerly wife and widow of said deceased; (2) of Williamson Wilson Marlow, a boy of four years old, and Annie Laurie Marlow, a girl two years old, the minor children of said Venia and Alfred Aaron; and (3) of Martha Jane Marlow, the widowed mother and only surviving parent of said deceased, who now resides in the county of Ouray, in the state of Colorado.

"That heretofore, to wit, on the 28th day of April, 1886, the defendant William L. Cabell was duly appointed and commissioned marshal of the United States for the northern district of Texas; and that on the 25th day of November, 1887, the said Wm. L. Cabell as principal, with the other defendants as sureties, made, executed, and delivered, in conformity to law, a certain official bond of the said Wm. L. Cabell as such marshal, in the sum of twenty thousand dollars, (\$20,000,) which said bond was in due time approved by the proper authority, and a copy of the same is hereto attached and made a part of this petition.

"The condition contained in said bond is as follows:

"'Now, if the said William L. Cabell, by himself and by his deputies, shall faithfully perform all the duties of the said office of marshal, then this obligation to be void; otherwise to remain in full force and virtue.'

"Which conditions, being fully interpreted, mean, amongst other things, that one of the duties of such officer and his deputies is and was to safely keep in custody and from harm, to humanely treat and carefully protect, all prisoners lawfully committed to or held in the custody of said marshal and his

deputies, or any of them; and, further, that the said marshal would appoint and retain in his service as deputies none but fit, proper, and competent persons.

"That thereafter, to wit, on the 19th day of January, 1889, and before that day, in the county of Young, in said district, the said Wm. L. Cabell, while marshal, as aforesaid, by his duly-authorized deputy marshal, Ed. W. Johnson, (who was then and there acting under the immediate orders and instructions of said William L. Cabell,) had in his custody, by reason of such orders and instructions, and also by virtue of office and by lawful authority, several certain prisoners of the United States, one of whom was Alfred Aaron Marlow, then the husband of the plaintiff Venia Asher, the father of her minor children, herein named, and the son of Martha Jane Marlow.

"That for a long time prior to the said 19th day of January, 1889, and on that day, there was great hostility and violent public prejudice openly manifested by certain lawless persons in said Young county towards said Alfred Aaron Marlow and certain of his fellow prisoners, to wit, his three brothers, Lewellen Marlow, George Marlow, and Charles Marlow, who at the same time were confined with him in the county jail of Young county upon the lawful orders of a proper officer of the United States, on charges of violating the laws thereof, which charges, upon final trying in the proper court, proved to be unjust and groundless.

"That on and before said 19th day of January, 1889, William L. Cabell, marshal as aforesaid, was well aware of the excited and lawless and dangerous condition of public sentiment in Young county against his said prisoners, and of the hostility and prejudice entertained against them by the lawless persons aforesaid, as was also the said Ed. W. Johnson, his deputy; yet, notwithstanding such knowledge, the said William L. Cabell, being then and there in the county of Dallas, ordered the said Ed. W. Johnson, who was then and there in the county of Young, about one hundred and twenty miles (120) distant from the county of Dallas, to remove said prisoners from the county jail of Young county, leaving the time and manner of their removal to the discretion of said Johnson.

"Plaintiffs would now further show to the court that said Ed. W. Johnson was an improper and unfit person to perform the hazardous and responsible duty of removing said prisoners under the circumstances herein detailed, and this the said William L. Cabell well knew or might have known by the use of ordinary diligence.

"For that said Johnson was a brawling and quarrelsome man, with little respect for the laws of the land, and, prior to his appointment by the said marshal, had committed a homicide. That during his tenure of office as deputy marshal under said William L. Cabell, and prior to said 19th day of January, 1889, he had lost his right arm in a personal shooting affray over a lewd woman, in which affray he committed still another homicide. That, being morally unfit for the place he held, he, the said Johnson, became, by reason of his maiming, as aforesaid, physically unfit and incapacitated for the performance of the duties of his office, especially in a frontier region, such as that in which Young county is situated, and also in the Indian country, which to a great extent was his field of duty; and more especially was said Johnson unfit in every way for the post of chief deputy marshal, which he held at Graham in said Young county, where one branch of this honorable court is located, —all of which said William L. Cabell was bound to know, and did know, and still retained the said Johnson in his service as chief deputy in that portion of his district.

"And that furthermore, by reason of the carelessness and unfitness of said Johnson for the position so held by him, the said jail in which the aforementioned prisoners were confined had been attacked on the 17th day of January,

1889, by a numerous mob, composed of the lawless persons aforesaid, who were wickedly bent and determined upon doing to the said Alfred Aaron Marlow and his aforementioned fellow prisoners great bodily harm.

"That said Ed. W. Johnson resided in said town of Graham, and was there at the time of the attack on the aforementioned jail and before that time. That the said federal prisoners therein confined had all been to such jail committed upon arrests made by him; yet, disregarding his lawful and sworn duties, the said Johnson suffered persons to be employed as guards at said jail who were in sympathy with the lawless persons aforesaid; who were compassing the destruction of said prisoners, and made no effort to repel the attack of said lawless persons, or to stay their violence, which was open and notorious, but left said prisoners to deal with their assailants as best they could, with their naked hands; nor did said Johnson take any measures to arrest or bring to justice the said lawless persons,—all of which the said William L. Cabell well knew, or might have known by the use of ordinary diligence, there being at the time communication by wire between the town of Graham, where said Johnson was, and the city of Dallas, where said Cabell was, at the time of the happening of the matters and things aforesaid. That by messages from said Johnson and other persons, and from news dispatches published in daily newspapers the next day, the said William L. Cabell was fully informed of the attack on said jail, and of the imminent danger which menaced the lives of his said prisoners.

"That, knowing the matters and things hereinbefore related, and that they had taken place almost under the very eyes of said Johnson, the said William L. Cabell carelessly, wrongfully, and negligently further intrusted the safe-keeping and removal of said prisoners from the jail in which they were confined to his said deputy, on the 19th of January, 1889, two days after the attack on said jail.

"And the said William L. Cabell, by virtue of his office and the lawful authority aforesaid, and by his orders and instructions unto the said Ed. W. Johnson immediately directed, caused the said Johnson, on the date last aforesaid, to take said prisoners and the said Alfred Aaron Marlow into his official charge, with further orders to remove them from the said county jail of Young county. That said marshal could easily have given to said removal his personal attention, or have intrusted the same to a proper deputy, which was then and there his sworn duty.

"That while said Alfred Aaron Marlow and his fellow prisoners aforesaid were in the custody of said marshal, as before recited, a large number of the lawless persons aforementioned, having at heart the injury, great bodily harm, and destruction of said prisoners and the said Alfred Aaron, had unlawfully, willfully, wrongfully, wickedly, and maliciously combined, confederated, and conspired together to carry out their wicked and unlawful purposes, all of which the said Johnson well knew, and through him the said William L. Cabell well knew, or might have known by the use of ordinary diligence.

"That, well knowing the great hostility which, prior to the said 19th day of January, 1889, and on that day, had been openly and notoriously manifested by said lawless persons against the aforementioned prisoners, the said William L. Cabell wrongfully and negligently permitted the said Ed. W. Johnson—an unfit person for such service in any event—to attempt the removal of said prisoners in the nighttime, which the said Johnson did, contrary to common sense, to ordinary discretion and care, and against the advice, warning, and admonitions of divers good citizens of said Young county.

"That under the circumstances aforementioned said prisoners, for the purpose of removal, were taken from their place of confinement in the nighttime, in the presence of a large number of the boisterous and lawless persons afore-

said, by the said Ed. W. Johnson; and, well knowing the dangers surrounding him, the said deputy marshal wholly failed to provide reliable guards to protect said prisoners, but, on the contrary, knowingly selected as guards a force made up almost entirely of the same lawless persons who had wickedly and unlawfully, on the 17th day of January, 1889, attacked, as hereinbefore recited, the jail in which said prisoners were confined, for the purpose of taking their lives, or of doing them great bodily harm.

"And a large number of others of the lawless persons aforementioned, in pursuance of their unlawful and malevolent purposes and designs, combined together as a mob, and, being in collusion with the guards selected by said deputy marshal as aforesaid, did, on the 19th day of January, 1889, in the county of Young, in said northern district of Texas, unlawfully, willfully, wrongfully, maliciously, and cruelly assault with guns and firearms the said prisoners, and did then and there, under circumstances of peculiar atrocity and barbarity, mortally wound and shoot to death the said Alfred Aaron Marlow, without any fault or cause therefor on his part.

"That at the time of the unlawful and murderous assault last above mentioned the prisoners aforesaid, including the said Alfred Aaron Marlow, being securely shackled together in pairs by their ankles, were unable to escape, and, being unarmed, were unable to defend themselves against the persons so assaulting them, except as they might disarm their assailants under the impulse of the great peril besetting them.

"Plaintiffs aver that at the time of the night attack upon the prisoners aforesaid, bound and defenseless as they were, in which the said Alfred Aaron Marlow was shot to death as hereinbefore recited, the said deputy marshal, and said guards in his employ, unlawfully deserted said prisoners, and immediately joined with said other lawless persons who were then and there assaulting said prisoners, thereby delivering said prisoners into the hands of said mob. That neither said Johnson nor his said guards fired a single shot in defense of said prisoners, but, on the contrary, joined the said mob, and aided the lawless persons composing the same by helping them to shoot, wound, and kill the said prisoners. That several of said guards voluntarily handed over their arms to said mob, except such as were seized by said prisoners to use in their self-defense; and said Johnson himself was disarmed by one of said prisoners as he, the said Johnson, was in the act of voluntarily handing over his pistol to one of the lawless persons.

"In conclusion, plaintiffs allege that said deputy marshal and his said guards colluded and conspired together with said lawless persons so assaulting said prisoners; and that, in order to carry out such conspiracy, said deputy marshal knowingly employed as guards other lawless persons, who, but two days prior to their summons to serve as such guards, had been engaged in the attack on the jail where said prisoners were then confined, and had, immediately prior to their said summons so to serve as guards, made known their purpose to kill and murder said prisoners; and that Ed. W. Johnson, deputy marshal, removed said prisoners from the jail of Young county, and, with the assistance of said persons so summoned as guards, carried them in the nighttime to a lonely and secluded spot, distant from human habitations, and, when said prisoners were attacked by said lawless persons, the said deputy marshal, in accordance with a previous understanding with said persons then and there making said attack, did, with his guards, unlawfully desert said prisoners, and leave them to be attacked and murdered by said mob, without making any effort whatever to protect them.

"That by reason of such attack the said Alfred Aaron Marlow was killed, as also was his brother, Lewellen Marlow, and George Marlow and Charles Marlow were permanently disabled by gunshot wounds. Nor did the said William L. Cabell, after the occurrences herein related, dismiss or discharge

said Johnson from his service, but retained him as deputy until his, said Cabell's, successor was appointed, long afterwards, thus virtually ratifying and approving said acts.

"Wherefore, in the matters and things hereinbefore recited, which led to the cruel and inhuman murder of said Alfred Aaron Marlow, plaintiffs allege that said William L. Cabell, marshal as aforesaid, acted wrongfully and negligently, and that by reason of such wrongful acts and negligence the said Alfred Aaron met his death.

"Plaintiffs show that the said Alfred Aaron, being a young man, 26 years of age, had a reasonable expectancy of a continuance of life for a further period of thirty-eight years; that he was an industrious and sober laboring man, whose earnings were, on an average, fully five hundred (\$500) dollars a year, and that he supported his family comfortably for a man in his sphere of life; that his mother, Martha Jane Marlow, for whose benefit this suit is also brought, is an aged woman, 65 years old, and almost helpless; that she has still a reasonable expectancy of a continuance of life for a further period of eleven years; that she was largely dependent upon the assistance of her said son, during his lifetime, for her sustenance, and that he dutifully recognized her dependence upon him, and contributed to her maintenance and support fully \$100 a year up to the time of his death.

"Wherefore, plaintiffs say that there has been a breach of the official bond of the said William L. Cabell, marshal, as aforesaid, and that by reason of the facts herein set forth the said marshal and his sureties are liable to plaintiffs on said bond for damages in the sum of \$10,000; and they pray that said defendants, being already herein duly cited, be, on final trial, adjudged to pay said sum and the costs of this suit, and that they have general relief."

To the said petition the defendants filed their second amended original answer, as follows:

"Now at this time come the defendants in the above entitled and numbered cause, and by leave of court file this, their second amended original answer, in lieu of their first amended original answer, filed in this cause on February 6, 1891, and plead anew as follows:

"(1) Now at this time come the defendants in the above entitled and numbered cause, and demur to the pleading of the plaintiffs herein, and they except to the sufficiency of the second amended original petition of plaintiffs filed herein, and say that the matters therein alleged, if true, constitute no cause of action against these defendants, and of this the said defendants pray the judgment of the court.

"(2) And specially excepting to the said pleading of the plaintiffs, these defendants say that the same is insufficient, because said petition shows that the acts complained of, and on account of which plaintiffs seek to hold these defendants liable, were not the immediate acts of these defendants themselves, nor of any of them, and hence the plaintiffs show no right of recovery against defendants.

"(3) And, further, these defendants specially except to plaintiffs' pleading, because on the face of said pleading it appears that the cause of action alleged by the plaintiffs against these defendants accrued and arose (if it ever existed) more than one year before the filing of plaintiffs' second amended original petition herein, in which for the first time plaintiffs set out their alleged cause of action, on which they now ask recovery, and hence on said causes of action (if they ever existed) are now barred by the statute of limitation of one year.

"(4) These defendants also specially except to all those extensive portions of the second amended original petition of the plaintiffs herein which are made up of statements regarding injuries and wrongs which occurred long

prior to the alleged death of Alfred Aaron Marlow, which were not the injuries which resulted in his death, because all such allegations are inappropriate, and are evidently alleged by the plaintiffs for their oratorical effect.

"(5) And, should the foregoing demurrer and special exceptions be by the court overruled, then these defendants, further answering to the plaintiffs' second amended original petition herein, come and deny each and every allegation in said pleading contained, and they call for strict proof, and of this they put themselves on the country, and hence pray judgment that they go hence," etc.

Upon the hearing of the exceptions to the said second amended original answer, the court below rendered judgment sustaining the said second exception, and thereupon, the plaintiffs declining to amend, dismissed the suit. The plaintiffs have brought the case to this court for review, and assign as error "that the court erred in sustaining the defendants' second exception to plaintiffs' second amended original petition, and in dismissing this cause, as will appear from an inspection of said petition, the defendants' demurrer, and the court's judgment thereon."

No written opinion appears to have been given by the judge rendering the decision, and defendants in error submitted no arguments or brief in the case.

*M. L. Crawford, Andrew J. Houston, and Edwards & Blewett*, for plaintiffs in error.

*Bassett, Seay & Muse and McCormick & Spence*, for defendants in error.

Before PARDEE, Circuit Judge, and LOCKE and BRUCE, District Judges.

PARDEE, Circuit Judge. It is well settled that by the common law no civil action lies for an injury to a person which results in his death. *Insurance Co. v. Brame*, 95 U. S. 754-756; *Dennick v. Railroad Co.*, 103 U. S. 11-21; *The Harrisburg*, 119 U. S. 199-214, 7 Sup. Ct. Rep. 140. There is no statute of the United States giving such an action in the courts of the United States. It follows that, if such action can be maintained, authorities must be found therefor in the statute of the state wherein the injury occurred. Article 3128, Rev. St. Tex., is as follows:

"The common law of England (so far as it is not inconsistent with the constitution and laws of this state) shall, together with such constitution and laws, be the rule of decision, and shall continue in force until altered or repealed by the legislature."

It follows that in the state of Texas no civil action will lie for injuries resulting in death, unless authorized by statute, and the following is the only statute on the subject:

"An action for actual damages on account of injuries causing the death of any person may be brought in the following cases: *First*. When the death of any person is caused by the negligence or carelessness of the proprietor, owner, charterer, or hirer of any railroad, steamboat, stagecoach, or other vehicle for the conveyance of goods or passengers, or by the unfitness, negligence, or carelessness of their servants or agents. *Second*. When the death of any person is caused by the wrongful act, negligence, unskillfulness, or default of another." Rev. St. Tex. art. 2899.

The construction to be given article 2899 seems to be clear. As against common carriers, an action is given for injuries resulting in the death of a person, when caused by the negligence or carelessness of the common carrier, or by the unfitness or negligence or carelessness of the servants or agents of the common carrier; as against all other persons, the cause of action for injuries resulting in death is only given when the death is caused by the wrongful act, negligence, unskillfulness, or default of the defendant himself. In other words, common carriers are made liable for the unfitness, negligence, and carelessness of their servants or their agents resulting in the death of a person. Other than common carriers are not made liable except for their own wrongful acts, negligence, unskillfulness, or defaults, when the same results in the death of a person. And this seems to be the construction given to the statute by the supreme court of the state of Texas. In *Hendrick v. Walton*, 69 Tex. 192, 6 S. W. Rep. 749, which was a suit brought against a sheriff for the wrongful and unlawful act of his deputy in killing a person, the supreme court of the state of Texas, construing article 2899, among other things, said:

"In the first place, it is to be observed that this is not the regulation or extension of a right previously existing at common law. The right of action for injuries resulting in death is wholly the creature of the statute; and the authority of the suit here brought, if found at all, must be found in the written law itself. If the second subdivision of the article quoted stood alone, it would be a grave question whether we should not apply to it the maxim that what one does for another he does himself, and to hold that it not only gives a right of action against one whose own immediate act or negligence is the cause of the death of another, but also against a principal, when the death has been caused wrongfully or negligently by the act of his agent. Neither principal nor agents are named in the subdivision in question, but in subdivision 1, immediately preceding this, an action is given against the carriers, to whom it applies, for fatal injuries, not only caused by their own personal negligence, but also where accruing from the gross negligence of their servants or agents. This provision has been considered by this court in the case of *Railway Co. v. Scott*, (decided at the Tyler term, 1886,) and is held to afford no remedy against a railroad company when the death is caused by the mere ordinary neglect of the servants or agents of the corporation. This law was amended by the omission of the word 'gross' by the act of March 25, 1887, (Laws 20th Leg. p. 44,) but the amendment was subsequent to the accrual of the alleged cause of action in this case, and has no bearing upon the question. Besides, the change of one clause of a statute by amendment does not operate to change the construction of another and independent clause as derived from the context of the original act. It is clear, therefore, that in the first subdivision of article 2899 the legislature did not mean to apply the rule that the act of the agent is the act of the principal, because for the ordinary negligence of the agent it does not make the principal liable. Now, is it reasonable to presume that they intended to exempt corporations owning steamboats and railroads, who can only act through agents, from liability for ordinary neglect of their agents or servants, and at the same time make private persons responsible for the death of others, when not caused by their own immediate act or omission? We think not. We rather think it was the purpose to impose the greater liability upon carriers by making them responsible for the gross negligence of their agents, and at the same time to leave the liability of others for the acts of their agents as it existed at common law. \* \* \*

Since, therefore, the language of our statute indicates that the legislature of our state did not mean to make persons responsible for the acts of their agents in these cases, except such as are specified in the first subdivision of the article cited, it is but reasonable to conclude that they intended to render other persons liable only for their own immediate acts."

The question, then, to be determined in the present case is whether the second amended original petition filed by the plaintiffs in the circuit court shows a case where the defendant Cabell, late marshal, is sued for his own wrongful acts, negligence, and defaults. The said petition shows that the defendant Cabell, as United States marshal, had in his custody, under lawful process of the United States courts, certain prisoners, one of whom was Alfred Aaron Marlow, whose widow brings this present suit; that against the said prisoners then and there in the custody of the marshal there was great hostility and violent public prejudice openly manifested by certain lawless persons in Young county, in the jail of which county said prisoners were confined; that an attack had been made by the said lawless persons upon the said prisoners while confined in the jail aforesaid, and that in such attack the marshal's deputies and guards made no effort whatever to protect the said prisoners, but were in sympathy with the lawless persons aforesaid; that the defendant Cabell was well aware of the attack upon the jail aforesaid, and of the excited, lawless, and dangerous condition of public sentiment existing in said county against said prisoners, and of the hostility and prejudice entertained against them by the lawless persons aforesaid; that the said Cabell, marshal, committed the custody of said prisoners, including said Alfred Aaron Marlow, to his deputy, one Ed. Johnson, well knowing said Ed. Johnson to be an unfit and improper person to be a deputy marshal, or to be in charge of the custody and control of the said prisoners; and that the said marshal, well knowing the unfit and improper character of the said deputy, and well knowing the notorious hostility and prejudice existing against the said prisoners on the part of the lawless persons aforesaid, and of a previous failure of his deputies and guards to protect said prisoners, wrongfully and negligently directed and ordered the said Johnson, as deputy, as aforesaid, to take said prisoners into his official charge, and remove them from the county jail in Young county, without giving the same his personal attention, or intrusting it to a fit and competent deputy. The said petition goes on further to show that in the removal so ordered and directed by the defendant, with the connivance of the said Johnson and the guards and deputies selected by the said Johnson, the said prisoners were attacked by a mob, who murdered the said Alfred Aaron Marlow; the petition concluding:

"Wherefore, in the matters and things hereinbefore recited, which led to the cruel and inhuman murder of the said Alfred Aaron Marlow, plaintiffs alleged that said William L. Cabell, marshal as aforesaid, acted wrongfully and negligently; and that by reason of such wrongful acts and negligence the said Alfred Aaron Marlow met his death."

From this it appears that the defendant Cabell is distinctly charged with default and negligence in the performance of his duty as United



States marshal, which default and neglect led and contributed to, if not entirely causing, the killing of Alfred Aaron Marlow, in this: (1) That knowing the danger attending the life and safe-keeping of said Marlow, a prisoner in his custody, he neglected to take measures for his protection; (2) that he knowingly intrusted the custody and safe-keeping of said Marlow to an unfit and improper person; (3) that knowing the unfit and unworthy character of Johnson, and well knowing that a dangerous and lawless element of the community was conspiring and contriving to injure and oppress said Marlow, and well knowing of the previous attack of said dangerous and lawless element upon the jail and the prisoners therein, and of the collusion of his deputies and guards therewith, he, the defendant, directed and permitted the said Johnson to remove said Marlow from the jail in Young county, without taking any measures to protect said Marlow in said removal. It seems clear that the defendant Cabell, as late United States marshal, while undoubtedly sued on account of the faults, negligence, and wrongful acts of his deputies and agents, is also sued for his own defaults and negligence. The question remaining is whether the defaults and negligence charged directly against the defendant are sufficient in connection with the other facts alleged to make him responsible for the unlawful killing of Alfred Aaron Marlow. The defendant, as United States marshal, certainly owed a duty in the premises to the said Marlow,—that of safe-keeping and protection from unlawful injury. The defendant's oath of office, his bond, and the necessary implications of the law, all point to such duty as imposed upon him. See Rev. St. U. S. §§ 782, 783, 5538. "Whenever the common law, a statute, a municipal by-law, or any other law, imposes on one a duty, if of a sort affecting the public within the principles of the criminal law, a breach of it is indictable, and a civil action will lie in favor of any person who has suffered specially therefrom." Bish. Non-Cont. Law, § 132, and cases there cited. "Commonly, where the law has cast a duty upon one to another, a simple neglect to discharge it, whereby the other has suffered injury, is actionable." Id. § 526. "When the injury proceeds from two causes operating together, the party putting in motion one of them is liable the same as though it was the sole cause. This is one form of a universal principle in law, that he who contributes to a wrong, either civil or criminal, is answerable as a doer. And it is immaterial to this proposition whether that to which he contributes is the volition of a responsible person or of an irresponsible one, or whether it is a mere inanimate force or a force in nature or a disease." Id. § 39, and cases there cited. That a United States marshal may take prisoners into his custody, permit them to be disarmed and shackled, and then negligently and knowingly deliver them over to incompetent deputies and the known hostility of mobs, without liability for his neglect of duty, is a proposition which we think cannot be sanctioned. Substantially, this is alleged against the defendant in this case.

The judgment of the circuit court, in sustaining the exception to the plaintiffs' second amended original petition, was, in our opinion, errone-

ous. The other grounds of exception are not urged, and, so far as the record shows, are not well taken. The judgment of the circuit court is reversed, with costs, and the cause is remanded, with instructions to overrule the exceptions to the plaintiffs' second amended original petition, and otherwise proceed in this cause according to law.

BRUCE, District Judge, (*dissenting.*) The right to maintain this action arises, if at all, under article 2899 of the Revised Statutes of the state of Texas, and not upon any act of congress authorizing an action for damages on account of injuries causing the death of any person. The supreme court of the state of Texas, in the case of *Hendrick v. Walton*, 69 Tex. 192, 6 S. W. Rep. 749, have held that this statute does not authorize an action against the principal for the act of his agent, and at page 197 the court say:

"Since, therefore, the language of our statute indicates that the legislature of our state did not mean to make persons responsible for the acts of their agents in these cases, except such as are specified in the first subdivision of the article cited, it is but reasonable to conclude that they intended to render other persons liable only for their own immediate acts."

The action, then, is given and survives the death of the injured person in the cases specified in the first subdivision, (which is as to common carriers;) but in the second subdivision, when the death of any person is caused by the wrongful act, negligence, unskillfulness, or default of another, the court holds the action is not authorized against the principal for the act of his agent. The general principle is that for tortious conduct, resulting in death, every one must be held responsible only for his own conduct, not that of his agent, nor, by the same rule, that of his servant. The action, then, is maintainable in the character of cases named in the statute, and this statute, being in derogation of the common law, is not to be construed to cover what is not fairly within its terms. The act was manifestly intended for common carriers, to secure greater care on their part as to the skillfulness and efficiency of their agents and servants, and was inspired, no doubt, by the desire to protect the traveling public. In the second paragraph, the words "agent" or "servants" are not employed, so the idea of holding persons responsible for the torts of their agents and servants is negatived, and there is no action maintainable under this act for negligence of agents and servants causing injuries from which death results, except as provided in the first paragraph. The right to maintain an action under this act is restricted to the cases named in the act, and, except in the case of common carriers, is for the wrongful act, negligence, and unskillfulness of the individual himself, and not for that of his agent or servant. It may also be observed that in some of the states the act differs from that of Texas, and gives to the representative of the deceased the same remedy which the deceased party would have had if the injury had not resulted in death; but such is not the statute we are considering, and to give it that effect would be to go beyond its terms.

The negligence here complained of, which resulted in the death of

Marlow, was the negligence of the deputy marshal, Johnson, in the performance of his official duty; and it may be a question whether the deputy, Johnson, was acting in the line of his official duty at all, so that the marshal can be held to be responsible as claimed here. But, aside from that, can the statute in question be construed to include a cause for alleged official negligence, such as is made in the plaintiffs' petition? It is said the complaint is not only of the negligence of the deputy marshal, Johnson, but that negligence is charged also upon the marshal himself, although he was not there at the time of the death of the prisoner, Marlow, and was not an actual participant in the violence resulting in the death. But it is charged in a somewhat elaborate statement of the facts and conditions leading up to the violent attack upon the prisoners in charge of the deputy marshal, Johnson, that the marshal knew, or will be held to have known, the condition of the public mind at the time; the danger of mob violence to which his prisoners were exposed; and that his deputy, Johnson, was a very unfit man for the execution of the duty with which he was charged; in fact, that he was in sympathy with the mob, and unfaithful to his trust. Concede that,—and it is stated strongly and fully,—and yet can it be held that this action here is maintainable against the marshal, upon his official bond, because his deputy betrayed his trust, or because the marshal was at fault, and did not use good judgment in the selection of his deputy to perform this duty? If an action is given on account of such wrongful conduct, negligence, or whatever it may be called, on the part of a United States marshal, then why not carry the principle further, and hold the appointing power of the marshal, if he—the marshal—be an improper man for the discharge of the important and delicate duties intrusted to him, responsible for making an improper selection for the discharge of such duties, where negligence in their performance results in the death of a party. The principle contended for is wrong in the application which is sought to be made of it, and the statute cannot fairly be held to mean more than that an action is given and may be maintained against persons for their own wrongful acts and negligences which are the immediate cause of the death of a party, and not the constructive, indirect, and remote cause.

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FARMER v. NATIONAL LIFE ASS'N OF HARTFORD, CONN.

(*Circuit Court, E. D. New York. May 10, 1892.*)

1. FOREIGN INSURANCE COMPANIES—SERVICE ON STATE SUPERINTENDENT—WAIVER.

The appointment of the state superintendent of insurance as the attorney of a nonresident insurance company for the purpose of receiving service of process, as required by Laws N. Y. 1884, c. 846, § 1, does not authorize him to accept service by mail, and such service is void.

2. SAME—GENERAL APPEARANCE—REMOVAL OF CAUSES.

The filing of a petition and bond for the removal of a cause from a state to a federal court, and the proceedings thereon, do not constitute such a general appearance as will prevent the federal court from setting aside the service as illegal and void.

**At Law.** On motion to set aside service of summons. **Granted.**

A summons was issued in a suit in the New York supreme court in Kings county by Thomas Farmer against the National Life Association of Hartford, Conn., a Connecticut life insurance company. The summons was mailed on December 1, 1891, in an envelope directed to the superintendent of the insurance department of the state of New York. The paper was delivered at the office of the superintendent of the insurance department, December 2, 1891. He telegraphed to the plaintiff's attorneys that he required a fee of two dollars before he acknowledged the service of the paper. Thereupon the plaintiff's attorneys sent him the fee of two dollars as requested by him. In return, the superintendent of the insurance department sent the plaintiff's attorneys the following paper.

"INSURANCE DEPARTMENT, ALBANY, December 3, 1891.

"*Messrs. Judge and Durack, No. 373 Fulton Street, Brooklyn, N. Y.*—  
SIR: I admit the service of process on me as attorney for the National Life Association of Hartford, Connecticut, made by you in behalf of Thomas Farmer of ———, pursuant to chapter 346, Laws of 1884. I have sent to said company by registered mail to-day a copy of the paper served on me, fee \$2, the receipt of which is hereby acknowledged.

"Your obedient servant,

"JAMES F. PIERCE, Superintendent."

Chapter 346, § 1, Laws N. Y. 1884, provides that—

"No fire, fire marine, life, or casualty insurance company or association organized or incorporated under the laws of any other state of the United States, or of any foreign government, shall, directly or indirectly, issue policies, take risks, or transact business in this state, until it has complied with the insurance laws, and having first appointed in writing the superintendent of the insurance department of this state to be the true and lawful attorney of such company in and for this state, upon whom all lawful process in any action or proceeding against the company may be served with the same effect as if the company or association existed in this state. A certificate of such appointment, duly certified and authenticated, shall be filed in the office of the superintendent of the insurance department, and copies certified by him shall be deemed sufficient evidence in regard thereto. Service upon such attorney shall thereafter be deemed a service upon the company or association."

The defendant had previously filed in the office of the superintendent of the insurance department a paper designating him as its attorney in the exact language of the statute. The defendant filed a petition and bond removing the case into the circuit court of the United States for the eastern district of New York; and thereupon its attorney, appearing specially for the purpose of the motion, obtained an order to show cause why the service of the summons should not be set aside. The affidavit upon which the order was granted stated the facts above set forth.

*Roger Foster*, for the motion.

The filing of a petition for the removal of a cause from a state to a federal court, and the proceedings upon such a petition, are not the equivalent of a general appearance; and, after such a removal, the defendant may move to set aside the service of process upon the ground of a defect or irregularity in



the process or in the service of the same. *Parrott v. Insurance Co.*, 5 Fed. Rep. 391; *Atchison v. Morris*, 11 Fed. Rep. 582; *Small v. Montgomery*, 17 Fed. Rep. 865; *Miner v. Markham*, 28 Fed. Rep. 387; *Perkins v. Hendryx*, 40 Fed. Rep. 657; *Golden v. Morning News of New Haven*, 42 Fed. Rep. 112; *Water Co. v. Baskin*, 43 Fed. Rep. 323; *Claus v. Iron Co.*, 44 Fed. Rep. 31; *Reifsnider v. Publishing Co.*, 45 Fed. Rep. 433; *Bentlif v. Corporation*, 44 Fed. Rep. 667; *Estes v. Insurance Co.*, (N. Y. Com. Pl. trial term, Nov. 17, 1882, BEACH, J.,) Daily Reg. See, also, *Freidlander v. Pollock*, 5 Cold. 490; *Forrest v. Railway Co.*, 47 Fed. Rep. 1.

The service by mail was insufficient. The Code of Civil Procedure requires "the delivery of a copy" upon the person to be served. See sections 431, 432. The statute requires that service be made upon the superintendent of the insurance department in the same manner. In *Oland v. Insurance Co.*, (Md. June 13, 1888,) 14 Atl. Rep. 669, the Maryland insurance act of 1873 required service on the agent designated for that purpose. It was held that personal service upon a local agent, together with the mailing of a copy to the agent designated, was not sufficient service.

The superintendent of the insurance department had no power to waive an irregularity in the service, or to give any admission of service. If he has this power, he might date back his admission so as to put the defendant in default, or waive the statute of limitations. It could never have been the intention of the legislature to thus empower him to prejudice the rights of a corporate litigant. If, under the statute, the superintendent of the insurance department has the right to waive any defect in the service of the process, or any of the requirements of the statute, he has the right to waive them all. There can be no resting place between the two horns of this dilemma. If he has the right to waive a defect arising from the omission of the plaintiff to deliver a copy of the summons to him personally, he has a right to waive the omission of the plaintiff to furnish him with any copy of the summons at all, and may thus, without any notice to the insurance company, render it liable to a judgment by default against it in ignorance of its rights, or compel it, in order to avoid such judgment by default, to serve a general appearance, which may prejudice its rights to avail itself of the statute of limitations or otherwise, and waive any irremediable defects in the service or in the summons itself. This opportunity for collusion on the part of the public officer with the plaintiff, a citizen of his own state, who may have had important political influence in securing his appointment, it could never have been the intention of the statute to bestow, nor could it have been the intention of the defendant by its designation to grant. Had the legislature attempted to give him such power the statute would be unconstitutional and void, as taking away defendant's property without due process of law. A private power of attorney, such as was given by the defendant in pursuance of the statute, would not authorize such an admission or waiver. A power of attorney is always strictly construed, and even general words are limited by the special language which precedes them. *Craighead v. Peterson*, 72 N. Y. 279; *Rossiter v. Rossiter*, 8 Wend. 491; *Danby v. Coutts*, 29 Ch. Div. 500; *Hodge v. Combs*, 1 Black, 192; *Whitly v. Barker*, 1 Root, 406. "Writ of error against the judgment of the county court in a certain cause in which Col. Cleaveland was attorney to said Barker, who lived in this state. Cleaveland indorsed upon the writ of error, as attorney to Barker, that he acknowledged said writ had been duly served, without any special authority from Barker to do it. Barker pleaded in abatement of the writ that it had never been served upon him as the law required. Plea in abatement adjudged sufficient. The party is not concluded by the indorsement of the attorney in such case, without special authority." *Millay v. Whitney*, 63 Me. 522. Authority to "get cargo bonded; will hold bondsmen harmless, and

come down, if necessary,"—does not authorize a receipt to sheriff in principal's name acknowledging attached property to be insured by defendant, and promising to deliver it to sheriff on demand. *Lagow v. Patterson*, 1 Blackf. 252. An authority to compromise all difference and disputes, and to execute and sign in principal's name any release, covenant, or conveyance of part of principal's estate, and to give and receive discharges, receipts, etc., does not authorize the agent to confess judgment in the name of the principal. *Moore v. Circuit Judge*, 55 Mich. 84, 20 N. W. Rep. 801. Authority given by a corporation to an agent to accept service "in actions on any liability or indebtedness incurred or contracted" by the corporation does not authorize his acceptance of service in garnishee proceedings. Statutory substitutes for personal service are always strictly construed. *Amy v. Watertown*, 130 U. S. 301, 9 Sup. Ct. Rep. 530; *Pollard v. Wegener*, 13 Wis. 569; *Wright v. Douglass*, 3 Barb. 555; *Coal Co. v. Sherman*, 8 Abb. Pr. 243, 245; *Cook v. Farren*, 34 Barb. 95. It has been held that the statute now before the court for construction must be strictly construed. *Richardson v. Insurance Co.*, (Sup.) 8 N. Y. Supp. 873. In *Read v. French*, 28 N. Y. 285, 295, it was held that an admission by a defendant of service of a summons and complaint on him, which did not state that the service "was personal" by the delivery of a copy to him, did not authorize the entry of judgment by default against him. *Coal Co. v. Sherman*, 8 Abb. Pr. 243, 245, per SUTHERLAND, J.: "Proof of service of the summons in the manner prescribed by the Code, substituted for such appearance, is necessary, without voluntary appearance, to give the court jurisdiction." In *Wright v. Douglass*, 3 Barb. 555, 574, it was held that personal service on the trustee of a foreign corporation must be made.

*James P. Judge*, opposed.

The superintendent of the insurance department is the head of a large business department of the state government located at Albany, N. Y. The purpose of the statute was to provide a place where all process in cases against foreign insurance companies could be served, and does not imply that the executive thereof should be personally, physically served, in whatever portion of the state or the United States or elsewhere such superintendent may be, when relief by a citizen of this state is sought by the commencement of an action, but clearly gives him the right to admit service of process on him as fully and completely as the defendant could itself. The superintendent, as attorney of the defendant corporation, had the right to admit service of process, and waive defects in the service of the same. In case this motion is granted, the defendant will claim that one year has elapsed since the maturity of the policy, and that consequently the action is barred by the limitation clause contained in the policy.

**BENEDICT**, District Judge. The motion must be granted.

BRUSH ELECTRIC CO. *et al.* v. ACCUMULATOR CO. *et al.*

(Circuit Court, D. New Jersey. March 16, 1892.)

## 1. PATENTS FOR INVENTIONS—PRELIMINARY INJUNCTION—EFFECT OF DECISIONS IN OTHER CIRCUITS.

Where letters patent have been twice sustained in another circuit a preliminary injunction against infringers will issue as a matter of course, and such injunction will not be denied because of *ex parte* affidavits of alleged new evidence in respect to anticipation, especially when it appears doubtful whether such evidence was not known to the defendants in such prior cases, and that the defendant corporation herein was closely allied with the corporations defendant in the prior litigation, and contributed to the expenses thereof, either directly or through its individual stockholders.

## 2. SAME—WHEN BOND REQUIRED.

Where, however, such injunction will seriously affect defendants' business, and it appears that an appeal has been taken from the decisions in the other cases, the court will require complainants to give bond to secure payment of damages in case the injunction is subsequently dissolved.

In Equity. Bill for infringement of patents. On motion for preliminary injunction. Granted.

R. N. Kenyon, W. C. Witter, and Charles E. Mitchell, for complainants.

F. H. Betts and H. G. Ward, for defendants.

GREEN, District Judge. After careful consideration of the matters presented by counsel upon the argument of this cause, I am constrained to grant the motion of the complainants for a preliminary injunction upon the terms hereafter stated. The letters patent which it is charged in the bill of complaint the defendants have infringed have been, as to all their claims now in controversy in this suit, twice sustained, after protracted and desperately fought contests, by the circuit court for the southern district of New York; and the reasons for the conclusion reached have been fully and clearly given by Judge COXE, who heard the argument of the causes, in very able and learned opinions. *Brush Electric Co. v. Julien Electric Co.*, 41 Fed. Rep. 679; *Brush Electric Co. v. Electrical Accumulator Co.*, 47 Fed. Rep. 48. The rule is well established that where, as the result of a contested controversy, letters patent have been sustained, preliminary injunctions will be granted against infringers as a matter of course by the court which has adjudged the letters patent valid, and as a matter of comity by the federal courts in other circuits. The defendants seek to avoid the operation of this rule in the case at bar by alleging that they have discovered new evidence since the litigation in the New York circuit, which will effectually destroy the validity of the letters patent which they are charged with violating. This evidence they set forth at length in *ex parte* affidavits. It relates to the alleged anticipating invention of an electric battery by a Dr. Blanchard, of Vermont, claimed to be in all respects similar to the invention of Brush, secured to him by the letters patent in controversy. This alleged invention, it is said, antedates the invention of Brush nearly 20 years. Whether it can properly be called "new" v.50F.no.10—53

evidence" is a question of serious import. It is not denied that, although the present defendants were not the defendants upon the record in the New York causes, they were nevertheless closely allied in interest with those defendants through the greater part of that litigation, and did, either as a corporate body, or through the individual stockholders in the present defendant corporation, contribute to the expenses of those suits, or one of them. It is also admitted that this "new evidence" was in some degree, and to some extent at least, known to those who were defending the New York cases before the close of that litigation, but for reasons considered satisfactory was not presented then to the consideration of the court. It is offered now in opposition to the motion for a preliminary injunction. These patents having been twice sustained as valid, I do not think it proper, or, indeed, necessary, to discuss upon the pending motion the probable effect of the alleged new evidence, or whether laches in its production will deprive the defendants of the right to offer it as a part of their defensive case, to be considered on final hearing, or whether they are not estopped from attacking in any way the validity of the letters patent by reason of their alleged privity with the defendants in the New York litigation. It is enough to say that, whatever may be the defendants' rights in the premises, or whatever may be the legal effect of this evidence, these questions must wait for settlement, under the circumstances, until the cause comes before the court on final hearing, and ought not now to be permitted to deprive the complainants of the fruits of the victory which they have gained.

It was stated upon the argument of this motion that an appeal had been duly taken from the decree of the circuit court in New York to the circuit court of appeals for the second circuit, and that such appeal would be speedily heard and determined. As the motion for the preliminary injunction is granted in the case at bar solely upon the ground of the adjudications in the circuit court in New York, if the circuit court of appeals should reverse the decree of the circuit court defendants may apply immediately for a dissolution of this injunction. As the preliminary injunction now granted will of necessity, seriously affect the operations and business of the defendants, and as there is a possibility that the appellate court in New York may reverse the decree of the circuit court sustaining the validity of these letters patent, it is equitable, in my judgment, that before the writ of injunction issue the complainants shall execute and file with the clerk of this court a bond in the penal sum of \$10,000, with sureties to be approved by the court, conditioned to pay to the defendants all such pecuniary damage as the defendants may sustain or suffer in their business or operations by reason of the granting of this writ if the same shall be dissolved for the cause stated, or for other good and sufficient causes.



## THE PROGRESO.

STREET *et al.* v. THE PROGRESO.WATERBURY v. STREET *et al.*

(Circuit Court of Appeals, Third Circuit. May 24, 1892.)

## 1. CHARTER PARTY—EXCEPTIONS—"RESTRAINTS OF PEOPLE"—QUARANTINE.

Quarantine regulations which interfere with the charter engagements of a vessel are fairly within the clause of a charter excepting liability for results caused by "restraints of princes, rulers, and people."

## 2. SAME—DETENTION BY QUARANTINE—DUTY OF VESSEL WHEN QUARANTINE ENDED.

A vessel, having by charter agreed to be at a certain port by the 1st of October, "restraints of princes, rulers, and people excepted," and having been prevented from going there during October by quarantine regulations at such port, was held bound to have been at the port on the 1st of November, when she knew the quarantine would be raised.

## 3. SAME—OPTION OF CANCELLATION—WHEN EXERCISED.

A charter provided that if the vessel should not arrive at Charleston, her loading port, on or before a certain day, charterers should have the option of canceling the charter, option to be declared when vessel was ready to load. The vessel being delayed, her agents called upon the charterers, while the vessel was at Boston, to declare whether they would load or not. Charterers declined to exercise their option, whereupon the ship canceled the charter. *Held*, that such demand by the ship was premature, that charterers were not bound to exercise their option until the vessel was at Charleston, and that the ship was liable for any damages caused charterers by her breach of the charter.

42 Fed. Rep. 229, affirmed.

Appeal from the District Court of the United States for the Eastern District of Pennsylvania.

In Admiralty. Libel by Thaddeus Street, Timothy Street, and Thaddeus Street, Jr., against James M. Waterbury, owner of the steamship Progreso. Decree below for libelants. Defendants appeal. Affirmed.

*J. Warren Coulston* and *Robert D. Benedict*, for appellants.

*J. Rodman Paul* and *N. Dubois Miller*, for appellees.

Before *ACHESON*, Circuit Judge, and *WALES* and *GREEN*, District Judges.

*GREEN*, District Judge. From the record in this cause, it appears that in the latter part of August, 1888, the appellant, James M. Waterbury, owner of the steamship Progreso, then on a voyage from Cuba to the United States, did, through his agents, Belloni & Co., of New York city, by a certain charter party, demise and let to freight his said steamship Progreso to the firm of Street Bros., of Charleston, the appellees. The charter party, after providing that the steamship should, with all convenient speed, sail and proceed under steam to Charleston, S. C., there to load from the charterers a full and complete cargo of cotton in bales, to be conveyed to Liverpool, contained also, *inter alia*, two clauses or provisions which are of importance in the determination of this litigation, and which read as follows:

"Should the steamer not arrive at her loading port, and be in all respects ready to load under the charter, on or before the first (1st) day of October,

1888, the charterers have the option of canceling the same, to be declared when vessel is ready to load. The customs and usages of the ports of loading and discharging to be observed, unless otherwise expressed." "The act of God, the queen's enemies, fire, epidemics, strike or lockout of stevedores' men, draymen, or press hands, stoppage or destruction of goods on railway or at press, restraint of princes or rulers or people, collision, any act, neglect, or default whatsoever of pilot, master, or crew, in the management or navigation of the ship, and all other damages and accidents of the seas, rivers, and steam navigation, throughout this whole charter party, being excepted."

From the evidence in the cause, it appears that the *Progreso*, having taken on board at Havana a full cargo of sugar, sailed thence direct for Philadelphia. Reaching the Delaware breakwater on September 3d, she was detained by the proper authorities for a few hours at quarantine, and subsequently, for several days, at the lazaretto below Philadelphia, finally arriving at the latter port on September 10th. On that same day, Belloni & Co., agents for the appellant, as stated, evidently having heard rumors of impending or existing quarantine regulations at Charleston, which possibly might interfere with the arrival of the *Progreso* at that port, wrote to Street Bros. to the effect that the ship would arrive at Charleston about the 20th of September with a clean bill of health, and asking if, under such circumstances, she would be in danger of detention at quarantine; expressly stating that they could not afford to send the ship to that port if she was to be quarantined. In reply to this communication, by a note under date of September 12th, Street Bros. notified Belloni & Co. that, after submitting their letter of the 10th September to the board of health, they were officially informed that the *Progreso* would not be permitted to come up to Charleston, because of the quarantine, until November 1st. Thereupon, Belloni & Co. ordered the ship to proceed to New York for repairs, and, declining to keep her idle until she could safely sail for Charleston, sought and obtained a cargo for an *ad interim* voyage from Norfolk, Va., to Bremen. She arrived at Bremen November 6, 1888. From Bremen she sailed to Hamburg; accepted there a return cargo to Boston, at which port she arrived December 19th. On December 20th, the day following, the *Progreso* being at Boston, Belloni & Co. made formal application to Street Bros. to exercise the option in the charter party reserved to them upon failure of the ship to arrive at Charleston on or before October 1st, by requesting a declaration from them whether they would load the ship if she then proceeded to Charleston, to which Street Bros. replied that they would insist upon and claim all their rights under the charter party. Belloni & Co. then finally declined to send the ship to that port, and Street Bros., conceiving themselves aggrieved by such action, filed their libel to enforce the recovery of such pecuniary damages as they claimed they had suffered thereby. Upon these facts the contention of the appellant is that by the very terms of the charter party the *Progreso* was not required to go to Charleston if restrained by "princes, rulers, and people," and that she was in fact so restrained, within the meaning of the charter party, by the enforced quarantine at that port; and, *secondly*, that if she was bound to go to Charleston, by the terms

of her contract, she fully complied therewith by the tender made immediately upon her arrival at Boston.

It may be taken as settled that "detention at quarantine" is fairly included in the scope of that clause in this charter party which has reference to the "restraints of princes, rulers, and people." Quarantine regulations and health laws, so called, although often affecting in their operation a direct and palpable regulation of commerce, are constantly made and prescribed by states, and even by local municipal corporations, and pass everywhere, unchallenged, as the result of a legitimate exercise of that police power which resides in sovereignty. Such regulations would be worthless unless the enforcement were sure; and such certainty of enforcement is attained by virtue of the power of the people, as exhibited and exercised through their governmental agents. It follows, then, that enforced obedience to lawfully-prescribed quarantine regulations is a "restraint" of natural liberty of action devised by and proceeding from the "people." The Progreso was therefore clearly entitled to the benefit of this exception as a valid excuse for her default in performance of those terms and conditions of her contract, which the quarantine regulations at Charleston deprived her of ability to perform. What, then, were those terms and conditions? With the performance of what part of her contract did this "restraint" so seriously interfere? By the charter party the ship had contracted to arrive at Charleston on October 1st. Doubtless, if her freedom of sailing had not been interfered with by the quarantine regulations of that port, she could readily have complied with her agreement. But the enforcement of these regulations made it simply impossible for her to arrive at that port at the date designated. Not until a month later, November 1st, would she be permitted to reach Charleston, as she had been notified. Not until then could she be ready to load. But on that day there would be, at least, no "restraint of people" to bar her movements, or cause further delay and detention. Quarantine regulations were then to be done away with. Then and after that time they were as if they never had been. The ship would be free to come and go at that port as she pleased. The plain and indeed only result, then, of these quarantine regulations, was to work a temporary retardation in and hindrance of the ship's movements. The "restraint" could be for a limited time only. It operated, it is true, to delay the arrival of the Progreso at Charleston until November, but then its force would be spent. For such delay, so caused, this clause in the charter party afforded ample excuse and protection to the ship. An unsurmountable barrier had been placed in her course to Charleston by the strong hand of the law. Until that barrier was removed, she was helpless to keep and perform that part of her contract which demanded her presence at the port of loading on October 1st. But, when the cause of her helplessness was removed, her ability to perform was restored to her. Nowhere in the record is anything alleged as excusing her nonperformance after that date. Under the admitted circumstances, her failure to arrive at Charleston on the date fixed for arrival is therefore wholly excusable. But no valid excuse existed or has

been suggested for her failure to arrive there after her way had been cleared of obstacles. With the raising of the quarantine came free ingress to the port. Her course on November 1st to the Charleston wharves was straight and free. Her contract was "to proceed to Charleston with all convenient speed;" that is, with all speed possible under the circumstances. It cannot be doubted that the Progreso could have been at Charleston by November 1st if she had made "all speed possible under the circumstances" to arrive there, as she was bound by her contract to do. A charter party is to be construed in consonance with well-established rules which obtain in the construction of contracts generally; and no canon of construction is more often resorted to than that the language used by the contracting parties must receive a reasonable construction, expressive of the intent of the parties, and tending to promote the object in view. Here it was the obvious intent of the parties to this charter party that the Progreso should proceed to Charleston within a reasonable time to take on a cargo of cotton to be conveyed to Liverpool. The transportation of the cotton was the object to be attained. Whether that transportation commenced on October 1st or November 1st was not as material as that the cotton should be transported. This is evidenced by the fact that delay in arriving at the port of lading did not avoid the contract by its terms, but such avoidance for such cause lay solely in the discretion of the charterers. Delay might have been vexatious. If negligently caused by the ship, it was punishable; but mere delay, in itself, did not defeat or destroy the agreement. Such delay, unless it be so expressly stipulated in the writing, never defeats a contract, unless time be of its very essence, and then generally at the option, only, of the innocent party. Here it is clear that neither party regarded time as of the essence of the contract. As the learned judge who heard this cause in the court below tersely says in his opinion:

"So long as the circumstances remained substantially unchanged, the delay being no greater than might reasonably have been contemplated, the contract remained in force. The month which elapsed made no material change. The respondent was still engaged in carrying merchandise, and able to keep her engagement, and the libelants still had merchandise to carry. She bound herself to go to Charleston and carry it, if she could get there in reasonable time; a time which answered the purpose for which she contracted to go."

Her failure to report, therefore, within the reasonable time, to the charterers at the port of lading, being wholly without excuse, constituted a breach of the charter party, for which she must be held responsible.

Nor do we think that the offer to send the Progreso to Charleston, while she was in the port of Boston, in December, upon condition that the charterers would then signify their consent to load her, was in any way a compliance with the terms of the charter party. The demand then made by Belloni & Co. upon Street Bros. to exercise their option of accepting the ship after this delay in arriving at the port of lading was premature, and while appealing, possibly, to the courtesy of the charterers, could not have any legal effect upon the obligations of the ship yet to be performed. By the contract the option reserved to the charterers was

not to be exercised or declared until the Progreso had arrived at Charleston, and was ready to load. This reservation of option was a specific right secured to the charterers by their contract. The language creating such right is clear and unambiguous. The time and the place and the circumstances at and under which the right could be exercised were definitely fixed. The obligation of that contract was inviolable. It could neither be altered nor amended save by mutual consent of the parties interested. The demand made on behalf of the ship while she was lying in the port of Boston, upon the charterers, to declare, then and there, their option, was wholly unwarranted by the contract. To have yielded to such demand, and to have declared their option, would have been an assent by them to a material and substantial alteration of the contract in an important particular. They were clearly justified in refusing such assent, and in standing by the terms of the charter party. That charter party was still in force, and the only legitimate act for the ship was to proceed under it to Charleston, and tender herself, on arrival, ready to load. Nothing short of that would excuse. Nor do we think that any principle of equity can be cited which would justify the ship then in making such demand, under the admitted circumstances. Equity does not favor alteration of contracts fairly entered into. Parties are free to make their own bargains, and they are bound to stand by them when made. As was said by the learned judge of the district court when this cause was before him, "equity never relieves against terms of a contract sued upon, except for fraud, accident, or mistake." Neither appear to enter into the execution of this contract. It was voluntary in its inception, and wholly free from taint.

Some question has been made as to effect of the delay which occurred between November 1, 1888, when the ship should have been at Charleston, and December 19, 1888, when she arrived, in fact, at Boston, after her *ad interim* voyage, and tendered herself ready to proceed to the port of lading. Counsel for appellant strongly insist that for such delay the ship should not be chargeable in any way, as it was caused by the *ad interim* voyage. This matter is only important in connection with the assessment of the pecuniary damage which the libelants were justly entitled to by reason of the ship's default, and it is sufficient to say that we perceive no ground upon which to base any different conclusion from that arrived at in the court below. The ship was undoubtedly justified in seeking an *ad interim* voyage. But such voyage should have been undertaken only upon such conditions and to such places as would have enabled her to be at Charleston on November 1st. Voyages which prevented that were not justifiable, and delay caused by such voyages cannot be held excusable. We are satisfied, also, that the assessment of damages, made by the special commissioner to whom that matter was referred, is computed upon proper basis, and is just and correct. We find no error therein. The result is that the decree below is in all things affirmed.

## THE GLAMORGANSHIRE.

WIGGIN *et al.* v. THE GLAMORGANSHIRE.

(District Court, S. D. New York. May 16, 1898.)

## 1. SHIPPING—DAMAGE TO CARGO—STOWAGE—USAGE.

Goods liable to injure each other may be carried in the same ship, if it be the general usage to carry them together, provided all proper means are employed to prevent injury.

## 2. SAME—TEA AND CAMPHOR—INFERENCE OF NEGLIGENCE.

But where tea and camphor were carried on the same vessel, there being no general usage to carry the two together, but this vessel being especially fitted with an air-tight compartment for the camphor, in spite of which the tea was delivered impregnated with the fumes of camphor, it was held that the inference of want of care was irresistible, and that the ship was liable.

In Admiralty. Libel for damage to cargo. Decree for libelants.

*Evarts, Choate & Beaman*, for libelants.

*Wing, Shoudy & Putnam*, for claimants.

BROWN, District Judge. The evidence from Shanghai sufficiently establishes that the tea, when shipped, was in sound condition and free from camphor damage. This confirms the recital of the bill of lading that the tea was received "in good order and condition." The evidence also shows that all the tea consigned to the libelant was more or less damaged from the fumes of camphor, when delivered. The ship carried on board 400 tons of camphor, all in the aft compartment, separated by an iron bulkhead from the compartment next forward, in which, as well as in other parts of the ship, the tea was stowed. The defense is rested upon the alleged custom of bringing tea and camphor as parts of the same cargo, and on the claim that there was no lack of care on the part of the ship.

I cannot sustain the defense. The extreme susceptibility of tea to damage from the fumes of camphor has long been known. *The T. A. Goddard*, 12 Fed. Rep. 174. The value of tea in this market, however it may be in Europe, is greatly diminished by camphor infection.

Doubtless goods liable to injure each other may be carried in the same ship, if it be the general usage to carry them together, provided all proper means are employed to prevent injury. *Clark v. Barnwell*, 12 How. 280; *The Sabioncello*, 7 Ben. 357; *The Carrie Delap*, 1 Fed. Rep. 874. But no general usage is established to bring tea and camphor in the same vessel to this country. *Minis v. Nelson*, 43 Fed. Rep. 777; *Isaksson v. Williams*, 26 Fed. Rep. 642. Nor is there evidence of any custom anywhere to bring camphor in such a way as to impregnate with its fumes nearly a whole cargo of tea. The practice of sometimes bringing them together in the same vessel is of very recent date, and only in vessels specially designed and built to keep the camphor in air-tight compartments. When a large part of the cargo is found to be impregnated with camphor fumes on board a ship thus built, like the

Glamorganshire, the inference of some want of care is irresistible. *The Timor*, 46 Fed. Rep. 859.

Decree for the libelants, with costs.

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THE R. D. BIBBER.

KENEDY v. THE R. D. BIBBER.

(Circuit Court of Appeals, Fourth Circuit. May 25, 1892.)

No. 8.

**SHIPPING—DAMAGE TO CARGO—STRANDING—NEGLIGENCE.**

A schooner loaded with a cargo of rails, transported under a bill of lading which excepted liability from "dangers of the seas," arrived off the bar at Galveston harbor. Quicksands cause the depth of water on this bar to constantly vary, and it is not uncommon for vessels to ground in crossing. The master consulted with the local pilots and with his broker, and by their advice lightered 100 tons of his cargo. Being then assured that the vessel would cross in safety, he proceeded in charge of a pilot, but the vessel, from some unknown cause, went fast aground. That night a storm arose which lasted two days, and drove the vessel half a mile from the channel, and on some shoals. From these she was afterwards taken off by salvors. The cargo owner paid salvage on the cargo, and brought suit against the vessel to recover the same; alleging that the stranding was caused by the negligence of the master in not further lightering the schooner before attempting the bar. *Held*, that the grounding of the schooner was not due to the negligence of her master; that, even were it due to his negligence, still that was but a remote cause of the salvage service, the proximate cause, which alone the law regards, being the storm, and from damage caused by that her bill of lading protected the ship.

Appeal from the Circuit Court for the District of Maryland.

In Admiralty. Libel by Mifflin Kenedy against the schooner R. D. Bibber. Decree dismissing the libel. Libelant appeals. Affirmed.

*Brown & Brune, Treadwell Cleveland, Arthur George Brown, and William V. Rowe*, for appellant.

*Robert H. Smith*, for appellee.

Before BOND and GOFF, Circuit Judges, and HUGHES, District Judge.

HUGHES, District Judge. The schooner R. D. Bibber received in Philadelphia a cargo of 780 tons of steel rails, to be delivered in good condition at Galveston, Tex., subject to the usual exception of the "dangers of the seas." With this cargo she drew 13 feet 9 inches aft and 13 feet 6 inches forward. She reached the outer harbor of Galveston on the 17th of January, 1887, and came to anchor. On a voyage a few months before she had taken a cargo of 780 tons of rails to the same port, and, without lightering, had passed over the bar of that port, safely, into the wharf. On this second trip her master went ashore to the office of the pilots in Galveston, to inquire about the depth of water on the bar. Informed that this was 13 feet 6 inches on a tide, and having consulted his broker, he engaged a lighter, and went out with it to his vessel on the morning of the 18th, and took off 100 tons of rails; by doing which the draft of his vessel was reduced to 13 feet 3 inches aft and 13 feet forward, as indicated by the marks on her sternpost and stem. There-

upon he again went ashore, on the evening of the 18th, again to consult with the pilots whether still further to lighten his ship. The freight on the rails was \$3, the cost of lightering \$2, per ton. The pilots and his broker concurred in advising the master that, if his vessel were put in trim, he could safely cross the bar as she was then loaded. He returned next morning, and set his crew to putting the schooner in trim, completing the task at half past 1 on the 19th. A pilot he had engaged then came with a tug to conduct his vessel across the bar into port. This pilot had, during the morning, taken two other vessels across, one of them drawing 13 feet 3 inches and the other 13 feet 4 inches. The Galveston pilots keep one of their boats engaged every day with the lead, and a flag on that boat indicates the depth of water on the bar. On the 19th of January the depth indicated by this signal was 13 feet 6 inches from morning down to and including the time when the Bibber was in tow on that afternoon, making across the bar. When the pilot that had been engaged came to the Bibber, he asked about her draft, saying that it must not exceed 13 feet 5 inches. He was assured that it was not greater than 13 feet 4 inches. The schooner's hawser was then taken by the pilot's tug, and they set out for port. Just at this time another schooner, in charge of another pilot, drawing 13 feet 6 inches, passed in, across the bar, without touching. About the time the Bibber had got inside the beacon, and near the red buoy which marks the channel over the bar from the outer harbor, she struck bottom. This was about 3 o'clock on the afternoon of the 19th. Vigorous efforts were made to pull her off, and were continued for an hour or two, without avail, and were finally abandoned about 5 o'clock. The master then went ashore to engage another tug and a lighter for the next morning, and remained overnight on shore, leaving the schooner aground on the bar. At the time the schooner had grounded the tide was "just on top high water;" that is to say, at dead high tide, at the stationary stage at which a vessel gets no lift from a current in either direction. During the night of the 19th, an eastern storm came on, which "blew very heavy." It continued from the night of the 19th to the morning of the 22d. It prevented a tug and a lighter from coming out to the schooner on the morning of the 20th, by which time the storm had carried this vessel half a mile from where she had grounded in the channel, to the knoll and shoals on Bolivar point, and into water of only about 6 feet depth. By the afternoon of the same day the sea had become very rough, and the crew of the schooner were brought off on a pilot boat sent out by salvors, except the second mate, who remained on board. On the 20th, after the schooner had been driven by the storm upon Bolivar shoals, as described, her master began negotiations for the services of salvors for vessel and cargo, which were not concluded until the 22d. Nevertheless, the salvage services had been commenced on the afternoon of the 20th, and were brought to a successful end on the 22d. All the cargo was saved, and also the schooner itself; the latter in a condition more or less damaged. The salvage contract was for 50 per cent. of the values saved. The salvage upon the vessel was paid without suit,



upon an agreed valuation. That upon the cargo was made the subject of a libel in admiralty in the United States district court for the eastern district of Texas, which decreed for the libelants. This decree was affirmed on appeal by the circuit court of the same district. The salvage thus determined, amounting, with costs, to about \$13,000, was paid by the owner of the cargo, who afterwards libeled the schooner in the district of Maryland, to obtain a reimbursement of the money paid on the salvage contract under the decrees mentioned. In this last suit the district court of Maryland decreed against the owner of the cargo, dismissing his libel, and he has brought the case here on appeal.

At Galveston it is a common occurrence for vessels crossing the bar to touch on the bottom, and sometimes to hang there for a greater or less time. The evidence shows as to touching that as many as 9 out of 10 the vessels crossing the bar touch and drag, but, as the bottom is a fine quicksand, no damage results. In that harbor the variation of tide is only about a foot, and there is generally but one tide in 24 hours. The mere grounding of a vessel on the bar is not in itself a very serious occurrence.

The evidence embodied in the record of this case is quite voluminous, and somewhat conflicting, but the leading facts are set out in the foregoing summary. The briefs filed by counsel on either side are devoted to the discussion of this evidence, exclusively with reference to the question whether the grounding of the schooner was owing to the negligence of the master or his pilot. The cause of the grounding is not proved by either party to the suit. It is wholly unknown, and remains now as it stood before any evidence was taken, a subject of mere conjecture; each of several witnesses having a surmise of his own, each different from the rest.

The complaint of libellant is that the salvage was caused by the master's negligence in not taking off more of the cargo in the outer harbor than he did. The rails were shipped to be delivered at Galveston. Crossing the bar below that port was necessarily in the minds of the shipper and carrier at the time of the shipment. As a matter between men of business, it could not have been understood that more of the cargo should be lightered than was necessary to reduce the draft to the depth of water on the bar, inasmuch as the cost of lightering was two thirds as much as the carrier was to receive per ton for the entire voyage. How much should be taken out was a question of reasonable care and prudence. Respondent maintains that this degree of care and prudence was exercised; proves the draft of his ship and that of the channel on the bar; and proves also that three other schooners, one of the same, and two of greater, draft than that of his vessel, crossed the bar about the time when the Bibber attempted it, without touching, thereby warranting the implication that the grounding was not because of excessive draft in this schooner. No proof of the cause of the grounding is made, the real cause being still unknown. In bringing his vessel into a strange port over a bar formed of treacherous quick-

sands, so uncertain in its condition that a pilot boat is stationed daily upon it, engaged in unceasing soundings with a lead, the master of this schooner acted upon the advice of local pilots, and others competent to give it; he himself concurring in their opinion, and exercising, not only reasonable, but extraordinary, care; being, as part owner of the ship, pecuniarily interested in what he was doing. The carrier of goods is bound to exercise the care which a prudent man exercises in his own affairs; that care and diligence which the case in which he is acting reasonably demands; and where, as in the case under consideration, it is a question whether the injury occurred by the negligence of the carrier or by the danger of the seas, then the principle laid down by Lord DENMAN in *Muddle v. Stride*, 9 Carr. & P. 380, cited by the supreme court in *Clark v. Barnwell*, 12 How. 280, applies; the principle, namely, that "if, on the whole, it is left in doubt what the cause of injury was, or if it can as well be attributable to the perils of the sea as to negligence, the plaintiff cannot recover." In the present case the court below, upon a careful review of the evidence, held that the grounding of the schooner was not from negligence; and we think that, under all the circumstances which attended that occurrence on the occasion under consideration, the accident was not due to negligence on the part of her master, but, on the contrary, was the result of dangers of navigation incident to that harbor, belonging in class to those "dangers of the seas" from which the bill of lading given in the case by the ship expressly exempted her. But, even if this conclusion were wrong, still it is a mistake to treat the grounding of the schooner as the cause which rendered necessary the services of salvors to her cargo. That was the remote, but not the approximate, cause of the salvage service. It is neither an unusual nor a necessarily perilous thing for a ship temporarily to ground in the channel on that bar. A little delay, an additional tug, and sometimes a lighter, are generally the only consequences of such an occurrence. Had no storm supervened, the schooner and her cargo would have been safely in port on the morning after the grounding. But, while lying aground in the channel, the storm came upon her, lifted her from her safe position, bore her off over shallows for half a mile, and cast her upon the shoals of Bolivar point. It was this work of the storm which brought the schooner and cargo to the necessity of availing of the services of salvors. And so if there had been the most palpable negligence on the part of the master of the schooner in grounding her on the bar in the channel, that fault would not have entitled the libelants to recover damages on a bill of lading exempting her from liability for "dangers of the seas." The grounding was the remote, the storm and its work the proximate, cause of the damages that were sustained, and the law looks at immediate, and not remote, causes in dealing with such cases,—*causa proxima, non remota spectatur*.

A leading case on this subject is that of *Railroad Co. v. Reeves*, 10 Wall. 176, in which the suit was for damages for the nondelivery and loss of tobacco which had been shipped by railroad from Salisbury for Memphis. In passing through Chattanooga there was a delay of two days

or more, when the cars on which the tobacco was were caught in a great freshet in the Tennessee river, and swept away, and the tobacco lost. The supreme court held that, "where there is a loss of which the proximate cause was the act of God or the public enemy, the common carrier is excused, though his own negligence or laches may have contributed as a remote cause." It held that the loss was from the freshet, and that, whether the delay at Chattanooga was negligent or not, the carrier was not liable. The court in its opinion cited *Denny v. Railroad Co.*, 13 Gray, 481, to same effect. In the case of *Scheffer v. Railroad Co.*, 105 U. S. 249, the supreme court held that the proximate cause of the injury sued for must be looked to, and not the antecedent one. The case went from the eastern district of Virginia, and was a suit by the personal representative of an intestate, who had been injured in the head in a railroad collision, caused by the gross negligence of a conductor. Eight months afterwards the injuries received brought on insanity, in a fit of which the lunatic killed himself. Here was a case in which the remote cause of the death was gross negligence on the part of the defendant railroad company, but the proximate cause an act of suicide. The court below sustained the demurrer of defendant to the declaration, reciting the facts, and the supreme court on appeal affirmed the judgment below. In the case at bar the storm was the proximate cause of the subjection of the schooner and cargo to salvage services, and the grounding, whether through negligence or not, the remote cause, and the vessel is not liable. The decree below is affirmed.

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### THE EMMA KATE ROSS.

#### THE EMMA KATE ROSS *et al.* v. MYERS EXCURSION & NAV. CO.

(Circuit Court of Appeals, Third Circuit. June 21, 1892.)

##### 1. COLLISION—DAMAGES FOR DETENTION.

An excursion steamer, colliding with a tug through the latter's fault, was so injured as to be delayed for repairs 21 days, during all but 1 of which she was under charter. Her owners hired another boat to fill her engagements during 8 of these days, at \$110 per day, and during the rest of the time substituted other vessels of their own. *Held*, that the proper measure of damages for the detention during the latter period was not the value of the charters, but the cost of the substitution, and, in the absence of evidence, the cost would be presumed to be the same as in the case of the vessel hired, namely, \$110 per day. 46 Fed. Rep. 872, modified.

##### 2. SAME.

In the absence of any suggestion that the hired vessel was not competent for the purpose, it was immaterial that the other substituted vessels were larger than it; nor could the recovery be affected by the fact that the substituted vessels would otherwise have been idle.

Appeal from the Circuit Court of the United States for the District of New Jersey.

In Admiralty. Libel by the Myers Excursion & Navigation Company, owners of the steamer Crystal Stream, against the Emma Kate Ross, (P. Sandford Ross and another, claimants,) for damages for collision. Decree for the libelants in the district court. 41 Fed. Rep. 826. On appeal to the circuit court, this decree was affirmed, and a decree there entered for \$5,801.99 and costs. See 46 Fed. Rep. 872, where a full statement of facts will be found. The circuit court found that the Emma Kate Ross was in fault; that the Crystal Stream was free from fault; that the measure of damages for her detention during repairs was the cost of a vessel hired to fill her charter engagements during a part of the time she was detained, plus the net value of her charters for the rest of the time, her place having been filled during the latter period by other boats belonging to the libelants. Claimants appeal. Modified and affirmed.

*Robert D. Benedict*, for appellants.

*Wing, Shoudy & Putnam*, (*Charles C. Burlingham*, of counsel,) for appellees.

Before DALLAS, BUTLER, and WALES, Judges.

BUTLER, Judge. The errors assigned may be grouped under four heads: *First*, the Emma Kate Ross was not in fault; *second*, the Crystal Stream was in fault; *third*, the award for repairs is excessive; *fourth*, the award for detention is wrong.

As respects the first, second and third, which involve matters of fact only, we agree with the circuit court, and need add nothing to what it has said on these subjects. As respects the fourth we think there is some cause for complaint. The vessel was detained 20 days,—for which she had charters. During 8 of them the libelants hired and substituted the Moran; for the remaining 12 they substituted another of their own. For the 8 days, the court awarded the cost of the Moran's hire,—\$110 per day,—and for the remaining 12, the amount of the disabled vessel's charters during that period. The true measure of loss from detention under the circumstances here shown, is the cost of substitution. When furnished a suitable vessel to take the place and do the work of the other, her owners are fully compensated, in this respect. The cost of such substitute accurately measures the market value of the other's services. The value of her charters may not; other considerations enter into this. Charters are the result largely of the business established by owners, and the energy and capacity displayed in prosecuting it. For this reason one of several similar vessels, belonging to different owners, plying between the same points, may secure twice as many cargoes as another; and yet the latter would carry them as satisfactorily, and command as good charter rates when employed. The market value of her services is consequently as great as that of the other. The cost of a proper substitute is therefore the measure of loss for detention, whenever its application is practicable. If a substitute cannot be obtained (as in ordinary cases of demurrage) it is, of course, inapplicable.

In the case before us, the court applied this measure for the period

during which the Moran was substituted,—awarding simply the cost of her hire. For the remaining 12 days, however, during which the libelants' own vessel was substituted, it awarded the net amount of charters,—thus in effect allowing for the latter substitute a much higher rate of compensation than was paid for the former. This we think is wrong,—the result probably of confining the defense, below, on this branch of the case, to a denial of any loss whatever. The libelants are entitled to the cost of a proper substitute for the whole period, and no more; and there is no just reason why they should receive a higher rate for their own substituted vessel than was paid for the other. The fact that a substitute was procured for part of the time at \$110 per day justifies an inference that this was the market value of the services, and that this vessel or another could have been obtained at that rate for the entire period. The Moran was chartered for 10 days, though substituted but for 8. It is of no importance that the libelant's own substituted vessel was larger. The Moran was large enough, there is no evidence, nor suggestion, that she was not fully competent for the service. Presumably the libelants substituted their own vessel because it was more advantageous to themselves than to hire another.

The libelants cite *The Cayuga*, 14 Wall. 270, and *The Favorita*, 18 Wall. 603, where the owners of injured vessels substituted others belonging to themselves, and were awarded the amount of the formers' charters. If these cases support the contention here, the libelants have done themselves injustice in not claiming this measure of compensation for the entire period of 20 days; for if it is applicable at all under the facts it is necessarily applicable to the whole period. The cases, however, do not support the position. The question was not before the court. The libelants there, as stated, substituted their own vessels throughout the period of detention. There was no hiring, or other evidence of the market value of substitutes. Under such circumstances the inference was probably justifiable that the market value of the vessels used was equal to the value of the others' charters. This seems to have been taken for granted. The subject was not considered or alluded to. The only question raised was whether the libelants were entitled to receive any compensation for the vessels substituted,—as they would otherwise have been idle. This question was decided against the respondents.

Notwithstanding the decision, the respondents here, again present the question, contending, for the same reason, that the libelants should receive nothing for the 12 days during which their own vessel was substituted. Whatever we might think of this question if it was open, we are bound by the decision. It is not, however, improper to say that we think the decision is right. The libelants were entitled to the market value of the services rendered by their substitutes,—regardless of the fact that they might otherwise have been idle. The vessels represented a large investment made in preparation for contingencies which might require their services. Why then should the respondents have their use without paying for it? As the court said in *The Cayuga*, 7 Blatchf. 390:

"There is neither justice nor equity in allowing a tortfeasor the benefit of this outlay, gratuitously. Conceding that a just allowance for the necessary cost of another vessel, hired at a fair value, to perform the services is necessary to indemnify the libelants, there is no ground for withholding such allowance when the libelants themselves furnish the substitute."

We do not see any force in the suggestion that the decision applies to ferryboats only, and that a distinction should be drawn between such vessels and those employed on excursions and other similar services, where substitution is practicable. We are unable to see any reason for such a distinction, and no suggestion of it is found in the cases. *The City of Peking*, 6 Marit. Law Cas., which the respondents cite, does not sustain them. The facts of that case are numerous and complicated, but the decision, so far as it relates to this subject, determines no more than that the libelant, who operates a line of steamers between Marseilles and Shanghai, in which the Sanghailan and the Melbourne were employed, the former being injured by collision at Hong Kong, where the latter (arriving directly after) was transferred to her place, and other vessels procured as substitutes for the Melbourne, was entitled to be reimbursed the cost of such substitution, instead of receiving demurrage based on an estimated value of the Sanghailan's services during the period of detention. As the Melbourne discharged all the services the Sanghailan would have performed if she had not been injured, it was held that compensation for the expenses which her owners incurred in supplying the Melbourne's place made them whole in this respect.

The decree must be modified as before indicated. The commissioner found the net amount of charters for the 12 days during which the libelants' own vessel was substituted, to be \$1,776.48. The hire of a substitute for this period at the rate paid for the Moran would be \$1,320. This sum deducted from the former leaves \$456.48; and the award for detention must be reduced to this extent, making the whole amount allowed on that account \$2,200.48. We add nothing to this sum for delay in payment. The circuit court added nothing, and under the circumstances we do not think justice requires it. The interest on bills paid for repairs must be increased—to cover the time which has elapsed since the decree of the circuit court was entered—\$228. With these modifications the decree is affirmed. Costs of the appeal to this court to be taxed by the clerk and equally borne by the parties.

## MERRILL v. FLOYD.

(Circuit Court of Appeals, First Circuit. June 30, 1892.)

No. 23.

**1. APPEAL—JURISDICTION—BILL OF EXCEPTIONS—WAIVER.**

A jury was waived, and the cause tried to the court, which made findings of fact, and returned a "verdict" thereon. Afterwards a motion "to set aside the verdict on the ground that there was no evidence to support the same" was denied. The court then allowed a bill of exceptions to the findings and rulings at the trial, on the grounds that there was no evidence to support the findings, and that, upon the findings, defendant was not liable. *Held*, that the question whether defendant had not waived his right to except to the sufficiency of the evidence to support the findings by failing to ask a ruling thereon before the court announced its conclusions did not affect the jurisdiction of the appellate court, but merely raised the question whether defendant was not limited to a review of the sufficiency of findings to support the judgment.

**2. SAME—DISMISSAL—BILL OF EXCEPTIONS—CERTIORARI.**

Where, on a writ of error to the circuit court of appeals, the question of the sufficiency of the evidence to support the findings of fact made by the court in lieu of a jury is raised, the fact that the bill of exceptions does not embody all the evidence is no ground for dismissing the appeal; the proper remedy is by *certiorari* for diminution of the record, under rule 18 of that court.

In Error to the Circuit Court of the United States for the District of Massachusetts.

Action by Byron B. Floyd against Ezra F. Merrill for fraudulent representations. Judgment for plaintiff. Defendant brings error. Heard on motion to dismiss the writ of error. Denied.

*William A. Macleod* and *Robert D. Trash*, for plaintiff in error.

*Benjamin F. Butler* and *T. Henry Pearce*, for defendant in error.

Before GRAY, Circuit Justice, and PUTNAM and NELSON, Circuit Judges.

GRAY, Circuit Justice. The original action was brought on September 6, 1889, by Floyd against Merrill, for fraudulent representations as to the condition of a corporation in which both parties owned shares, whereby the defendant induced the plaintiff to sell his shares to the defendant for much less than their value. The answer denied all the allegations of the declaration. On February 2, 1892, the counsel for both parties signed and filed a stipulation in writing in these words:

"It is agreed by counsel for plaintiff and defendant in the above-entitled case that the same be marked, 'Jury waived' tentatively."

The case was thereupon tried by ALDRICH, J., who, on March 10th, filed the following "findings of fact and verdict:"

"This was a trial before the court, the parties having waived a jury trial. Having heard and considered all the evidence submitted, and the arguments as well, I find that the defendant had peculiar knowledge of the condition of the corporation and its affairs and the value of the stock; that the plaintiff was comparatively ignorant of the situation, and the defendant knew this; that the defendant, having such knowledge, sought the plaintiff for the purpose of possessing himself of his interest in the corporation, and in the negotiations following studiously and artfully concealed material facts as to value, and artfully misrepresented the true condition, and, having deceived the plaintiff by such means, secured his stock for the sum of one thousand

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dollars, when in fact it was worth four thousand dollars. My verdict, therefore, is that the plaintiff recover the difference between the sum paid by the defendant and the value of the stock thus obtained, which is three thousand dollars, together with interest from date of writ."

On April 16, the judge denied a motion "to set aside the verdict on the ground that there is no evidence to support the same." The defendant thereupon tendered a bill of exceptions to the findings and rulings at the trial, upon the ground that there was no evidence to support the findings of fact, as well as upon the ground that upon those findings of fact the defendant was not liable; and this bill of exceptions was allowed and filed. On the same day, a motion by the plaintiff that "judgment be entered on the verdict in this cause *non obstante* the exceptions" was granted, and judgment was entered for the plaintiff for the sum of \$3,458 and costs. On April 26th the defendant sued out this writ of error. The defendant in error has now moved to dismiss the writ of error, because no exceptions were taken at the trial, but only to the denial of a motion for a new trial; because the record does not set out all the evidence introduced below; and because there is no appealable question of law or fact set forth in the record, upon which a writ of error could issue. It is quite clear that none of the grounds suggested will justify a dismissal of the writ of error, whatever effect they may have by way of limiting the argument on the merits. The exceptions taken below were not to the denial of the motion for a new trial, but to the previous conclusions of the court, and this upon two grounds,—that there was no evidence to support the findings of fact, and that the findings of fact would not support a judgment for the plaintiff. If there is any material omission in the record, the proper remedy is by motion for a *certiorari*, under rule 18 (47 Fed. Rep. viii.) of this court. When the case shall be argued on the merits, the attention of counsel may well be directed to the following questions: *First*. Whether a jury trial was duly waived, and, if not, whether any question is open but the sufficiency of the declaration to support the judgment. See Rev. St. §§ 649, 700; *Bond v. Dustin*, 112 U. S. 604, 5 Sup. Ct. Rep. 296; *Andes v. Slauson*, 130 U. S. 435, 9 Sup. Ct. Rep. 573; *Rogers v. U. S.*, 141 U. S. 548, 12 Sup. Ct. Rep. 91. *Second*. Whether, if a jury trial was duly waived, the defendant, not having requested the judge, before he announced his conclusions, to rule upon the sufficiency or effect of the evidence, could afterwards take the exception that there was no evidence to support the findings, or whether he must be limited to the question whether the facts found support the judgment. See *Norris v. Jackson*, 9 Wall. 125; *Boogher v. Insurance Co.*, 103 U. S. 90; *Land Imp. Co. v. Bradbury*, 132 U. S. 509, 515, 10 Sup. Ct. Rep. 177; *Hathaway v. Bank*, 134 U. S. 494, 10 Sup. Ct. Rep. 608; *The E. A. Packer*, 140 U. S. 360, 11 Sup. Ct. Rep. 794. But those questions, as well as all the grounds assigned for the motion to dismiss, affect only the determination of the merits of the case, and have no tendency to show that this court has no jurisdiction to make that determination. Motion to dismiss the writ of error denied.



SINCLAIR v. PIERCE *et al.*

(Circuit Court, D. Massachusetts. May 5, 1892.)

No. 2,983.

## 1. REMOVAL OF CAUSES—AUTHORITY OF STATE AND FEDERAL COURTS.

Questions of fact arising on a petition for removal are for the federal court alone, and the state court has no jurisdiction to determine them. *Railroad Co. v. Daughtry*, 11 Sup. Ct. Rep. 806, 188 U. S. 298, followed.

## 2. SAME—INJUNCTION TO STATE COURT—JURISDICTION.

It seems from *French v. Hay*, 23 Wall. 250, that a federal circuit court has jurisdiction of a bill to enjoin the prosecution of a case in a state court, on the ground that it has been removed to the federal court.

## 3. SAME.

An action for damages was brought in a state court against an army officer and two other persons for wrongfully arresting and detaining an alleged deserter. The other defendants were defaulted, and the officer filed a petition and bond for removal on the ground that the case arose under the laws of the United States. The state court held the petition insufficient, and was about to proceed with the trial, when the officer applied to the federal court to enjoin further proceedings. *Held* that, as the right of removal by the single defendant after default of his codefendants was extremely doubtful, (*Putnam v. Ingraham*, 114 U. S. 57, 5 Sup. Ct. Rep. 746; *Haz v. Caspar*, 81 Fed. Rep. 499,) and as the question presented was only one of the inconvenience and expense of double litigation, the injunction should be denied without prejudice to a renewal of the application, in the expectation that, on proper representations, the state court would stay proceedings until a decision could be had on a motion to remand.

**In Equity.** On application for an injunction restraining the prosecution of a suit in a state court. Refused.

An action of tort for an assault and false imprisonment at common law was commenced by writ dated the 5th day of November, A. D. 1891, and issued from the superior court in and for the county of Middlesex in the commonwealth of Massachusetts, in which writ one of the respondents, Charles M. Pierce, of Lowell, in said Massachusetts, is plaintiff, and the other respondent, Jerome F. Manning, is counsel for said Pierce, and George F. Peck and William S. Sampson, both of said Massachusetts, and the complainant, William Sinclair, of the state of Ohio, who is in the military service of the United States, and stationed as commander at Ft. Warren, in Boston harbor, and within the jurisdiction of this court, are defendants. The *ad damnum* of the writ is \$25,000. The allegations of the plaintiff in the state court are that he was arrested as a deserter by said Peck, and taken to Ft. Warren, where he was imprisoned by said Sinclair for 20 days, at the end of which time, not being found to be a deserter, he was discharged; to all of which the said Peck and Sinclair were incited by said Sampson. The defendants Peck and Sampson were defaulted. The defendant Sinclair alone duly filed in the state court a petition for the removal of the case to the circuit court, on the ground that his duties as commander of the fort, the orders of the secretary of state, the United States statutes, and the army regulations compelled him to do whatever acts he had done, and that the suit is of a civil nature, and arises under the constitution of the United States. The necessary bond had been duly filed in the state court, and a transcript of the record duly filed with the clerk of the circuit court. The judge of the state court did not deem the petition for removal sufficient, and refused

to grant or recognize it; and the case was on the eve of trial when this bill was brought. The complainant says in his bill that upon the filing of the aforesaid petition in the state court and the other preliminary papers the jurisdiction of the state court thereupon ceased, and the jurisdiction of the circuit court attached in accordance with the act of congress, chapter 866 of the Acts of 1888, (25 St. at Large, 433.) A restraining order was immediately issued, and a summons to show cause why a temporary injunction should not issue and a subpoena to answer to the bill were served upon the respondents. The respondents filed a motion to dissolve the restraining order. On May 3, 1892, a hearing was had before PUTNAM, J., upon the request for a temporary injunction, and upon the motion to dissolve the restraining order.

*Frank D. Allen*, Dist. Atty., and *J. M. Marshall*, Asst. Dist. Atty., for complainant.

*Jerome F. Manning*, for respondents.

PUTNAM, Circuit Judge. The jurisdiction to entertain this bill appears to be sustained by *French v. Hay*, 22 Wall. 250, as applied in *Railroad Co. v. Ford*, 35 Fed. Rep. 170. The jurisdiction is also recognized in *Wagner v. Drake*, 31 Fed. Rep. 849. The existing statutes of removal contain two important features, one of which did not before exist, and the other was not previously so emphasized as it now is. The state court has no jurisdiction to determine questions of fact arising on petitions for removal. The United States circuit court has final jurisdiction in relation thereto. *Railroad Co. v. Daughtry*, 138 U. S. 298, 11 Sup. Ct. Rep. 306. If a motion to remand is heard in a United States circuit court, and there allowed, the result is conclusive in all courts, and terminates the controversy as to the right or regularity of removal. *In re Coe*, 49 Fed. Rep. 481. The pending case sought to be removed presents a controversy especially appropriate for the federal courts, and it will probably reach them in some form at some stage. *Bock v. Perkins*, 139 U. S. 628, 11 Sup. Ct. Rep. 677. It is also evident the district attorney proceeded in good faith, and in accordance with his official duty, in asking a removal. Under these circumstances, it can hardly be doubted that, if the attention of the state court is carefully brought to the foregoing considerations, it will stay proceedings until the plaintiff in the state court has used reasonable efforts to secure a decision of the United States circuit court on a motion to remand. Certainly it must be presumed that a single judge of the state courts is as capable as a single judge of the United States courts of weighing the great inconvenience and unnecessary expense of double litigation when it can be avoided. Therefore, as, in this instance, the right of a single defendant to remove is in great doubt, notwithstanding the other defendants have been defaulted, (*Putnam v. Ingraham*, 114 U. S. 57, 5 Sup. Ct. Rep. 746, and *Hax v. Caspar*, 31 Fed. Rep. 499,) and as the question presented to me is wholly one of inconvenience and not immoderate expense, whatever I might feel myself required to do if the right of removal seemed to me clear, or under more serious circumstances, I do not perceive that I am now justified in granting the injunc-

tion asked for. The petition for a temporary injunction is disallowed, without prejudice to a renewal of it under a new state of facts, and the restraining order is dissolved.

### BOUND v. SOUTH CAROLINA RY. CO. *et al.*

(Circuit Court, D. South Carolina. June 9, 1892.)

#### DUTIES OF TRUSTEES—GOOD FAITH—RAILROAD MORTGAGE.

Where the trustees in a railroad mortgage are empowered, under certain circumstances, to declare all the bonds secured thereby to be past due, they are bound to exercise this power with the utmost good faith, and only when approved by their honest, disinterested judgment, as the best thing for the interest of the bondholders.

#### 2. RAILROAD MORTGAGE—FORECLOSURE.

Where most of the lien holders of a railroad are urging a sale, and it appears that, in spite of the exercise of ability and great economy by a receiver during the past three years, no interest has been paid on any of the securities for a year, the property will be ordered sold, although the sale is opposed by one class of bondholders.

In Equity. Bill by Frederick W. Bound against the South Carolina Railway Company and others for the foreclosure of the second mortgage thereon. Decree of sale.

For former decisions rendered in the course of this litigation, see 43 Fed. Rep. 404, 46 Fed. Rep. 315, 47 Fed. Rep. 30, and 50 Fed. Rep. 312.

*Mitchell & Smith*, for complainant.

*Wheeler H. Peckham, Louis C. Ledyard, E. Ellory Anderson, I. W. Diloway, Smythe & Leo, S. Lord, T. W. Bacon, and Asher D. Cohen*, for defendants.

SIMONTON, District Judge. This bill is filed in behalf of second mortgage bondholders of the South Carolina Railway Company, praying foreclosure of that mortgage. The railroad property of the defendant was purchased at a sale ordered in this court, foreclosing a mortgage of the South Carolina Railroad Company. This property is now covered by several liens. The first is the lien of certain bonds of the Louisville, Cincinnati & Charleston Railroad Company, (afterwards called the "South Carolina Railroad Company,") created by statute. This lien is now represented by the claim of Henry Thomas Coghlan, which has been reduced to a decree, and at present, with interest, is about \$67,000. The next in rank is the lien of a mortgage of the South Carolina Railroad Company to Walker and others, trustees. Of the bonds secured by this lien there are outstanding, past due, \$253,825.31. Next comes the lien of the consolidated first mortgage of the South Carolina Railway Company securing bonds of the par value of \$5,000,000. The interest on all the bonds secured by these liens has been paid, except for the past year. The next lien is that of the second mortgage bonds of the South

Carolina Railway Company, to which class complainant belongs. Then come income bonds and the stock. No interest has been paid on the second mortgage bonds or the income bonds since July, 1888. The bill made the railway company, the trustees of the Walker mortgage, the trustees of the first consolidated mortgage, Barnes & Sloan, the trustees of the second mortgage, and the trustees of the income bonds, and also Henry Thomas Coghlan, defendants. Cross bills have been filed by Barnes & Sloan, trustees, by Walker *et al.*, trustees, and by Coghlan. Certain holders of first consolidated mortgage bonds, Smith and others, upon petition showing reason therefor, were permitted to come in and appear in behalf of themselves and certain other bondholders of the same class and of like mind as themselves, and they also have filed a cross bill. Barnes & Sloan, trustees of the first consolidated mortgage, after service of the bill filed in this cause, and before answering, exercised the power given them in their mortgage, and declared all the consolidated first mortgage bonds past due. They then filed their cross bill, praying foreclosure of their mortgage. The cross bill of Smith and others, bondholders, under this mortgage, antagonize the position of these trustees, aver that the act declaring the bonds past due was ill advised, in fact an improper exercise of the power uncalled for, operative only of injury to the *cestui que trust*, and void. They pray that the mortgage be not foreclosed. The cross bill of Walker and others, trustees, prays the foreclosure of their mortgage. Coghlan asks that a sale be had of all the mortgaged property to realize his debt. The income bondholders and the company concur in the prayer that the property be sold.

At the hearing the first question discussed was that between the trustees of the first consolidated mortgage and the bondholders, their *cestuis que trustent*, who arraign and antagonize their action in declaring the bonds past due, and seeking a foreclosure of the mortgage. This question was argued at length, and with great ability. There can be no doubt that, however large the discretion of trustees may be in the exercise and execution of their trusts, the court never loses its power to review the use of this discretion, and, if need be, to correct any abuse in its exercise. Perry, Trusts, § 511, and cases quoted. Compare *Michoud v. Girod*, 4 How. 554; *Wormley v. Wormley*, 8 Wheat. 441; *Oliver v. Piaatt*, 3 How. 400; *Markey v. Langley*, 92 U. S. 142; *Pray v. Belt*, 1 Pet. 670. A trustee, in dealing with his *cestui que trust*, or in the management of the trust estate, must always show *uberrima fides*. He must never lose sight of the fact that he is acting for another, who is the real beneficiary; and no thought or hope or purpose of personal advantage can have part in the motive for or in the result of his act. Perry, Trusts, § 427. If discretion be given to him by the instrument creating the trust, "this discretion may be likened to that of judges. It is not arbitrary discretion. It does not include the unrestrained power to do what the trustee pleases. To extend it that far is to make it a means of destroying the trust which it was intended to aid and maintain. The trustee, instead of doing merely what in his present circumstances he chooses to do in deference to his interests or inclinations, is to do that

which his honest, disinterested judgment approves, or ought to approve. He must not act under the impulse of fraud, collusion, or self-interest." Freeman's Note to *Read v. Patterson*, 6 Amer. St. Rep. 885, 14 Atl. Rep. 490. No actual fraud or collusion is charged. The objection to the action upon the part of the trustees is that it was dictated or controlled by self-interest. It is alleged that the trustees Barnes & Sloan used their discretion in disregard of the interest of the holders of first consolidated mortgage bonds, against their interest in fact, and in the interest of junior securities, of which Sloan was a large holder, and for whom Barnes was a trustee under the second mortgage, as well as a holder of bonds under this second mortgage. The inquiry is, were they biased by their interest? Neither of them owned a first consolidated mortgage bond, or any prior securities. Both of them were interested in junior securities. Upon notification of this suit by Bound they declared all of the first consolidated mortgage bonds past due. As the necessary result of this, the negotiability of the bonds and their value as an investment were at once destroyed. If the failure to pay coupons had depressed their market value, this action tended to depress them still more. In fact it made it the chief interest of every holder of such bonds to press foreclosure and sale of the railroad property, so as to realize their principal as soon as practicable. Those whose necessities prevented the ability to await this result had no other alternative than to sell upon a depressed market. Nor was this action on the part of the trustees essential to secure payment of the bonds in case of a sale of the road, or to compel a sale of the road, and so foreclosing the first mortgage. One coupon was past due. The aggregate was \$150,000. This would have sustained a cross bill for foreclosure of that mortgage. If such a bill was sustained, and a decree of foreclosure prepared, then the bonds could have been declared past due, or the court would have ordered the net proceeds of sale applied to them. The effect of the declaration was to make a foreclosure inevitable, and to prevent any examination or investigation into the causes of the apparent insolvency of the company. This insolvency may have been occasioned by bad and extravagant management. The correction of this may have saved the credit and solvency of the road. The action of the trustees shut out any practical result from any investigation. The trustees acted *suo motu*, without consulting a single first mortgage bondholder. On the other hand, the declaration was clearly to the interest of junior securities. It assisted materially the scheme of reorganization which had been suggested and was languishing, whereby the first mortgage bondholders were required to give up 1 per cent. of interest per annum,—take 5 per cent. instead of 6 per cent. bonds,—and thus lighten the load of the junior securities. There must have been other advantages to these junior securities, for all of them are here favoring this declaration. Yet Mr. Barnes, as trustee for the second mortgage, when asked to pursue the same course and exercise the same power with regard to the second mortgage bonds, refused to do so. It would thus appear that this act was without any advantage to the first mortgage, and may have been of advantage to the junior

securities. It is difficult to escape the conclusion that the trustees, owners, and guardians of junior securities, unconsciously it may be, were influenced by their own personal interest, and were blinded as to the interest of their *cestui que trust*.

In the view which we take of the case, the further discussion of this question is unnecessary. The prayer of the cross bill of Walker *et al.*, trustees, and that of Coghlan, are not resisted. They are entitled to their money. As the railroad property is a unit, and is valuable for this reason, it will not be advisable, were it possible, to sell a part of it to satisfy these claims. It is to the interest of all parties that if a sale be had it must be of the whole. If the sale be postponed, such postponement would be in the interest of the holders of a part of the first consolidated mortgage bonds, and against the wishes of the holders of all other securities and of the railway company. The experience of the past three years shows the exercise of great economy and ability by the receiver and his subordinates. With the exception of the current year, the business has been excellent. Yet all the earnings have been needed for the equipment of the road, and for keeping it in proper order and repair. The surplus has, from time to time, been applied to the interest on the oldest securities and the past-due coupons of the first consolidated mortgage. The interest on all these securities is in default one year. No interest whatever has been paid upon the junior securities. It is true that the money expended upon the road has made the whole property much more valuable, and to this extent all the securities are benefited. But primarily the senior securities enjoy the benefit of these expenditures. And it would be inequitable to deprive the junior securities of any advantage which might be derived from an enhanced price at a sale, and a recovery of a part at least of their principal. A postponement of the sale, therefore, may do no good to any but a class of the secured creditors, and may be a great injury to every other class. Where there are two classes of creditors before the court, one of which is safe at all events, and the safety of the other is doubtful, the latter class are entitled to the consideration and care of the court. All parties in interest are before us. A decree will be passed for the sale of all the property covered by the several liens and mortgages ascertained and mentioned, in which provision shall be made declaring all first consolidated mortgage bonds entitled to payment as if past due, which decree shall provide for a sufficient cash payment to meet the costs and expenses of the case, and to liquidate the obligations of the receiver which have been entered into with the sanction of the court.

BOND, Circuit Judge, concurs.

CENTRAL TRUST CO. OF NEW YORK v. WABASH, ST. L. & P.  
RY. CO. *et al.*

(Circuit Court E. D. Missouri, E. D. June 4, 1902.)

No. 2,857, 2,464.

1. BAILMENT—DUTY TO REPAIR.

The rule of the civil law that a bailor for hire is bound to keep the thing in repair is not recognized by the common law, and, in the absence of express contract, the question as to which party is bound to repair largely depends on custom and usage and the character of the article.

2. SAME—USE OF RAILWAY ROLLING STOCK—USAGE.

It is the usage in this country for all railroad companies receiving cars from other roads to make necessary repairs at their own expense, unless the car is inspected and branded as defective when received; and in view thereof a company which claims cars belonging to another road, and, pending a judicial determination of the title thereto, is by agreement permitted to retain and use them subject to a rental in case the decision is against it, cannot, after such decision, set off against the rental any claim for the cost of repairs.

3. PLEADING—AMENDMENT.

In a controversy between two railroad companies, their receivers and creditors, as to the rentals due for the use of certain rolling stock, defendant will not be permitted, after the filing of the master's report, to amend its answer so as to interpose a new set-off, when it appears that the same claim is the subject of a cross bill pending in another court, where the matter can be adjudicated on its merits.

In Equity. This controversy arose during the process of disintegration of the Wabash, St. Louis & Pacific Railway Company under the receivership as administered by Solon Humphreys and Thomas E. Tutt. The case is now heard on exceptions to the master's report on the intervening claim of the Omaha & St. Louis Railway Company to recover compensation for the use of certain rolling stock held and used by the receivers, but which was subsequently adjudged to belong to the intervenor. A full statement of the facts may be found in 42 Fed. Rep. 343, and 46 Fed. Rep. 156, the latter being a report of the opinion of Judge THAYER, overruling a demurrer to the intervening petition.

*Theodore Sheldon*, for intervenor.

*F. W. Lehman*, (*W. H. Blodgett*, of counsel,) for defendant.

THAYER, District Judge. The court is unable to concur in the view that the Wabash Company is entitled to a credit in the sum of \$40,607.37 for moneys said to have been expended by it in making repairs and in paying taxes and insurance on the intervenor's cars and engines while the same were in the possession of the receivers, Humphreys and Tutt, or in the possession of their successor in interest, to wit, the new Wabash Company. The true relation of the receivers and their successor in interest to the equipment in question was that of bailees for hire, and a bailee of that kind is clearly liable for all repairs to the article hired that were rendered necessary by his own neglect or want of ordinary care. In a case of this character, where the bailor sues to recover compensation for the use of the article hired, and the bailee interposes an offset for repairs made while in his possession, it is the latter's duty to show that the expenditures were justifiable, that they inured to the advantage of the owner, and were not rendered necessary by any fault or neglect on the part of the bailee. Schouler, Bailm. (2d Ed.) § 23, and cases cited. There is no proof in the present case that would authorize the

court to hold that the sum of \$40,607.37 was properly expended by the Wabash Company in repairing equipment of the intervener that had got out of order as the result of ordinary wear and tear, and without fault on the part of the bailee. — Even if it be conceded that the bailee would be equitably entitled to an allowance for expenditures in repairing such defects in equipment as were not due to the bailee's fault, yet there is no evidence in the case that would enable the court to say what portion of the total sum claimed as an offset was so expended, and is properly chargeable to the Omaha Company.

But the court is of the opinion that none of the offsets interposed by the Wabash Company can be allowed for another reason. By the civil law, the bailor for hire was generally bound to keep the thing in order, or in a state of repair suitable for use. No such absolute liability, however, is recognized by the common law. Whether the bailor or the bailee is bound at common law to pay the ordinary expenses incident to keeping the article hired in a state of repair while in the custody of the bailee, seems to depend largely on custom and usage and the character of the article, when the matter is not regulated by express contract between the parties. Schouler, Bailm. § 152; Story, Bailm. (9th Ed.) §§ 388, 389, 392. The evidence in the case at bar shows that all railroads in this country are in the habit of repairing cars received from other roads at their own expense if repairs are deemed necessary, unless the car is inspected and branded as defective when it is received. This practice has become so universal that it has been formulated as a rule by the Master Car Builders' Association, to which rule all of the leading railroad companies throughout the country have assented. (The letter written by the general agent of the receivers under date of March 1, 1886,<sup>1</sup> and the agreement entered into on May 29, 1889, between the gen-

<sup>1</sup>WABASH, ST. LOUIS & PAC. RAILWAY.

SOLON HUMPHREYS and THOMAS E. TUTT, Receivers.

JAMES F. HOW, Gen. Agent for the Receivers.

St. Louis, Mo., Mch. 1st, 1886.

GENTLEMEN: As a question exists as to whether the parties interested in the bonds on the C., B. & St. L. Ry. (Omaha division of the Wabash) have any title to any of the equipment now in the possession of the receivers of the W., St. L. & Pac. Ry., and, if so, as to how much of it, I think the best arrangement that could be made would be for us to furnish such as you need on that line, and for you to keep an accurate account of the amount the Wabash road would be entitled to for the use of it. This, on the basis of \$125 per month for locomotives, \$3.00 a day for passenger cars, \$1.50 a day for baggage cars and cabooses, where any such cars are definitely assigned to you, and on the basis of the usual mileage on freight cars and passenger cars when not regularly assigned to you; and that these reports are to be made to the receivers of this road monthly. It being understood that if, on the final adjudication of the question, which is to be brought without delay before the courts by the parties representing the bondholders of the C., B. & St. L. road, it is decided that they are not entitled to any, or only a portion, of the Wabash equipment which you have used, then you are to settle for any excess of such equipment as you may have used, on the basis of the reports above as agreed on.

Yours, truly,

JAMES F. HOW, Gen. Agt.

To Theodore Sheldon, Att'y U. S. Trust Co.

Thos. McKissock, Receiver C., B. & St. L. Ry.

P. S. It is understood that above agreement refers, as regards the quantity of equipment, only to the average amount used on the road for the past three months. If more than that is used, same is to be paid for promptly at the end of each month, at the rates stated above.



eral managers of the Omaha and Wabash Companies, were undoubtedly composed with a full knowledge of the existence of the rule or usage in question, and they should be interpreted—particularly the letter of March 1, 1886—in the light of that usage.) It admits of no doubt, I think, that when the letter was written, and the proposition it contained was accepted, it was the mutual understanding of both parties that the receiver of the Omaha Company should keep the cars and engines assigned to him in an ordinary state of repair at the expense of his trust, and that the receivers of the Wabash Company should do likewise with the equipment claimed by the Omaha Company which the Wabash receivers were to retain until the settlement of pending litigation. In short, the court holds that, considering the nature of the thing hired, and the usages which prevail among railroads, no obligation rests upon the Omaha Company to pay the bills for repairs which figure as an offset in this case, even though all of the expenditures were incurred in repairing the effects of ordinary wear and tear. It is suggested by the Wabash Company that the rental charged for equipment is excessive, considering the fact that the loan of the equipment in question was not a temporary loan, or an ordinary interchange of rolling stock, such as usually occurs among railroads. The answer is that the prices charged and allowed by the master, are such as the receivers of the Wabash Company themselves proposed in March, 1886, and the general managers approved on May 29, 1889.

Finally, the application made by the Wabash Company to amend its answer and to interpose a new and additional set-off to intervenor's claim, which was not presented to the master, must be denied, both for the reason that the application is made too late, and because the proposed set-off forms the subject-matter of a cross bill which was filed in 1886 against the intervenor's predecessor in interest in the United States circuit court for the southern district of Iowa. The cross bill appears to be still pending and undetermined, and the merits of the claim can as well be adjudicated in the court where it was first filed. The result is that the intervenor's exceptions Nos. 1 to 7 (both inclusive) will be sustained. Its eighth and ninth exceptions are overruled. Defendant's exceptions are also overruled. The order of allowance recommended by the master will be entered, but the amount of the allowance will be \$83,613.43, with interest, instead of \$43,006.06, as recommended.

POTTER v. BEAL *et al.*

(Circuit Court of Appeals, First Circuit. June 11, 1892.)

No. 20.

## 1. APPEALABLE ORDERS—FINALITY OF DECREE—HOW DETERMINED.

The question whether a decree is final and appealable is not determined by the name which the court below gives it, but is to be decided by the appellate court on a consideration of the essence of what is done by the decree.

## 2. APPEAL—REVIEW—MODIFICATION OF JUDGMENT—CIRCUIT COURT OF APPEALS.

On appeal from a final decree the circuit court of appeals has authority to go beyond a mere reversal, and enter such a decree as should have been rendered by the court below on the whole case, as shown by the record; and it is its duty to review all interlocutory proceedings, of every character, to which reasonable objection has been made and insisted upon.

## 3. APPEALABLE ORDER—INSPECTION OF PRIVATE PAPERS—FINAL DISPOSITION.

A national bank president, against whom an indictment was pending for violating the banking laws, brought a bill against the receiver of the bank to obtain possession of a trunk alleged to contain private papers. To this proceeding the United States district attorney was made a party defendant on his own petition, for the purpose of claiming the papers, in order that they might be laid before the grand jury. After hearing, a decree was made appointing a special master to make a private examination of the trunk, with directions to turn over to the complainant any papers belonging to him, and to the receiver such papers as belonged to the bank, and were not material to the prosecution against the president, and to reserve for further consideration such as concerned bank transactions, and were material to the prosecution. *Held* that, in so far as the decree directed papers to be turned over to the president and the receiver, it was final and appealable, since such papers might thus pass entirely beyond control of the other party claiming them.

## 4. EQUITY—PARTIES—PRODUCTION OF PAPERS.

It was improper to make the district attorney a party defendant for the purpose of procuring the papers to be laid before the grand jury. The proper course was for him to obtain a *subpoena duces tecum* from the court in which the investigation was pending, and then to make summary application to the court which had impounded the papers.

## 5. CONSTITUTIONAL LAW—UNREASONABLE SEARCH—INSPECTION OF PRIVATE PAPERS.

Under the circumstances, the order made by the court for an examination of the papers by a special master was in violation of the fundamental and constitutional rights of the litigants as to the method of trial.

## 6. SAME—METHOD OF EXAMINATION.

It appearing that before the bill was brought, the trunk had been opened by consent of the president of the bank and the receiver, and certain papers taken out in the presence of third persons, one of whom thereby obtained some knowledge of its contents, it was in the power of the court to ascertain by private examination the nature of the evidence thus to be had, and, if it proved *prima facie* admissible, to allow public testimony thereof to be given.

Appeal from the Circuit Court of the United States for the District of Massachusetts. Reversed.

In Equity. Bill by Asa P. Potter, president of the Maverick National Bank of Boston, against Thomas P. Beal, receiver thereof. Complainant alleges, in substance, that he deposited in the vaults of the bank certain personal and private papers, books, and documents, which were never the property of the bank, and that some of the papers were then in a trunk, to which he held the key; that the trunk was in the vault when the bank was closed by order of the comptroller, and that the receiver has since held it, and refused to pass it to the plaintiff; that the papers are personal in their nature, and necessary to a settlement of his private affairs; that he is charged with violations of the law, and that the government attorney is about to issue a summons calling the receiver before the grand jury with the papers in question; that he is

without adequate remedy at law, and therefore seeks the interposition of equity. The relief sought is (1) an order that the books, papers, and other documents be delivered to plaintiff; (2) that defendant Beal be enjoined from using the same before the grand jury; and (3) such other relief as may be just.

At a preliminary hearing Frank D. Allen, the United States district attorney, appeared on behalf of the government. At this hearing, which was merely on the evidence contained in the sworn bill, the prayer for a preliminary injunction was denied, and the receiver was directed to lodge the trunk with the clerk of the court, who was ordered to keep the same in its then condition until otherwise ordered. Afterwards the district attorney, on his own petition, and against plaintiff's objection, was made a party defendant, and filed a motion that the trunk be opened and delivered to the government and the grand jury, in order that all material evidence therein contained might be used in the investigation. The receiver thereafter filed his answer, alleging that the trunk came into his possession as a part of the assets of the bank; that he is advised and believes that it is his duty to examine its contents, and ascertain whether it contains property of the bank, or memoranda, books, papers, or accounts concerning its affairs. Whereupon plaintiff asked for a further hearing, that evidence might be introduced as to the nature of his possession. This hearing was had February 23, 1892, and plaintiff called one Work, a cashier, whose evidence tended to show that the trunk was kept in the bank, and not elsewhere, as the private trunk of Mr. Potter, but the witness had no knowledge of its contents; that Mr. Potter and one Kellogg, the clerk of the bank, and a secretary to Mr. Potter, and no other persons, had access to the trunk. Neither Mr. Potter nor Kellogg was called as a witness. It appeared also that the trunk, while in possession of the receiver, was opened several times by agreement, and there were taken out certain insurance policies on Mr. Potter's house, as well as certain deeds of Florida lands which one Hanson held in trust as security to certain notes held by the bank. At these times Mr. Edward W. Hutchins, counsel for the receiver, was present. He was called as witness by plaintiff, and on cross-examination stated that he then saw into the trunk, and obtained some knowledge of its contents. He was then asked to state what were some of its contents, but the question was objected to and ruled out, and he was allowed to make no statement of its contents, though he testified that on those occasions he, as well as the receiver, took part in the examination of the trunk without any objection, so far as he knew. After the conclusion of this hearing, on February 25, 1892, the court delivered an opinion, which is reported in 49 Fed. Rep. 793, and made the following order:

"With a view of ascertaining the rights of the parties to this bill in a manner not unreasonable and not in conflict with the provisions of the constitution, it is ordered that Hon. John Lowell, of Boston, be, and he hereby is, appointed master to examine the contents of the trunk referred to in said bill. That Mr. Howe, of counsel, pass the key to the clerk of this court,

and that the clerk open the trunk in the presence of the master and no other person; and that, after examination by the master, in the presence of no one, such papers, documents, and other things, if any, as are the property of the Maverick Bank, and are not material to the issue suggested in the motion of the district attorney in this matter, after being first shown to the plaintiff, be delivered to the defendant Beal by the clerk. *Second.* That such, if any, as are private, and are not the property of the Maverick Bank, together with such as do relate to Maverick Bank transactions, and are necessary and material to be introduced by Mr. Potter in his own behalf, be forthwith delivered to his counsel, Mr. Howe. *Third.* That such, if any, not included in the clauses above, as relate to Maverick Bank transactions, and in the judgment of the master are or may be material to the issue suggested in said motion of the district attorney and the proper presentment of the government's case, be sealed, returned to the trunk and the safe custody of the clerk, and that the clerk relock the trunk in the presence of the master, return the key to Mr. Howe, and hold the trunk and such contents until further directed. That the master, without further characterization, report whether or not he finds papers and documents within the classes named, and what disposition has been made thereof. The examination contemplated by this order is to be considered as part of the preliminary hearing, or, in other words, in aid thereof, and is designed to enable the parties to lay evidence before the court in a private and reasonable manner, the nature of the case being such that it would be unreasonable to ask or permit it to be done in a public manner. Upon report, the parties will be further heard as to the proper use and disposition of such, if any, papers and other things as are material to the government's case. The examination herein provided for is to be private, and no publicity whatever is to be given to it except such as is conveyed through the report of the master, of the character indicated. Before the examination contemplated by this order, the parties and their counsel may, in the presence of each other, or separately, if they so agree, make such explanation to the master as they desire as to the character of the papers, and until such examination and report, or until the foregoing order is vacated or modified, all parties are strictly enjoined from interfering in any way with the trunk or its contents."

From this order, plaintiff took the present appeal.

*Henry D. Hyde, M. F. Dickinson, Jr., and Elmer P. Howe*, for appellant.

*Edward W. Hutchins, Henry Wheeler, and Frank D. Allen*, for defendant Beal.

*Frank D. Allen*, U. S. Atty., *pro se*.

Before COLT and PUTNAM, Circuit Judges, and NELSON, District Judge.

PUTNAM, Circuit Judge. The order of the circuit court provides that, without proof, and without hearing the parties, except the explanation authorized by it, the master shall make a secret, private examination of the contents of the trunk in question in this case; not for informing the court or counsel, but for distribution. He is directed to divide the contents into three parts, delivering one to complainant, one to the original defendant, Beal, and returning the third into court for the purpose of further consideration. This so clearly violates the constitutional and fundamental rights of litigants as to the method of trial, that it is to be presumed the learned judge who entered the order had reason to understand it would be accepted by all interested as a matter of convenience; though to provide for all contingencies, he, both in his opin-

ion and by a special order, reserved the rights of all parties till they could be passed on by this court.

The first question which meets us is whether this appeal shall be regarded as from an injunction granted by an interlocutory order under the seventh section of the act establishing this court, or whether it is to be taken hold of as from a final decree. The record states that the order was preliminary; but, of course, this is not effectual, as it is for this court, and not for the circuit court, to determine that question in all cases, and the determination is to be governed by the essence of what is done, and not by the appellation given to it. If this is to be regarded as an appeal under the seventh section, there might yet be some matters concerning which this court could take jurisdiction, as, for instance, the fact that the injunction order holds the papers after they pass from the custody of the court; but it may be doubted whether we can be given jurisdiction by an injunction entered under color for that purpose, or by one purely nominal, concurrent with proceedings before a master, or the appointment of a receiver, or the impounding of papers or moneys pending litigation, if as effectual without the injunction as with it. The power of the circuit court to control proceedings before a master, or to make effective a receivership, or in impounding papers or moneys, is in the main ample, both theoretically and practically, without any injunction; and if, in such case, we should dissolve a superfluous injunction, we may be permitted to touch only the surface, and required to leave unaffected the substance of the order appealed from. As, however, the order in this suit places a part, and perhaps the whole, of the contents of this trunk absolutely beyond the control of the court, it seems to dispose of a part or the whole of the matter in controversy so effectually that we are forced to accept as a final decree so much as directs a distribution, notwithstanding the difficulty of determining, as between cases apparently analogous, on which side of the line this at bar properly falls, in accordance with the practice and principles of the supreme court. It seems to us the case is more akin to *Forgay v. Conrad*, 6 How. 201, *Thomson v. Dean*, 7 Wall. 342, *Railroad Co. v. Bradleys*, Id. 575, *Hill v. Railroad Co.*, 140 U. S. 52, 11 Sup. Ct. Rep. 690, and *Grant v. Railroad Co.*, 50 Fed. Rep. 795, than to *Pulliam v. Christian*, 6 How. 209, or *U. S. v. Girault*, 11 How. 22. In *Barnard v. Gibson*, 7 How. 650, *Forgay v. Conrad*, *supra*, was referred to, and distinguished from the ordinary cases with reference to the right of appeal from a decree for an injunction in patent causes before the master's accounts are taken. It was also cited with apparent approval in *Hill v. Railroad Co.*, *supra*. Inasmuch as in the case at bar the papers which may be delivered the complainant, or the original defendant, under the order appealed from, may go effectually beyond the control of the other party claiming them, or even be destroyed, before an appeal can be taken to this court from any decree which entirely disposes of the suit, the necessity of our taking jurisdiction is as apparent as it was in any of the cases cited, or in *Farmers' Loan & Trust Co., Petitioner*, 129 U. S. 206, 9 Sup. Ct. Rep. 265. Therefore we conclude to hold the appeal as one from a final decree, with reference to so much of

the order as directs distribution to the complainant and the defendant Beal of any part of the contents of the trunk.

We have no doubt that when this court properly takes jurisdiction on appeal from a final decree it has power to go beyond a mere reversal, and to enter such decree as should have been entered by the court below on the whole case as appearing in the record; nor have we any doubt that it is likewise its duty to review all the interlocutory proceedings of every character, using the term in the largest sense, with reference to which objections have been seasonably made and insisted on. Therefore we consider first the order of the court below making the attorney of the United States for the district of Massachusetts a party defendant. In accordance with the broad principles of *Florida v. Georgia*, 17 How. 478, we presume the United States would generally be allowed to intervene summarily, or by a supplemental information or bill, for protecting property rights involved in a pending suit in equity; but in this case the petition of the district attorney, asking to be made a party, does not state the grounds on which he bases it. It is gathered from the record at various points that his purpose is to reach for use in criminal proceedings certain papers said to be in the trunk in controversy. For such purpose we think the proper course was for him to obtain at the outset a *subpoena duces tecum* from the court where the criminal proceedings were pending, to be framed in accordance with the rules of criminal procedure, and thereafterwards to make summary application to the court which had impounded the papers covered by the subpoena. We are unable to see that, for any purpose connected with criminal proceedings, it was necessary or proper that the attorney of the United States be made a party to the pending bill, or that the law authorizes him to thus prejudice either the original parties to the suit or the United States. These suggestions, however, we will leave for further consideration in the event the necessity therefor arises, holding for the present that, in the absence of a subpoena or other alleged specific right, the attorney of the United States has no standing in this suit.

So far as shown by the record the title of the complainant to the trunk and its contents is clear, and no facts were proven which suggest the contrary, or which are sufficient to authorize the court to defeat at the outset his presumed purpose in bringing this bill, namely, to obtain the trunk and its contents free from public or private inspection, as is his right if the same are his property. We are unable, however, to enter on this account a decree for the complainant, by reason of the exclusion by the court below of the testimony of Edward W. Hutchins as to the nature of the papers which he had inspected. Whether or not this evidence, if admitted, would have overcome in any particular the facts now shown by the record, we, of course, have no method of determining. Nor can we determine whether the evidence should have been admitted; nor have we the jurisdiction to direct in detail what course the circuit court should pursue for the purpose of ascertaining whether or not it is admissible. It is enough for us to say that, as evidence was offered which, if admitted, might possibly have shown that the com-

plainant was not entitled to the entire contents of the trunk, and was rejected in such way that the record does not disclose the nature of the proposed proof, we are unable to enter a decree dismissing the bill; and to say also that the question of the admission of this evidence is to be determined primarily by the circuit court as all like matters are disposed of. It is for the judge of the circuit court to ascertain by private examination of the witnesses, or in such other way as the rules of law permit, whether or not the evidence is *prima facie* admissible; and if he is satisfied that it is, we know of no rule of law which debars the defendant of his right to prove facts relevant to the case by Mr. Hutchins, if the complainant has, either purposely or unguardedly, permitted Mr. Hutchins to so far inspect the contents of the trunk as to know what it contains in any part. In short, we know of no rule of law which, so far as concerns the admission of the testimony offered, differs from that applicable to causes in general; with reference to all which the court will always see to it that private transactions are not unnecessarily exposed to the public gaze, though it will not shrink from permitting them to go into the record when the necessities of justice require it. We do not hold that it is not, in proper cases, within the power of the chancellor to substitute in lieu of himself a suitable master or referee for the purpose of ascertaining *prima facie* whether or not testimony offered is entitled to be heard; but we do hold that, on the state of this record, without some proof beyond what is here disclosed, the court should not inspect, nor permit an inspection of, the contents of the trunk, either private or public, and thus perhaps defeat the very purpose of the bill. We draw a broad distinction between the right of the circuit court to pass on the admissibility of the testimony of Mr. Hutchins, offered and ruled out, and to determine this preliminary question privately, and its right, on the other hand, to order an inspection of the contents of the trunk, either private or public; and we limit this distinction to the case as shown, without undertaking to deny that there are possibilities that, under some circumstances, an inspection may become necessary for the ends of justice. An inspection, however, if ever ordered, should be only in cases of real necessity, when the other proofs make it clear that private rights cannot be determined without it; nor should it be made without positive evidence that there are papers of doubtful ownership, nor without some evidence of their identity and character. No inspection should be permitted, in suits of this character, merely because the defendant is unable to prove his case without it, nor because of mere doubts, suspicions, or suggestions, nor, as we repeat, except there is a clear emergency demanding it. It is true that in a limited sense the party who seeks the aid of equity to obtain possession of private papers submits himself to the court; and yet it is to be remembered that the main object of going into equity may be, not to obtain the papers themselves, but to secure the privacy to which the owner of them is entitled, and which he may not be able to protect except with the aid of the chancellor; and it is not permissible that the chancellor should defeat at the outset—unless under extreme circumstances—any portion of the relief

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which the complainant seeks, and which, perhaps, may be more effectually denied by permitting the privacy of his papers to be violated than by any refusal to give possession of them.

The rules laid down by us are in harmony with those applied to proceedings for production of private papers in suits in equity, or in proceedings at law under Rev. St. § 724; for either of which it is necessary to show, not only that specific papers exist and are in the possession of the party against whom the order is asked, but also that they are pertinent to the issue. The record in this case fails in all these particulars. The secrets of the party against whom an order of production may run are so well preserved by the law that he seems to be at liberty to seal up such portions as he is willing to make affidavit are privileged or irrelevant. The form of such affidavits appears in *Seton, Decrees*, (4th Ed.) 136, (10.) When the affidavit contains statements at variance with each other, or the documents, so far as made known, show a discrepancy, the practice seems to be that the court may get at the truth by compelling a discovery, and, if necessary for that purpose, may unseal the documents and examine them. It is said, however, that this exception to the general rule does not apply when the affidavit is merely suspected, or "even if open to every possible suspicion." *Bowes v. Fernie*, 3 Mylne & C. 632. Coming closer to the case at bar, it is said that interlocutory production and inspection will not be ordered on the motion of a plaintiff in equity, if in this way he would practically obtain the object of his bill. This was so ruled by Sir JOHN LEACH in *Lingen v. Simpson*, 6 Madd, 290. This case is explained in *Chichester v. Marquis of Donegal*, 4 Ch. App. 416-419, where it was said that the production would have enabled the plaintiff to have gotten a great portion of the custom of the defendant, and thus to have accomplished on an interlocutory order the main purpose of the suit. In the case at bar the bill alleges that the contents of the trunk are "private property," and "personal in their nature;" and the prayer is that the defendant may be enjoined from permitting the papers to be inspected, and that also, pending the prosecution of the suit, he may be enjoined "from showing them, or any of them, or allowing them, or any of them, to be inspected." Therefore to permit an inspection, as ordered by the circuit court, would perhaps defeat the purpose of the bill as effectually as the production asked and refused in *Lingen v. Simpson*, *supra*. These principles and cases relating to the ordinary practice concerning production of private papers are not brought in here as strictly applicable, but they illustrate the tenderness with which courts guard against unnecessary exposure.

The order admitting the attorney of the United States a party defendant is reversed, and his petition to be so admitted is dismissed, without costs, and without prejudice to any rights of him or the United States in any other proceeding. The order entered February 25, 1892, appointing a master, is reversed, and the case is remanded for further proceedings in accordance with this opinion, so far as it appertains. The complainant recovers the costs of this appeal against the original defendant, Beul.



## NEW YORK &amp; N. RY. CO. v. NEW YORK &amp; N. E. R. CO.

(Circuit Court, S. D. New York. May 31, 1892.)

**1. INTERSTATE COMMERCE — CARRIERS — CONNECTING LINES — "EQUAL FACILITIES" — PLEADING.**

Section 3 of the interstate commerce act, as amended by the Laws of 1889, provides (1) that every common carrier shall provide equal facilities for the interchange of traffic with connecting lines; and (2) that there shall be no discrimination in rates and charges between such lines. A petition, presented by a line affected, averred that petitioner was deprived by respondent of equal facilities with a competing connecting line for interchange of traffic, a discrimination in rates, the withdrawal of a joint through traffic, and a threat to close a through route via petitioner's line. *Held* a charge, not only of discrimination in rates, but of failure to provide equal facilities for interchange of traffic, and to bring before the commission the determination of both offenses.

**2. SAME — CHANGES OF SCHEDULE.**

Under the charge of a denial of "equal facilities" for the interchange of traffic the conduct of respondent in so arranging the running of its trains that greater facilities for interchanging, forwarding, and delivering freight were afforded to a competing connecting line than to petitioner, was proper to be shown to the court in a proceeding to enforce an order of the commission, though no question of the hours of running trains was presented to the commission in express terms.

**3. SAME — EFFECT OF CONTRACT FOR FACILITIES.**

The offending line, being a separate, independent company from the favored line, owning no stock therein, neither having built, bought, nor leased it, conducted its business, nor received its earnings, could not escape the inhibition of the statute by a mere contract for the interchange of traffic. The effect of such contract could not be to make the one line a mere extension of the other.

**4. SAME — EFFECT OF COMBINATION OF CARRIERS.**

Though the offending line and the favored line, being members of a "terminal company," a combination of carriers by which the terminus of the favored line was connected with New York, were a legal unit within section 1 of the act (24 St. at Large, p. 379) providing that it shall "apply to any common carrier or carriers engaged in the transportation of passengers or property wholly by railroad, \* \* \* when both are used under a common control \* \* \* for a continuous carriage or shipment from one state," etc., it was not thereby relieved from its obligations under the act to all roads connecting directly with itself, of which petitioner was one.

In Equity. Application by the New York & Northern Railway Company to compel obedience on the part of the New York & New England Railroad Company to an order of the interstate commerce commission in respect of discrimination against petitioner in affording freight facilities. Heard on motion to dismiss the petition. Motion denied.

*Sherman Evarts*, for complainant.

*Wager Swayne*, for defendant.

LACOMBE, Circuit Judge. This is an application on petition of the New York & Northern Railway Company, as a person interested, to enforce obedience to an order or requirement made May 6, 1891, by the interstate commerce commission, and is presented under section 16 of the interstate commerce act, as amended by chapter 382 of the Laws of 1889. Upon the return day of the order to show cause, heretofore granted, defendant filed its answer, and, before any proofs were taken, moved to dismiss the petition. Such a motion must be determined upon the assumption that the averments of the petition and the findings of fact of the commission (made by the statute *prima facie* evidence) cor-

rectly set forth the matters therein stated. It seems undesirable at this stage of the case to summarize generally the facts thus assumed to be true, as subsequent evidence taken in this court may modify such assumptions. The section invoked by the petitioner upon its application to the commission reads as follows:

"Sec. 3. That it shall be unlawful for any common carrier subject to the provisions of this act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever. Every common carrier subject to the provisions of this act shall, according to their respective powers, afford all reasonable, proper and equal facilities for the interchange of traffic between their respective lines, and for the receiving, forwarding, and delivery of passengers and property to and from their several lines, and those connecting therewith, and shall not discriminate in their rates and charges between such connecting lines. But this shall not be construed as requiring any such common carrier to give the use of its tracks or terminal facilities to another carrier engaged in like business."

Section 13 provides that any person (or) corporation complaining of anything done or omitted to be done by any common carrier, subject to the provisions of this act, in contravention of the provisions thereof, may apply to the commission by petition, which shall briefly state the facts. Under that section this petitioner applied to the commission, and, after taking proofs, obtained the order or requirement it is now seeking to enforce.

The respondent contends that the second clause of section 3, above quoted, enacts two different and independent subjects as grounds of complaint against carriers; the one being the denying reasonable, proper, and equal facilities for the physical interchange and prosecution of traffic between a company's line and connecting lines; the other being discrimination in respect to rates and charges between such connecting lines. A similar construction is adopted in the opinion of the commission, which holds that the provision "embraces the imposition of an affirmative duty to interchange and forward traffic between connecting lines, and a prohibition that there shall be no discrimination in rates and charges between such connecting lines." Respondent further contends that the charge and allegations before the commission dealt only with one of these subjects, and that, therefore, any order of the commission requiring the respondent to cease and desist from any violation which is embraced within the other subject would not be a "lawful" order; and apparently also insists that the judgment of the commission was in fact confined to discrimination in rates and charges. An examination of the record, however, does not support this contention. The petition which was presented to the commission charged that the respondent was depriving petitioner of reasonable, proper, and equal facilities (as compared with those afforded to the Housatonic Railroad, a competing connecting line) for the interchange of traffic between petitioner and respondent,

and for the receiving, forwarding, and delivering of property to and from the line of said petitioner and the line of the respondent. In support of such charge it averred, not only a discrimination in rates, and the withdrawal of a joint through tariff which had been theretofore in force and operative between the parties, but also that respondent had threatened to close the through route via petitioner's line altogether, and had refused to accept freight at all on through bills, thus compelling the shippers to attend at Brewsters,—the point of connection,—to transfer and rebill their goods. This was plainly a charge, not only of a discrimination in rates, but of a failure to discharge the affirmative duty to interchange and forward traffic with the equal facilities, required by the first subdivision of the second clause of the third section, above quoted. The petition prayed for an order directing the respondent to grant equal facilities for the interchange of traffic, and for the receiving, forwarding, and delivering of property to and from the line of petitioner and that of respondent, as were here afforded to the Housatonic Railroad. The commission found that there had been a refusal to afford facilities for the interchange of interstate traffic, and the receiving, forwarding, and delivering of the same, reasonable, proper, and equal to the facilities afforded to the other connecting road; that the respondent was "guilty of the discrimination charged in the complaint, in its rates and charges for the interchange of interstate traffic, and in the arrangements it makes for through lines for the freight traffic." And the order or requirement of the commission commanded the respondent to desist from discriminating against petitioner (1) by refusing to make such arrangements with, or afford such facilities to, the petitioner for the interchange, at the point of connection, of interstate traffic, and for the receiving, forwarding, and delivering of such traffic, as are reasonable and proper and equal to arrangements made or facilities afforded by it for interchange between respondent's line and the other connecting road; and also (2) from discriminating in respect to rates and charges, etc. The decision of the commission manifestly disposed of both subjects of complaint, and it seems, quite plain from the record that both subjects were before them.

Since the service of the order the respondent has restored the joint through tariff. It has also desisted from refusing to accept freight on through bills, but has so arranged the running of its trains that the facilities for interchange, forwarding, and delivering are (as is alleged) substantially no better than before, and not equal to those afforded to the competing line. The respondent contends, however, that such acts may not be shown before this court, acting summarily under section 16 in review and enforcement of the order of the commission, because no question of the hours of running trains was presented to the commission. It is manifest that equal facilities may be refused quite as much in one way as in the other, and both grounds of complaint relate to the subject-matter of physical interchange and prosecution of traffic, instead of to a discrimination in rates. To refuse altogether to receive traffic from one connecting line; to receive it only under arrangements which impose such obligations upon the shippers as to transfer and rebilling as would

make the transaction of the business impracticable in competition with a more favored line; to receive it without reshipment and transfer, indeed, but systematically to neglect to forward it; to receive and forward it, but to so arrange the hours or manner of its delivery as to deprive it of facilities equal to those afforded to traffic coming from the competitor,—these and a great variety of other devices which might be suggested, while differing somewhat in detail, are in substance practically the same. Any one of them, if satisfactorily proved, may justify the conclusion that a common carrier subject to the provisions of the act is deliberately refusing to “afford all reasonable, proper, and equal facilities for the interchange of traffic” with a connecting line, which the statute makes it his affirmative duty to afford. And there seems no good reason for holding that the order of the commission should not be as broad as the conclusion directing the carrier to “cease, desist, and thenceforth abstain” from refusing to afford such facilities, when such refusal was the offense charged and proved. To require petitioner to begin a new proceeding each time the ingenuity of the offending carrier may devise some slight variation of the methods by means of which such refusal is persisted in would be to fritter away the system of procedure provided in the statute to secure obedience to its requirements. It must be held, therefore, upon this motion, assuming the facts to be as stated, that the order made by the commission was no broader than the petition and proofs before them warranted; and that this court may properly investigate the charge that respondent is disobeying the requirements of such order by acts and omissions in substance the same as those considered by the commission, directed to the same end, and accomplishing precisely the same result.

The consideration of the next objection, viz., that the point where the respondent exchanges traffic with the petitioner is 16 miles from the point where it exchanges traffic with the competing road, and that it cannot be required to furnish equal facilities to all roads at different places, may be postponed till the proofs are closed. No doubt, as respondent contends, the question of the existence of discrimination and of an actionable refusal of equal facilities is to be ascertained by applying all the considerations of equity affecting the case, and should be found to exist only when such facilities can be afforded “under substantially similar circumstances and conditions,” but there is nothing in the act which makes mere distance between connecting points, whether a furlong, a mile, or ten, or twenty, controlling of that question. There is no suggestion here of affording new facilities at a new connecting point. So far as the record shows, the affording of equal facilities to both connecting roads at their several points of connection has been at all times entirely practicable, easy, and convenient, and the existing equality was destroyed by the defendant solely to divert the business of petitioner to a more favored road. In the face of the finding of the commission that “the physical condition for interchanging of traffic with both the connecting lines are suitable, adequate, and substantially equal,”—a finding which the form of this motion leaves unchallenged,—the requirements

of the second clause of the third section seem to be plainly applicable. Until this finding of fact is questioned, and the record upon which the case made in this court is to be finally determined is completed, further discussion of this point would be a waste of time.

It is further contended that there is no question here of equal facilities to two connecting lines; that what the petitioner is really asking is that the New England Company shall extend to petitioner's line the same facilities which it extends to its own line. The facts do not seem to warrant such a contention. The Housatonic Company is a separate corporation, independent from the New England Company. The latter, so far as appears, does not own even a share of the former's stock. It neither built, nor bought, nor leased it. It neither conducts its business, nor takes the earnings therefrom. The only link between them is such community of interest as springs from the existence of the contract for the interchange of traffic, which it is claimed secures the former road unequal facilities. If it be that such a contract makes each line a mere continuation or extension of the other, it is hard to conceive how a case of refusing equal facilities could ever be made out. The very granting of superior facilities to one line would make it a part of the one that favored it, and no longer a connecting road, when compared with its unsuccessful rival. Nor am I able to see that the mere ownership of half the stock of the terminal company, which connects the terminus of the Housatonic road with New York, alters the situation in any way, when the immediate question is as to the respective facilities accorded to the Housatonic Railroad and to the petitioner. Respondent cites the first section of the act, providing that it shall "apply to any common carrier or carriers engaged in the transportation of passengers or property wholly by railroad, or partly by railroad and partly by water, when both are used, under a common control, management, or arrangement for a continuous carriage or shipment from one state," etc., "to any other state," etc. That the respondent (considered by itself) is so engaged is not disputed. It runs through or into the states of Massachusetts, Rhode Island, Connecticut, and New York. It is no doubt true that the arrangements between respondent, the Housatonic road, and the terminal company are such that they form a combination of carriers, within the meaning and effect of section 1, so as to make them a legal unit within the provisions of the act, and, as such, jointly responsible for affording equal facilities in proper cases to competing lines connecting with such combined continuous line. But, besides the duty which any one of these corporations may owe, jointly with the others, it is not relieved from its obligations under the act to all roads which connect directly with itself. The New England Railroad might, perhaps, by reason of its combination with the other two, be charged with some duty towards lines connecting physically with the Housatonic Railroad, but such combination cannot excuse it from fulfilling its own obligations to roads which connect physically with itself, unless its union with the other combined lines is of such a character that their lines have become its own; and such a state of affairs does not seem to exist here. The

motion to dismiss the petition is therefore denied. Counsel may arrange for a trial of the issues immediately upon the adjournment of the present jury session.

### TREADWELL v. LENNIG.

(Circuit Court, E. D. Pennsylvania. April 25, 1892.)

**1. EQUITY—EVIDENCE—ANSWER UNDER OATH.**

Matter contained in an answer made under oath, when an oath thereto is waived in the bill, is not evidence for the respondent after replication and proofs, even when the respondent has died since the answer filed.

**2. SAME—BOOK OF ACCOUNTS.**

A book of accounts, referred to in the answer, but not offered in evidence, is not made evidence because the complainant called for it, and asked, when it was produced, some questions about it which brought out its contents.

**3. WITNESS—COMPETENCY—TRANSACTIONS WITH DECEDENTS—CROSS-EXAMINATION.**

Evidence elicited by cross-examination of complainant testifying on his own behalf in a suit against the representatives of a decedent, as to matters independent of the matters inquired about in direct examination, are competent as against respondent, and would not be affected by an objection to the competency of the witness.

In Equity. Bill for an account against Nicholas Lennig and John B. Lennig, executors of Charles Lennig, deceased.

*Demming & Logan and Charles M. Demond*, for appellant, cited, as to whether the book of accounts was made evidence by being called for by the respondent: *Carradine v. Hotchkiss*, 120 N. Y. 608, 24 N. E. Rep. 1020; *Smith v. Railway Co.*, (Sup.) 16 N. Y. Supp. 417; *Carr v. Gale*, 3 Woodb. & M. 59; *Austin v. Thompson*, 45 N. H. 113; *Withers v. Gillespy*, 7 Serg. & R. 10.

*Charles Hart and Angelo T. Freedley*, for respondent.

BUTLER, District Judge. The bill is for an account based on the following facts: On May 12, 1884, the complainant borrowed of Charles Lennig, now deceased, \$3,000, on his promissory note, and a transfer, as collateral, of 6,000 shares of the United Verd Copper Mining Company. The note was payable in six months from date, and contained the following provision:

"The holder of this note may sell the shares of stock at public or private sale at any time or times hereafter, without reference or notice to me, and with the right on the part of the holder of this obligation to become the purchaser at such sale or sales of the whole or any part of said collaterals, freed and discharged of any equity of redemption, and to transfer, assign, and deliver up the same."

When the note matured another was given in renewal for an additional period of six months. This last note matured June 2, 1885, and

<sup>1</sup> Reported by Mark Wilks Collet, Esq., of the Philadelphia bar.

was neither renewed nor paid. Mr. Lennig continued to hold the note and stock until December, 1888, when he sold the latter for \$6,000, being \$1 per share. The answer admits the foregoing facts substantially as stated in the bill; but avers that Mr. Lennig appropriated the stock to the payment of the note, on January 10, 1887, at a little over 50 cents per share, which he says was its full value at that time, and denies liability for any further credit.

The jurisdiction of the court is denied in the defendant's printed brief, but was admitted on the argument; and the subject need not, therefore, be considered.

In our view of the facts it is unnecessary to examine the question raised respecting Mr. Lennig's right to make the alleged appropriation. The burden of proving that he did make it is on the respondent; and he has not produced any evidence which tends, even, to prove it. The statement in the answer is not evidence—the respondent's oath having been waived. Neither is Mr. Lennig's book, or his statements to Mr. Jerome, evidence. His declarations cannot be used against the complainant. The book is not in evidence; the respondent did not offer it; and it could not have been received if he had. The fact involved is not susceptible of proof by book account. The circumstance that the complainant called for the book, referred to in the answer, and that when it was produced he asked some questions respecting it which brought out its contents, does not make the book or account evidence against him. Not only is there no evidence to support the alleged appropriation, but there is evidence to the contrary—evidence which seems to show pretty clearly that it was not made. The complainant's testimony, on examination by the respondent, if true, puts the question beyond doubt. The respondent thinks this testimony is inadmissible—that the witness was incompetent to give it. We do not agree with him. Without regard to the question whether he was competent to testify respecting the matters inquired about by his own counsel, and in his own behalf, he was fully competent to testify to any other independent matter about which the respondent might inquire. The objection noted when he was first called, if sustained, would remove from the case all he had said on his own behalf, in chief, and what he had said on cross-examination respecting this; but when the respondent passed beyond and inquired about other independent matters, respecting which his own counsel could not inquire, the answers were clearly competent. The respondent had the right thus to examine the witness; but he cannot get rid of the answers after obtaining them by such objection to his competency. He was competent to any extent when examined by the respondent. The fact that Mr. Lennig retained the note and did not inform the complainant of the alleged appropriation of the stock, is also entitled to much weight. It was his duty to return the note and give information, if he thus applied the stock and canceled the debt, and to do it promptly. But there is no evidence that he did either. It was not pretended that he returned the note. If he had informed the complainant of the cancellation of the debt, it seems more

than probable—virtually certain—that he would at the same time have returned the note, as his duty required. The bill must be sustained, and a decree may be prepared accordingly.

**MERCANTILE TRUST CO. v. KANAWHA & O. RY. CO. *et al.***

(Circuit Court, S. D. Ohio, E. D. June 8, 1892.)

No. 479.

**1. RECEIVER'S CERTIFICATE—LIEN—EXTINGUISHMENT.**

The lien of receiver's certificates continues as long as the order authorizing their issuance remains in force, though such order was made without notice to parties interested; and the fact that a reference is had to determine all claims against the receiver, and a report is confirmed which makes no allusion to the certificates, is not an adjudication against them, when it appears that they were not presented or considered, and that their holder had no notice of the reference.

**2. SAME.**

A receiver's certificates, which are ordered to be paid out of the income of the road from time to time, are in the nature of a call loan, and the holder has a right to presume that the receiver will notify him when the loan is to be called or the money paid.

**3. SAME—MISAPPROPRIATION BY RECEIVER.**

Where a purchaser of receiver's certificates has paid their par value to the receiver, without notice of any facts to put him upon inquiry, his lien is not affected by the fact that the receiver appropriates the money to his own use.

**4. SAME—SALE OF PROPERTY—CONTINUANCE OF LIEN.**

Receiver's certificates were issued in a railroad foreclosure suit, and thereafter the road was sold to a committee of the bondholders, to be paid for by a deposit of the bonds. The decree confirming the sale directed the conveyance to be made expressly subject to the payment of any sums in cash on account of the purchase price which the court might afterwards direct, and a vendor's lien to be served for security. These provisions were incorporated in the deed to the committee, and in their deed to a new corporation organized by the bondholders. *Held*, that the reservation had the force of a covenant running with the land, and, as no cash was paid in, the lien of the certificates was not transferred to the fund arising from the sale, but was continued on the property.

**5. SAME—ENFORCEMENT OF LIEN—JURISDICTION.**

Where receiver's certificates are issued by direction of a federal court in one state, and ancillary proceedings are had in a federal court of another state, into which the road extends, the latter court has jurisdiction to enforce the lien of the certificates, even in a separate suit and against a company which purchased the road after the sale in the original proceeding.

**In Equity.** Bill by the Mercantile Trust Company against the Kanawha & Ohio Railway Company for the foreclosure of a mortgage. Heard on the intervention of the Adams Express Company to enforce the prior lien of certain receiver's certificates. Decree for intervenor.

*Simpson, Thatcher & Barnum and Alexander & Green*, for complainant.  
*Ramsey, Maxwell & Ramsey*, for Adams Express Company.

**SAGE**, District Judge. This cause is before the court upon the intervening petition of the Adams Express Company and the proofs and exhibits offered by the parties. It is set up in the petition that in 1883 the Ohio Central Railroad Company was the owner and in possession of the railroad involved in this suit, the river division of which extends from the town of Corning, in the state of Ohio, to a point in the county



of Gallia, on the north side of the Ohio river, and thence, crossing the river by bridge, to the city of Charleston, W. Va., as mentioned and described in the bill of complaint herein, and had duly executed a mortgage thereon to the Central Trust Company of New York, to secure its bonds to the amount of \$5,316,000. On the 20th of November, 1883, the Central Trust Company filed its bill in equity to foreclose said mortgage in the circuit court of the United States for the district of West Virginia, and on the 21st of November, 1883, upon the application of the Central Trust Company, and with the consent of all parties, the court appointed Thomas R. Sharp receiver of said railroad, with power to operate and manage the same. He accepted the appointment, and entered upon the performance of the duties of the position. On the 13th of December, 1883, the court made an order authorizing the receiver to issue certificates to an amount not exceeding \$50,000, bearing interest at the rate of 6 per cent. per annum; the court finding that that amount would be required for the repairing of bridges and ditching and ballasting certain portions of the roadbed, and for certain other expenses of maintenance, repairing, and management. It was further ordered that the certificates should be a first and paramount lien on the property of the railroad company then in the possession of the receiver, and upon that which he might afterwards take into his possession. Said certificates were not to be negotiated at less than their face value, and it was further ordered that the receiver should pay them out of the revenues of the railroad company received by him from time to time.

On the 24th of March, 1884, the court entered a further order, authorizing the receiver to sell or negotiate certificates upon such terms and at such rates as he might deem proper, and might be able to obtain.

It is further set forth that the petitioner, on the faith of these orders, both of which remain in full force and are unreversed, and in consideration of receiver's certificates delivered to it by said Thomas R. Sharp, paid to him at various dates beginning April 16, 1884, and ending August 29, 1884, \$35,935.39, taking therefor certificates at par. A decree of foreclosure was subsequently entered under which the railroad was sold to a committee of the bondholders under said mortgage, who turned in their bonds in payment of all but a small portion of the purchase price, and thereupon organized the defendant corporation, the Kanawha & Ohio Railway Company, executed the mortgage sought to be foreclosed herein, and distributed the stock of said Kanawha & Ohio Railway Company, and the bonds secured by said mortgage, *pro rata* among the owners and holders of the bonds secured by said mortgage of the Ohio Central Railroad Company and said Central Trust Company; and that the stock and mortgage bonds of the Kanawha & Ohio Railway Company are still almost wholly, if not altogether, held by said original distributees.

The petitioner further sets forth that no provision was made in the proceedings in the United States circuit court for the district of West Virginia for the payment of the receiver's certificates issued to and held by petitioner, and that the same are wholly unpaid and due to petitioner

with interest; also that no notice was ever given to petitioner to present the same for payment. Wherefore petitioner prays that said certificates may be declared a first and paramount lien upon so much of said realty as is in the state of West Virginia, and that out of the proceeds thereof it may be first paid the amount of said certificates, with interest.

The following are by stipulation admitted to be facts:

(1) That on the faith of the orders of December 13, 1883, and March 24, 1884, mentioned in the intervening petition, and in consideration of receiver's certificates simultaneously delivered to it by said Sharp, the Adams Express Company paid to said Sharp, receiver, the sums stated upon the days stated in the intervening petition; the receiver's certificates being in form as shown therein.

(2) That none of the money so as aforesaid paid to said Sharp by the Adams Express Company was used for the purposes specified in said order of December 13, 1883, or for any other purposes of said receivership, or for the benefit of the property held therein or of the parties to said cause.

(3) That neither the purchasers, nor their grantee, nor the Kanawha & Ohio Railway Company, nor the complainant herein, knew of the existence of said certificates until September, 1887; and that the Adams Express Company never demanded of the Kanawha & Ohio Railway Company payment of said certificates, nor ever in any way, until the filing of its intervening petition herein, sought to enforce the alleged lien which it now asserts. Said certificates have never been paid, nor the money represented thereby.

It is objected that the certificates, having been issued upon orders made without notice to parties interested, are not entitled to recognition anywhere, because the court in West Virginia has not, after notice and hearing, approved them; citing *Union Trust Co. v. Illinois M. Ry. Co.*, 117 U. S. 476, 6 Sup. Ct. Rep. 809. It is urged that in legal effect these certificates have been disapproved by that court, because it directed a reference for the determination of all claims against its receiver, and the report of the referee was approved and embodied in the final decree of June, 1886, and that thus the court in effect adjudged that nothing should be paid on these certificates. The objection will be overruled. The holding in *Union Trust Co. v. Illinois M. Ry. Co.* was that the receiver and those lending money to him on certificates issued on orders made without prior notice to parties interested, "take the risk of final action of the court in regard to the loans." So they do, but the order stands until set aside; and it has not been set aside. As to the suggestion that the reference and the confirmation of the report of the referee amounted to an adjudication against these certificates, it is only necessary to state the facts that petitioner had no notice of the reference, and did not appear, and that its claim was not presented or considered, and to cite the old case of *Ravee v. Farmer*, 4 Term R. 146, and the still older case of *Golightly v. Jellicoe*, Hil. 9 Geo. 3 B. R., referred to in the note to *Ravee v. Farmer*. The certificates in question were issued under an order which declared that they should be a first and para-

mount lien on so much of the property of the Ohio Central Railroad Company as was then in the possession of the receiver, or as might thereafter come into his possession. The court had jurisdiction over the parties and possession of the *res*, and the certificates were ordered for a purpose authorized by law. Under the order of the court they became a valid first lien upon the railroad. *Wallace v. Loomis*, 97 U. S. 146, 162; *Union Trust Co. v. Illinois M. Ry. Co.*, 117 U. S. 434, 6 Sup. Ct. Rep. 809; *Vilas v. Page*, 106 N. Y. 439, 451, 452, 13 N. E. Rep. 743. The certificates were delivered by the receiver to the petitioner contemporaneously with the payment by the petitioner to the receiver of their par value. The fact that the receiver appropriated the money is immaterial. *Union Trust Co. v. Illinois M. Ry. Co.*, *supra*. There is no showing of any facts sufficient to put the petitioner on inquiry. It is a joint-stock company organized under the laws of the state of New York. It had no notice of the proceedings in the United States court in West Virginia to foreclose the mortgage, and the court had no notice of the issuing of the certificates. *Wood v. Carpenter*, 101 U. S. 135, 143, and *Jesup v. Railroad Co.*, 43 Fed. Rep. 503, cited by counsel for the complainant, do not apply. In each of those cases the court found that the complainant had knowledge of facts sufficient to put him on inquiry.

The only question in the case, therefore, is whether the lien has been discharged. The real suggestion of the complainant is that by virtue of the sale and transfer of the railroad property the lien was transferred from the property to the fund. Had the purchaser been a party to the suit, or an independent party, and paid the purchase money in cash, it might well be claimed that the lien was transferred to the fund. But it appears from the record of the decree and proceedings of sale that the purchase was made by a reorganization committee of the bondholders, who paid in only money enough to meet the costs and other expenses of the case, and for the residue turned in bonds. Under the decree of confirmation the conveyance was directed to be made, and was made, expressly subject to the payment of any sums which the court might thereafter direct to be paid in cash on account of the purchase money, and a vendor's lien was ordered to be reserved in the deed upon the property and premises conveyed for the security of such payment, with the right to resell if such payment should not be made within 30 days after an order of court directing it. These provisions of the decree were incorporated by recital in the deed to the purchaser, and subsequently in the deed made by the purchasing committee to the Kanawha & Ohio Railway Company. It follows logically and necessarily that the lien, which would have been transferred to the fund had the purchaser paid in money for the property, was preserved against the property itself, the recitals in the deed having all the force of covenants running with the land, and binding upon any one who should acquire the title. The precise point was adjudicated in *Vilas v. Page*, 106 N. Y. 439, 13 N. E. Rep. 743. *ANDREWS, J.*, at page 454, 106 N. Y., and page 747, 13 N. E. Rep., says:

"If the purchasers on the sale, whether bondholders or third persons, had paid the purchase money in cash, or secured its payment, there would, we conceive, be no doubt that the lien would be transferred to the proceeds. There would then be a substitute for the thing sold, upon which the lien would attach, relieving the land in the hands of the purchasers. But it could not have been the intention of the court to make a constructive payment on a purchase by the mortgagees, through a cancellation of the mortgage debt, equivalent to an actual payment, so as to relieve the property from the charge. Such a lien would be illusory merely, having no substantial quality. The purchasers cannot claim to have the premises purchased discharged from the lien."

This court has the power to enforce the lien. A portion of the line of the railroad sold is within its territorial jurisdiction, and proceedings ancillary to those conducted in the United States circuit court in and for West Virginia were conducted here. In *Swann v. Clark*, 110 U. S. 602, 4 Sup. Ct. Rep. 241, the lien of receiver's certificates was enforced in an independent suit.

The petitioner has not been guilty of laches. The receiver's certificates were practically call loans, and the petitioner had the right to assume that the receiver, the court's officer, would notify it when the loan was to be called or the money paid.

The decree will be in favor of the petitioner for a lien, prior to the complainant's mortgage and to any claims against the Kanawha Railway Company, for the amount of the certificates, with interest and costs.

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### DULUTH STORAGE & FORWARDING Co. *et al.* v. PRENTICE.

(Circuit Court, D. Minnesota, Third Division. June 20, 1892.)

#### DEED—DESCRIPTION—FLOAT.

A deed described the land conveyed as beginning at a certain rock and running thence one mile east, one mile north, one mile west, and one mile south, to place of beginning, and also stated that it was the land set off to a certain Indian under a treaty with the government. The Indian had previously selected his land as "a tract one mile square, the exact boundaries of which may be defined when the surveys are made." After the deed was given, the Indian's land was located and patented so as to include four distinct but adjacent parcels, no part of which lay within the boundaries named in the deed. *Held*, that the deed was not a float, but attached to the described lands, and in the absence of mistake could not be construed to pass title to any of the patented lands.

In Equity. Bill to establish title to lands. Decree for complainants. Statement by NELSON, District Judge:

This action was begun in April, 1890, by the Duluth Storage & Forwarding Company and the Duluth Street Railway Company on their own behalf, and also on behalf of all others similarly situated with reference to the subject of the action who might thereafter come in and be joined as parties thereto. The lands, of which those in controversy are a part, were patented in severalty, and in four distinct but adjacent

parcels, by the United States, October 23, 1858, to one Benjamin Armstrong and three other relatives of the Indian chief Buffalo. Armstrong, having succeeded to the interest of the other patentees, conveyed an undivided one half of the entire tract to Cash & Kelly, October 22, 1859, and the other undivided half to John M. Gilman, August 31, 1864. These grantees, and those claiming under them, in 1870, caused the entire tract to be platted into town lots, about 2,600 in number, which now lie in the center of the city of Duluth. The 577 complainants herein, who are about two thirds of all the present owners of the lots so platted, have, as to their respective lots, succeeded to the interest thus acquired by Cash & Kelly and Gilman, and unite in this action to quiet title against the defendant, who claims, adversely to the Gilman title, an undivided half of the entire tract, by virtue of a deed from Armstrong, made prior to the issuance of the patent, the origin of which adverse title was as follows: The patents to Buffalo's relatives were issued in pursuance of the following clause in the treaty with the Chippewa Indians of Lake Superior, signed September 30, 1854:

"And being desirous to provide for some of his connections, who have rendered his people important services, it is agreed that the chief Buffalo may select one section of land at such place in the ceded territory as he may see fit, which shall be reserved for that purpose and conveyed by the United States to such person or persons as he may direct."

On the day of the treaty, Chief Buffalo appears to have made, under the foregoing clause, the following written selection, which, in February, 1856, was filed in the office of Indian affairs:

"I hereby select a tract of land one mile square, the exact boundary of which may be defined when the surveys are made, lying on the west shore of St. Louis Bay, Minnesota territory, immediately above and adjoining Minnesota Point; and I direct that the patents be issued for the same, according to the above-recited provisions, to Shaw-bwaw-akung or Benjamin G. Armstrong, my adopted son, to Mathew May-dway-gwon, my nephew, to Joseph May-dway-gwon and Anton May-dway-gwon, his sons, one quarter section to each."

September 17, 1855, the May-dway-gwons united in an assignment to Armstrong of all their interest under the treaty. September 11, 1856, Armstrong executed to Prentice the deed upon which he bases his claim of title. It is a quitclaim deed of an "undivided one half of all the following described piece or parcel of land situate in the county of St. Louis and territory of Minnesota, and known and described as follows, to wit: Beginning at a large stone or rock at the head of St. Louis River Bay nearly adjoining Minnesota Point; commencing at said rock and running east one mile, north one mile, west one mile, south one mile, to the place of beginning,—and being the land set off to the Indian chief Buffalo at the Indian treaty of September 30, A. D. 1854, and was afterwards disposed of by said Buffalo to said Armstrong, and is now recorded with the government documents." Concurrently with the execution of this deed, Prentice and Armstrong joined in a contract reciting that the latter had that day deeded to the former "a certain piece of land," describing it substantially as in the deed, and agreeing that for the consideration

Prentice was to furnish Armstrong such money and provisions as might be necessary to go on and erect a house on said land and live thereon, and to assist him at Washington in perfecting his title, Armstrong at the same time agreeing to move at once upon and occupy the land. The government survey of the township in which the lands in controversy lie was not made until the year 1857. The large rock referred to in the Prentice deed was a prominent, natural landmark, and is well identified by the evidence. It is admitted that no part of the lands finally patented under the treaty and here in controversy lie within the square mile of land running east and north of said rock.

*Wm. W. Billson, (Geo. B. Young, of counsel,)* for complainants.

*Kitchel, Cohen & Shaw, John F. Dillon, and Elihu Root, (Samuel B. Clarke, of counsel,)* for defendant.

NELSON, District Judge, (*after stating the facts.*) This suit is brought to establish, as against the defendant, the titles derived from John M. Gilman, whose immediate grantors were Benjamin Armstrong and wife, under a deed dated August 31, 1864. The defendant's claim must stand or fall under his deed from Armstrong and wife, dated September 11, 1856. If the title of Gilman is sustained, the complainants must succeed, as they all trace title through him. Armstrong's title, conveyed by this deed, is claimed to be derived under a treaty with the Chippewa Indians in 1854 at La Pointe on Madaline island in Lake Superior, and under the selection of Chief Buffalo, according to the provisions of the treaty and appointment by Buffalo that the lands selected by him should be conveyed by the United States to Armstrong and three other relatives. The interest under the treaty of the three relatives was assigned September 17, 1855, to Armstrong. The question which must determine the rights of the parties to this controversy has been before this court in several ejectment suits brought by this defendant against persons claiming under Gilman, (see 20 Fed. Rep. 819; 43 Fed. Rep. 270;) and in one instance a case was reviewed by the supreme court of the United States and the construction by this court of the deed from Armstrong to Prentice affirmed. *Prentice v. Stearns*, 113 U. S. 435, 5 Sup. Ct. Rep. 547. It is true, additional testimony is taken in this suit by the parties under objections from each. The objections noted by the defendant to the testimony of Messrs. Ray, Carey, McFarland, and others are overruled. I am inclined to think this evidence is relevant. The admission of traditional evidence in cases of boundary is admissible, and Chief Buffalo's selection under the treaty was a matter of peculiar interest to the people in general who were about to make or had made settlement upon government land in that locality, and so the declarations made by Chief Buffalo before his death, and those of Armstrong to the persons camping with him at Endion, are admissible, the former as tending to show that the Buffalo selection lays east of the large rock mentioned, and the latter being relevant as also tending to show that it did, and that Armstrong fully recognized this location, and that the deed from him to the defendant of September 11, 1856, was intended to convey an undivided one half

of a described mile square lying east of the large rock, just as it states. The written contract between the parties contemporaneous with the deed is also admissible as throwing some light on the intention of the parties when the deed was executed. I am also inclined to the opinion that the documentary evidence from the land department at Washington showing the correspondence between officials of the Indian and land department are admissible; but, giving full weight to such testimony, it cannot overthrow the conclusion which the court must reach from a consideration of all the evidence in the suit. The argument of the defendant's counsel is based upon the theory urged in the ejectment suits that the interest conveyed by Armstrong to Prentice was in the nature of a float to attach to any land afterwards patented under the treaty, and not to a specific tract. This view of the case has never been adopted by this court, and it was held adversely to the defendant in the case before the supreme court of the United States. But it is urged that there was a mistake in the east and west lines as described in the Prentice deed, and that there should be a reversal of these lines by this court, which, if done, would include a large tract of the land claimed by the complainants. The witness Ellis, who drew the deed, testifies that he inserted the starting point and the boundaries given him by Armstrong, and Armstrong himself testifies that he dictated the description by boundaries to Prentice, and I can find no evidence showing that there was a mistake in the specific boundaries. On the contrary, if we are right in the conclusion from the evidence, Armstrong expected to acquire under the treaty the square mile lying east and north of the large rock, and that is all the land he claimed. There are many minor points urged by the defendant's counsel, but, in the view taken by the court, none of them, if decided in favor of the defendant, would bar the relief claimed in the complaint. Decree ordered for the complainants.

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GRAVES v. DAVENPORT *et al.*

(District Court, N. D. Illinois. June 8, 1892.)

1. WITNESSES—CREDIBILITY—ADVERSE PARTY AS WITNESS.

A complainant who has called defendants as his witnesses is bound by what they say, and cannot ask the court to disbelieve them, or to infer that they have testified falsely.

2. HUSBAND AND WIFE—PROMISSORY NOTE—CONSIDERATION.

A wife gave to her husband \$1,100 inherited by her, with which he bought a farm. He afterwards sold the farm, and with the proceeds bought another farm. When he wished to sell the second farm his wife refused to join in the deed unless some provision was made for her money, which he had had for 18 years, whereupon he gave her his note for \$3,000. *Held*, that the note was given for a good consideration.

3. PARENT AND CHILD—COMPENSATION FOR SERVICES.

Where a son works faithfully for his father on a farm for 10 years after his majority, his services are a good consideration for the father's promise to pay him \$5,042.

v.50f.no.11—56

**4. FRAUDULENT CONVEYANCES—EVIDENCE—CONSPIRACY.**

In part consideration of a conveyance by a father to his son, the son agreed to assume and pay a debt due to his mother. He thereupon mortgaged his land to his mother's brother for the necessary amount, receiving from the brother a check on a bank, in which were no funds to pay it. The check was given to the mother in payment of her claim, and she afterwards exchanged it for her brother's note. The father was at the time bankrupt, but the other parties had no knowledge of that fact. *Held*, that the way in which the debt was paid was not sufficient to show a conspiracy to defraud the father's creditors.

In Equity. Bill by Amos C. Graves, assignee in bankruptcy of Theron Davenport, against Josephus Davenport, Deborah Davenport, and Coe Swartout, to set aside certain conveyances on the ground of fraud.

*Charles Wheaton*, for complainant.

*H. H. Cody* and *Mark Bangs*, for defendants.

BLODGETT, District Judge. This is a bill in equity by the assignee of Theron Davenport, a bankrupt, seeking to set aside certain conveyances of real and personal property made by the bankrupt to the defendants Josephus Davenport and Deborah Davenport, on or about the 6th day of November, 1877. It appears from the proof that on the 6th day of November, 1877, the said Theron Davenport, who was then, in fact, insolvent, made to his son, the defendant Josephus Davenport, a conveyance of a farm situated in Kane county, Ill., containing about 348 acres of land, for the nominal or expressed sum of \$13,928, and that he also at the same time, made to the said Josephus a bill of sale of most of the live stock and farming implements upon said farm, for the expressed consideration of \$3,800. The assignee seeks by this bill to set aside this conveyance, on the ground that it was fraudulent as against the creditors of Theron Davenport, the bankrupt.

The evidence in the case is meager, in many respects fragmentary, but the following facts may be said to be clearly established by it: The bankrupt, Theron Davenport, had been, for several years prior to the transfer in question, in possession of the farm. His son, Josephus, who at the time of the transfer was about 32 years old, had resided with him from the time he reached his majority, had devoted himself faithfully to managing and conducting the affairs of the farm, with no special understanding between himself and his father as to the amount which he was to receive for his services, except that the father had frequently assured Josephus that he would do well by him if he would stay with him and carry on the farm. For 10 or 12 years before the transaction the bankrupt, Theron Davenport, had been engaged in buying and selling cattle, and trading in live stock generally, having given but little, if any, attention to the affairs of his farm. He was in good credit, and generally reputed and believed to be a man of ample means. But for some time before the transfer of the farm to Josephus, Josephus had been importunate to have the amount which was due him, or which he was to receive for his services, determined, and for a settlement with his father; but his applications in that regard had been deferred and postponed by the



father by one excuse and another until finally, just previous to the transfer, he proposed to Josephus to convey to him the farm, which was then subject to a mortgage of \$3,000, in full satisfaction of what he owed Josephus for his services, which they had adjusted a few days previously at \$5,042, and that he, Josephus, should pay enough money to liquidate and pay a claim which was held by the defendant Deborah Davenport, the wife of the bankrupt, against her husband, amounting, including interest, to \$5,885.83, and that he would assume and pay the \$3,000 incumbrance upon the farm; thus making the purchase price for the farm, as above stated, \$13,927.83, which was equivalent to about \$40 per acre for the land. At the same time the bankrupt made a bill of sale to the defendant Josephus of most of the live stock and farm implements upon the farm, the consideration for which was an agreement on the part of Josephus to pay certain indebtedness of his father's, for which he, Josephus, was holden as surety, amounting to \$3,800.

The bankrupt law, as it stood at the time of this transaction, required that, in order to entitle the assignee to recover back any payments or property transferred on the ground that it was a fraudulent preference or a fraudulent transfer, the person receiving the preference or transfer should know that the grantor was insolvent, and that the conveyance or payment was made in fraud of the provisions of the bankrupt act.

In support of the allegations of the bill the complainant relies mainly upon the testimony of the bankrupt and the two defendants Josephus and Deborah Davenport. He has called upon them to testify, and made them his witnesses in that behalf. The defendant Josephus testifies that he did not know at the time he received this property that his father was insolvent, or that he owed any other debts than those which were canceled or provided for under this transaction. That he supposed that by this transaction his father virtually provided for the payment of all his indebtedness; that his father kept no books, and that he was not aware that he was involved in debt. The defendant Deborah Davenport testifies that she did not know that her husband was involved in debt. She supposed that all the indebtedness he had was what he owed to herself and her son, and she had no idea of any other indebtedness. She was laboring under the belief that he was in prosperous and independent circumstances, aside from his interest in the farm. This testimony is attacked by the complainant's counsel upon the ground that it is improbable and incredible that these two witnesses, bearing the close relation they did to the bankrupt, should not have known more about his affairs than they testified they actually did. I do not think, in the light of the testimony of these witnesses, that their ignorance in regard to the extent to which he was involved in debt is improbable, or unworthy of belief. The bankrupt was a trader, engaged in the buying and selling of live stock away from his farm, kept no books to which either his wife or his son had access, and made no disclosures, as the proof shows, to them of his financial condition.

The son was employed upon the farm, took no part in the dealing in live stock by his father, and had no occasion, therefore, to become familiar with the financial condition of his father growing out of his dealings. There is no presumption that the bankrupt disclosed his financial condition to his wife, and nothing in the record contradicts her denial of the fact that she did not know of his insolvency. The only testimony which complainant has introduced, aside from that of the defendants Josephus and Deborah, which tends to charge either of them with any knowledge of the insolvency of the bankrupt, is that of one Farren, who testified to a conversation had with Josephus about the time of the adjudication of bankruptcy, in which Josephus said, or in which he says that Josephus stated, that his father had been insolvent three or four years. This witness is wholly contradicted by Josephus Davenport, and, with the improbability of his having made such a statement to a comparatively entire stranger, I am inclined to believe that Davenport's statement is true. Aside from this, however, this testimony of Farren, it seems to me, should be excluded from the consideration of the court on the ground that this complainant, having called Josephus Davenport to testify, cannot be allowed to impeach his testimony. In this connection I may also add that the complainant, having called both Josephus and Deborah to testify in the case, and presented them as reliable witnesses, is bound by what they say, and cannot ask the court to disbelieve them, or to infer that they have testified falsely, and that they must have had, as is insisted by complainant, actual knowledge of Theron Davenport's insolvency. I am therefore quite clear that the complainant has failed to prove that either of these defendants knew of the insolvency of Theron Davenport at the time they received payment in full upon their respective demands against him.

The complainant insists further, however, in regard to this feature of the case, that the bankrupt was not indebted to his wife, Deborah Davenport, and that, therefore, the payment to her was fraudulent. The proof shows that soon after the marriage of Theron and Deborah Davenport she received from her grandfather's estate about the sum of \$1,100, which she gave over to her husband, to be used in the purchase of a farm. This occurred about 1850. A farm was purchased, and after about 10 years it was sold, and with the proceeds another farm was purchased. After a few years Theron Davenport wished to sell the second farm, and his wife then declined to sign a deed releasing her dower and homestead right in that farm, unless some provision was made for her money, as she called it, which had been invested in the original farm; and at that time, as the consideration of her signing the deed of the second farm, he gave her a note for \$3,000, which represented the original \$1,100, and about 18 years' interest. The farm now in question was purchased with the proceeds of the second farm, and Mrs. Davenport had continued to hold this note, which, by its terms, was due one day after date, and drew interest at the rate of 10 per cent. per annum until the transaction between her husband and son on the 6th of November. In the light of the Illinois authorities, I

think this note was given upon a good consideration, as between Mr. and Mrs. Davenport. He had had her money, and there was an obligation on his part to recognize her right to a substantial interest in the property which had grown up from the investment of her money. So that when she demanded a recognition of her right in 1868, at the time the second farm was sold, I have no doubt that it was entirely competent for him to do so, and made the note for \$3,000 to his wife a good and binding obligation. The Illinois cases referred to are *McLaurie v. Partlow*, 53 Ill. 341; *Bridgford v. Riddell*, 55 Ill. 261. But aside from this, the proof also shows that she declined to sign the deed for the second farm, and release her dower and homestead rights, except on condition that he should give her this note, and that, of itself, would make a sufficient consideration. *Yazel v. Palmer*, 81 Ill. 83; *Medsker v. Bonebrake*, 108 U. S. 66, 2 Sup. Ct. Rep. 351.

It is also contended that nothing was due from the bankrupt to his son, Josephus, at the time of the sale of the farm, and that, therefore, the pretended allowance of \$5,042 on the purchase money for Josephus' service was fraudulent. I think, however, the proof shows that the son had rendered faithful and meritorious service for his father for upwards of 10 years; that the amount agreed upon between himself and the father was not extravagant, under the circumstances, and shows no evidence of a fraudulent intent.

Much is said in the briefs and argument of counsel for the complainant in regard to the way in which the claim of Mrs. Davenport was paid. The proof shows that Josephus understood when he agreed to take the farm on the terms proposed by his father that he was to raise money enough to settle the claim of his mother against his father; that his expectation was to raise this money by a mortgage upon the farm, and he had started for Aurora to make negotiations for that purpose, when he met the defendant, Coe Swartout, and on mentioning to Swartout the purpose of his visit to Aurora, Swartout at once proposed to loan the money necessary to pay the debt to Mrs. Davenport, and take a mortgage upon the farm. Swartout is the brother of Mrs. Davenport, and, as the proof shows, was reputed and believed, both by Mrs. Davenport and Josephus, to be a man of quite independent means, a farmer residing in Seneca county, N. Y., with means to the extent of \$30,000 or over. Josephus accepted this proposition made by Swartout, and a mortgage was made to Swartout upon the farm to secure the sum of \$5,885.83, being the amount due Mrs. Davenport from her husband, and Josephus received from Swartout \$1,400 in money, and a check upon a bank in Ovid, Seneca county, N. Y., for \$4,485.83. Josephus then passed over to his father, Theron, the check and the money he had received from Swartout, and Theron delivered them to his wife, and took up his note. Subsequently an arrangement was made between Swartout and Mrs. Davenport by which she surrendered the check to him, and took his note for the \$4,485.83, payable six years after date, with interest at 8 per cent. per annum. The complainant has introduced testimony tending to prove that Swartout was not a money lender, and had no

money in the bank on which this check was drawn, and not sufficient means at hand with which to have made good the check at the bank. This question has, however, it seems to me, become wholly immaterial, and is really eliminated from the controversy by the fact that the check was surrendered, and Mrs. Davenport took in lieu thereof the note of Swartout, with which she was entirely satisfied. It is insisted on the part of the complainant that, taken altogether, the transaction between the bankrupt and his wife and son, and the transaction between the son and Swartout, and Swartout and Mrs. Davenport, shows a conspiracy on the part of these parties to defraud the creditors of Theron Davenport. It is sufficient, however, I think, to say that these parties, who have been examined as witnesses, all deny any such conspiracy, deny that they knew there were any creditors to be defrauded, and deny any bad faith in any of the transactions which are attacked by the bill. And whatever may have been the purpose of Theron Davenport in making the conveyance to his son, the case, as I have already said, entirely lacks proof of any knowledge on the part of the son or wife of a fraudulent intent on the part of the bankrupt. With regard to the sale of the personal property by the bankrupt to Josephus, the evidence is clear, and I may say undisputed, that Josephus was responsible as surety on his father's paper for the full amount of \$3,800; that the property probably would not have sold for more than that amount, and it is doubtful, I think, if it would have brought the amount for which Josephus was liable. He agreed to take the property and pay these debts, as he supposed, thereby relieving his father from all indebtedness, and he has paid the debts as he agreed. The transaction does not, as it seems to me, show any evidence of fraudulent intent, so long as there is no proof of any knowledge of the father's insolvency. For these reasons I am of opinion that the complainant has not made out a case by the proof which entitles him to have this conveyance set aside, and that the bill should be dismissed for want of equity.

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### JOHNSTON v. CANADIAN PAC. RY. CO.

(*Circuit Court, D. Vermont. June 20, 1892.*)

#### 1. MASTER AND SERVANT—NEGLIGENCE—RAILWAY BRAKEMAN.

The mere starting of a freight train unexpectedly to a brakeman, who is thereby thrown from the rear car, is not actionable, unless such starting was suddenly, violently, or negligently done.

#### 2. SAME—INCOMPETENT CONDUCTOR—PLEADING.

A brakeman, suing for personal injuries alleged to result from the known incompetency of the conductor, need not set out the particulars of the conductor's incompetency.

#### 3. SAME—LIMITATION OF ACTIONS—CONFLICT OF LAWS.

In an action in Vermont by a railway brakeman against the company for personal injuries occasioned in the province of Quebec, Can., defendant in its pleas set out "a general law of the province of Quebec," "that all suits for any damage or injury sustained by reason of the railway shall be instituted within 12

months." *Held*, that this was a mere general statute of limitations, and as the right of action is given by the common law, and not by the statute, the statute of limitations of Vermont should govern.

At Law. Action by William Johnston against the Canadian Pacific Railway Company to recover for personal injuries. Heard on demurrers, pleas, and replication.

*Gilbert A. Davis*, for plaintiff.

*Joel C. Baker*, for defendant.

WHEELER, District Judge. The plaintiff has declared in two counts,—one for being thrown from the rear car of a freight train of the defendant, where he had been placed as a brakeman, under the caboose which had been detached and was following slowly, by the, to him, unexpected starting forward of the train ordered by the conductor representing the defendant; the other for being so thrown through incompetency and unfitness of the conductor, known before to the defendant. To these counts the defendant has pleaded the statute of limitations of the province of Quebec, in which the cause of action accrued, of one year upon such causes of action, both with and without alleging residence of the plaintiff in that province. The plaintiff has traversed the residence in those pleas alleging it, and demurred to those not alleging it; and the defendant has demurred to the traverse. The demurrers reach back to the first defect in the pleadings, and bring in question the sufficiency of the declaration, and the operation of this statute.

The gist of this action is negligence; and, although the starting forward of the train is alleged to have been done by direction of a representative of the defendant, it is not alleged to have been done suddenly, or violently, or negligently, otherwise than as it is alleged to have been done unexpectedly to the plaintiff. Therefore nothing actionable is alleged in the first count, unless a brakeman at the top of the rear car of a freight train is entitled to notice before the train is started forward, and to start it unexpectedly would, of itself, if injurious to him, be actionable. But freight trains must necessarily be, at times, slowed up and started up; and, if carefully done, the starting up would furnish no ground of action, although done unexpectedly to such a brakeman. The first count fails, therefore, to set out any actionable negligence, either in doing what should not have been done or in negligently doing what was done.

To furnish competent, fit conductors, or those reasonably supposed to be such, was a duty resting on the defendant. *Railway Co. v. McDaniels*, 107 U. S. 454, 2 Sup. Ct. Rep. 932. The second count sets forth a failure to fulfill this duty, and an injury to the plaintiff through that. The particulars of the incompetency or unfitness are not set out. That they should be is argued to be necessary, because actionable negligence must be set out. But the negligence of the conductor is not what is actionable; that of the defendant, in placing such a conductor over the plaintiff, is. The conductor was an instrument whose defects need not be with particularity described. *Barber v. Essex*, 27 Vt. 62. Besides

this, his incompetency and unfitness may be understood to relate to starting up a train unexpectedly to brakemen situated as the plaintiff is alleged to have been. This count seems to be sufficient.

That the statutes of limitation of the forum, and not those of the place, generally prevail, is not, and could not well be, disputed. *McElmoyle v. Cohen*, 13 Pet. 312. But that the effect of the law of the province is to give a cause of action for a year only, as some contracts do, is urged. *Riddlesbarger v. Insurance Co.*, 7 Wall. 386. The action, however, is founded upon the common law, which is understood to prevail everywhere, and not upon any peculiar law of the place, which would have to be pleaded. The statute relied upon is set out in the pleas as "a general law of the said province of Quebec," "that all suits, for any damage or injury sustained by reason of the railway, shall be instituted within twelve months next after the time that such supposed damage is sustained, and not afterwards." This seems to be an ordinary statute of limitation, not affecting the cause of action in any way, but only the time within which a suit upon it, in the courts where the law prevails, must be brought. The pleas are therefore bad here. Bad pleas would be good enough for a bad declaration, but as one count in this declaration is good, and the pleas profess to answer both, the demurrer to the pleas must be sustained; and, as a bad replication is good enough for a bad plea, the demurrer to the replication must be overruled. Demurrer to pleas sustained, and those pleas adjudged insufficient. Demurrer to replication overruled.

## COLORADO CENT. CONSOLIDATED MIN. CO. v. TURCK.

(Circuit Court of Appeals, Eighth Circuit. May 9, 1892.)

No. 42.

### 1. MINES AND MINING—EJECTMENT—DEFENSES.

In ejectment for a mining claim, the issue raised by the pleadings was whether plaintiff was the owner and entitled to the possession of an alleged vein having its apex within his location, after the same had passed under the side lines of an adjoining claim. *Held*, that it was not a change of the issue to defend upon the ground that both parties had the apex of separate veins within the boundaries of their claims, which veins, in descending, became united within the side lines of defendant's claim; and that therefore defendant was entitled to hold all of the vein from the point of junction downward.

### 2. SAME—INCONSISTENT DEFENSES.

Defendant was also entitled to set up that the alleged vein, having its outcrop in plaintiff's claim, was not a separate and independent vein, but simply one of numerous ore channels, which together formed one broad lode having its apex partly in plaintiff's and partly in defendant's claim; and it was immaterial that these defenses were inconsistent in the sense that proof of one was necessarily disproof of the other, for in ejectment defendant may set up anything tending to disprove plaintiff's general claim of ownership and right of possession.

### 3. SAME—ADJOINING CLAIMS—FOLLOWING VEINS.

The right of a mine owner, under Rev. St. § 2322, to follow a vein whose apex lies within the boundaries of his claim beyond the vertical side lines thereof and within the lines of other claims, is not confined to cases in which the claim thus entered is held under a junior patent or certificate, and the relative dates of the patents or certificates are immaterial.

**4. SAME.**

Where a vein upon which a location rests, after being followed for a considerable distance, forks and passes out through the side line of the location, so that the outcrop of one fork is on an adjoining claim, this whole fork belongs to the owner of the latter claim.

**5. SAME—EJECTMENT—VERDICT—DESCRIPTION.**

In ejectment to recover a mining vein the complaint described the premises as "so much of said Aliunde Tunnel Lode No. 2 mining claim and premises as lies beneath the depth of 300 feet beneath the surface of the ground, north of the north side line of said Aliunde Tunnel Lode, carrying said north line down vertically, and from thence on the pitch of said lode northwestwardly, and measuring thence along the line of said Aliunde Tunnel Lode No. 2, a distance of 600 feet next west of the northeast line of said claim." *Held*, that a verdict in favor of plaintiff for "the lode and premises described in the complaint" described the premises with sufficient accuracy.

**6. SAME—JUDGMENT—APPEAL.**

The fact that the court in entering final judgment did not award to plaintiff all the premises to which he was entitled under the verdict, affords no ground of complaint to defendant.

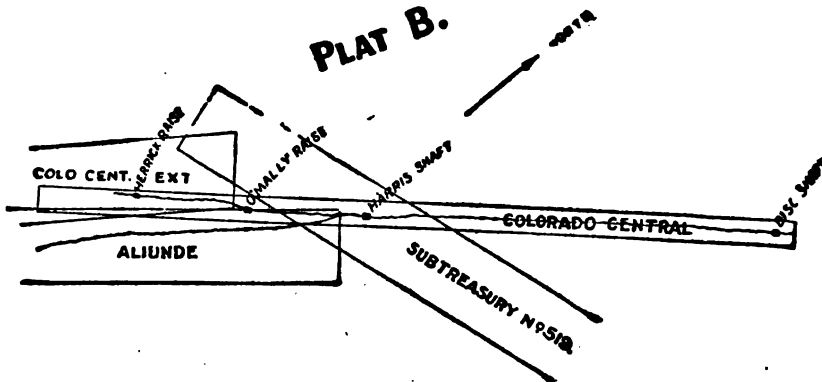
**7. APPEAL—PRESUMPTIONS.**

Where the jury, after retiring, are recalled at their own request, and given additional instructions, in the absence of counsel, and there is no showing as to the reasons for such absence, or whether any efforts were made to secure their presence, it will be presumed on appeal that the court acted with regularity and propriety.

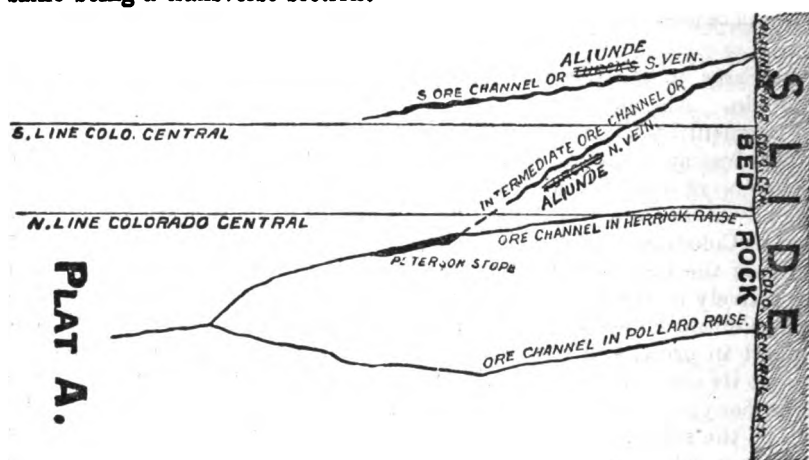
In Error to the Circuit Court of the United States for the District of Colorado. Affirmed.

Statement by THAYER, District Judge:

This was an action at law, brought by the defendant in error to recover possession of a mining lode or vein known as the "Aliunde Tunnel Lode No. 2," situated in the Argentine mining district, Clear Creek county, state of Colorado. The plaintiff in error, who was defendant in the lower court, is the owner and is in possession of three mining claims known respectively as the "Colorado Central," the "Subtreasury" and the "Colorado Central Extension" claims. The Aliunde claim belongs to the defendant in error, and adjoins the Colorado Central claim on the south, and at its northern end also abuts against the Subtreasury claim. The accompanying diagram (plat B) shows with sufficient accuracy the relation of the several claims to each other, their general direction, and the manner in which they adjoin, and in some places overlap on the surface of the earth.



The region of country where these claims are laid is mountainous, and the surface is broken to a considerable extent by ridges and ravines. As a general rule the granite—or, as it is usually termed, the “country rock”—in which the ore fissures are found lies from 50 to 100 feet below the surface of the earth, and is covered to that depth with a slide or wash from the mountains, consisting of loose gravel and detached boulders. By reason of that fact, as the evidence shows, it is and was a difficult task to trace the true apex or outcrop of a vein at the surface of the country rock. On the trial in the lower court the defendant in error maintained, and offered considerable evidence tending to show, that he had the apex of a mineral bearing vein within the side lines of the Aliunde claim, and had traced the apex or outcrop of that vein for some distance within the boundaries of his claim; that the vein became divided a short distance below the surface of the country rock, forming a north and south vein, (so termed,) as shown on the accompanying diagram, (plat A,) the same being a transverse section:



—That the north vein had a dip to the northwest of about 70 degrees from the horizon, and at a distance of about 60 feet below the outcrop or apex passed under the south side line of the Colorado Central claim. That the south vein descended into the earth with a slight dip to the northwest, but eventually passed under the south side line of the Colorado Central, and on its strike and dip also became united with the north vein underneath the Colorado Central claim. On the other hand, the plaintiff in error stoutly maintained before the jury (and this seems to have been its chief contention) that both the Colorado Central and Aliunde claims were laid on one and the same broad lode, which was from 100 to 200 feet wide, and was confined between two porphyry walls; that neither party to the suit had the apex of this broad lode exclusively within the boundaries of their respective claims, and that, in view of that fact, the defendant in error had no right, under the statutes of the United States, (section 2322,) to follow his alleged vein outside of a ver-



tical plane extended downward through the side lines of his claim. In addition to the main defense last mentioned, the plaintiff in error presented three other defenses in the form of instructions, which defenses, it may be conceded, were not distinctly outlined by the pleadings, and all of which the circuit court overruled. Without pretending to state the exact language of the several instructions last referred to, it will suffice to say that the court was asked to declare in substance—*First*, that, if the plaintiff below had the apex of what might be termed an independent vein within his own side lines, and the defendant below also had the apex of an independent vein within its side lines, and the two veins, descending downward, became united within the side lines of the Colorado Central claim, then the defendant was entitled to hold all of the vein from the point of junction downward, because it was the owner of the senior patent; *second*, that the proprietor of the Aliunde claim was in no event entitled to recover his vein within the side lines of the Colorado Central claim, because the latter claim was patented before the discovery on which the Aliunde patent rested; and, *third*, that the proprietor of the Aliunde claim was not entitled to recover his vein under the Colorado Central claim (the latter being held under the oldest patent) if the jury believed the Aliunde lode “to be a part of the same lode as that on which the Colorado Central patent issued.” As the jury found against the plaintiff in error on its main contention that there was only one broad lode covered by the several claims, and as that issue was submitted under directions from the court that are not challenged, the most important questions that we have to determine concern the action of the lower court with reference to the three other defenses above outlined. Of the four claims above mentioned the Colorado Central claim appears to have been held under the oldest patent. The Aliunde claim, however, was patented before the Colorado Central Extension claim.

*C. J. Hughes and R. S. Morrison*, for plaintiff in error.

*Willard Teller and Harper M. Orahood*, for defendant in error.

Before CALDWELL, Circuit Judge, and SHIRAS and THAYER, District Judges.

THAYER, District Judge, after stating the case as above, delivered the opinion of the court.

The circuit court appears to have refused the two instructions embodying the first of the three propositions above stated, on the ground that such instructions changed the issue which the defendant below had made during the progress of the trial, and for the further reason that the evidence was insufficient to warrant the jury in finding that there were separate and independent veins, one of which had its apex within the Aliunde claim and the other within the side lines of the Colorado Central. We are satisfied that the trial court erred in so far as its refusal to give the instructions was based upon the ground that they changed the issue and presented a defense which the defendant was not entitled to make. The action was in ejectment, and the issue raised by the pleadings was whether the plaintiff in the lower court was the

owner and entitled to the possession of the alleged vein having its apex within the Aliunde claim, after the same had passed under the Colorado Central side lines. In support of the negative of that issue the defendant had the right to show any fact which disproved the allegation of ownership and right of possession. It was at liberty to say that the alleged vein having its outcrop within the Aliunde claim was not a separate and independent vein, but simply one of numerous ore channels, which together formed one broad lode having its apex partly in the Aliunde claim and partly in the Colorado Central; or, failing in that contention, it had the right to show that both parties had the apex of separate veins within the boundaries of their claims, which veins, in descending, became united within the side lines of the Colorado Central. It is true that these propositions were inconsistent in the sense that the proof of one necessarily disproved the other, but, considering the nature of the action, we do not regard that as an insuperable objection to the allowance of both defenses. It frequently happens in ejectment suits that a defendant is permitted to derive title from several independent sources, and to defend his possession by setting up several conflicting outstanding titles. When, as in ejectment or replevin, a party is permitted to allege generally that he is the owner and entitled to the possession of certain property, the opposite party must be allowed to show any state of facts that tends to disprove such assertion.

The second ground on which the trial court based its refusal to give the instructions asked by the defendant is entitled to more weight. The defense that these instructions raised was predicated on the last clause of section 2336 of the Revised Statutes of the United States, which is as follows:

"Where two or more veins intersect or cross each other, priority of title shall govern, and such prior location shall be entitled to all ore or mineral contained within the space of intersection; but the subsequent location shall have the right of way through the space of intersection for the purposes of the convenient working of the mine. And where two or more veins unite, the oldest or prior location shall take the vein below the point of union, including all the space of intersection."

The trial court directed the jury to disregard the defense based on this section of the statute, not only because it changed the issue, but for the reason, as stated in its charge, that there was no evidence to locate the outcrop to any considerable extent of a separate vein within the Colorado Central side lines, and for the reason that, if there was such a vein, it was impossible to say from the testimony whether it had its apex within the Colorado Central side lines or within the side lines of claims adjoining it on the northwest, which were held under patents junior to the Aliunde patent. In other words, the circuit court appears to have been of the opinion that the developments made and proven by the defendant company were insufficient to establish the existence of a vein, within the meaning of section 2336, which in its descent united with the Aliunde vein. It is manifest, we think, that there was no evidence to prove the existence of the vein or the outcrop in ques-

tion, except such inferences as might be drawn from the developments in the Grant raise, the Herrick raise, the O'Mally raise, and the shaft sunk in the Jim Hall tunnel. These raises were put up some time after the owner of the Aliunde in the development of what is termed his "north vein" had passed under the Colorado Central's south side line, and they were put up, it seems, by the defendant company, not for the purpose of obtaining ore, but solely for the purpose of demonstrating either that there was but one wide lode between the porphyry walls, or that one fork of the vein on which the owner of the Aliunde was working had its outcrop within the Colorado Central side lines, and that the defendant was entitled to the vein below the point of junction. The Grant raise and the Herrick raise were put up at about the same inclination, and together extended from the defendant's third level nearly to the surface of the country rock. The Herrick raise was much shorter than the Grant raise, and was merely an extension of the latter in the direction of the surface. It was not claimed by the defendant company that the Grant raise had been put up on what might be termed a continuous streak or seam from the third level, nor was there any satisfactory evidence that such alleged ore streak as had been followed in that raise fell into the Peterson stope below the third level, into which the Aliunde vein had been traced and had descended. It was proven, however, by the defendant that a seam or vein varying from half an inch to an inch in thickness had been traced in the Herrick raise nearly to the surface, but the plaintiff's evidence tended strongly to show that the so-called "vein" in the Herrick raise was purely local; that it was not followed downward in the Grant raise, and did not extend for any considerable distance on either side of the raise in the direction of its strike. No stoping had been done by the defendant along the Herrick raise or the Grant raise. Moreover, the Herrick raise, as well as the O'Mally raise, had been put up so near to the north boundary line of the Colorado Central claim that it was somewhat doubtful, under the testimony, whether the ore channels that had been followed in these raises had their apex within the Colorado Central side lines or within the lines of other junior claims next adjoining it on the north. The O'Mally raise, on which the defendant also relied to establish the existence of a separate vein with an apex within its own side lines, had been put up from the second level nearly to the surface, at a point about 250 feet northeast of the Herrick raise. Some stoping had been done by the defendant at the foot of the O'Mally raise, but the stope lay at such an angle as would carry the apex of the vein within the side lines of the Aliunde, if the vein continued at that angle to the surface of the country rock. The O'Mally raise had not been extended downward below the second level. It was accordingly a matter of speculation where the alleged ore channel on which the stoping had been done would lead to in its descent, or whether it extended for any considerable distance below the foot of the raise. About midway between the Herrick raise and the O'Mally raise, at the third level, the Benny crosscut had been run, which tended strongly to demonstrate that no connection existed be-

tween the veins in the Herrick and O'Mally raises, and that both were merely local veins of no considerable extent or significance. The shaft above referred to as having been sunk in the Jim Hall tunnel seems to have been still further to the northeast, and is not shown on any of the drawings or models submitted to our inspection. The developments in that shaft, whatever they may have been, throw no light on the question now under consideration so far as the present record discloses. On the other hand, the evidence offered by the owner of the Aliunde had a strong tendency to show that he had the apex for a considerable distance within his side lines of a well-defined vein with the usual hanging and foot walls, which descended into the earth, with a uniform dip, at least to the 500-foot level. Levels had been run and shafts had been sunk to determine both the dip and the strike of the vein; and, what is of more importance, considerable stoping had been done along the vein on all of the levels. In view of these facts, we must conclude, as the circuit court appears to have done, that the evidence tending to show the existence of a separate vein with its apex within the Colorado Central boundaries which descended and formed a junction with the Aliunde vein was too uncertain and speculative to warrant the submission of that issue to the jury. Great difficulties, no doubt, stood in the way of furnishing other and better evidence of the existence of the supposed vein within the defendant's territory, but we are persuaded that a finding in favor of the defendant, based upon such evidence as was offered, would have rested too largely upon speculation, and too little upon legitimate inferences of fact, to be tolerated in a judicial proceeding. There was no error, therefore, in the charge of the lower court, so far as this issue was concerned, or in its refusal to give the defendant's instructions presenting the issue.

The defendant's second proposition, above outlined, was based on a construction of section 2322 of the Revised Statutes of the United States, the material part of which is as follows:

"The locators of all mining locations heretofore made, or which shall hereafter be made, on any mineral vein, lode, or ledge, situated on the public domain, their heirs and assigns, where no adverse claim exists on the tenth day of May, eighteen hundred and seventy-two, so long as they comply with the laws of the United States, and with state, territorial, and local regulations not in conflict with the laws of the United States governing their possessory title, shall have the exclusive right of possession and enjoyment of all the surface included within the lines of their locations, and of all veins, lodes, and ledges throughout their entire depth the top or apex of which lies inside of such surface lines extended downward vertically, although such veins, lodes, or ledges may so far depart from a perpendicular in their course downward as to extend outside the vertical side lines of such surface locations. But their right of possession to such outside parts of such veins or ledges shall be confined to such portions thereof as lie between vertical planes drawn downward as above described, through the end lines of their locations, so continued in their own direction that such planes will intersect such exterior parts of such veins or ledges."

The instruction tendered by the defendant company in effect asked the circuit court to declare that section 2322 does not permit one who

locates upon the apex of a lode or vein to follow the vein outside of his side lines and underneath the boundary lines of an adjoining proprietor if the latter holds under a senior patent. As the proposition was stated in the instruction it excluded all consideration of the question whether the Colorado Central Company had or had not first discovered and located the same vein on the dip which the owner of the Aliunde was following underneath its territory. In other words, it asserted that the right given by section 2322 to the holder of the apex to follow his vein on its dip outside of the side lines of his claim is merely a right that can be asserted against an adjoining claimant holding under a junior patent or certificate. We are of the opinion that the instruction, as asked, was properly refused. It rested upon an interpretation of the statute that cannot be sustained in view of the language employed, and, so far as we are aware, has never, as yet, been adopted. In two cases (*Milling Co. v. Spargo*, 16 Fed. Rep. 348, and *Amador Medean Gold Min. Co. v. South Spring Hill Gold Min. Co.*, 36 Fed. Rep. 668) it was held that a patent for agricultural lands, issued under the pre-emption laws of the United States, carries the right to all mines underneath the surface to which no right has attached at the time the certificate of purchase or the patent issues, and that a reservation in such patent, saving the rights of proprietors of mining veins or lodes, related solely to those proprietors whose rights had attached before the lands were purchased for agricultural purposes. We think that the same effect cannot be given to a patent for a mining claim which appears to have been given in the cases cited to patents for agricultural land. The title acquired by a patent of the former description bears little resemblance to a title conferred by the latter, because it is acquired and held under the provisions of statutes differing widely both in their language and purpose. The statute conferring the right to follow a lode outside the side lines of a location, when the top or apex of the lode lies within the boundaries of the location, does not, in terms or by necessary implication, limit the exercise of that right, especially where mining claims are involved, to cases where the adjoining claims are held under junior locations or patents, and we think we would not be justified in placing such a limitation upon the right by construction. The practice of the general land office for many years also appears to have been opposed to the existence of any such limitation.

The instruction embodying the third and final proposition above stated was intended, as we are advised by the counsel who drafted it, to present the law applicable to a particular phase of the testimony. The defendant company had begun work on the Colorado Central claim at least 600 feet northeast of the disputed territory, and had there discovered a vein on which the Colorado Central location and patent appear to rest. From this point it had drifted along the vein on several levels, in a southwesterly direction, until it reached the disputed ground. There was testimony in the case having a tendency to show that the Colorado Central vein forked as it entered the disputed territory, and that the apex or outcrop of one of the forks (that on which the Aliunde

location rested) had departed from the Colorado Central side lines, and was within the Aliunde location, although, by reason of the dip, a portion of the fork of the vein was still underneath the Colorado Central claim. We are advised that by reason of this phase of the testimony the instruction now under consideration was tendered, the intent being to obtain a declaration that upon the state of facts last mentioned the proprietor of the Aliunde could not follow the fork of the vein outside of his side lines, he being a junior patentee, although the outcrop was within his own boundaries. The instruction was not very well calculated to enlighten the jury, because it did not contain a sufficient statement of the facts upon which it was predicated to render it intelligible. But, waiving that objection, we think it was bad for other reasons. Upon the assumption that the Colorado Central vein had divided on its strike to the southwest, and that the defendant company had lost the outcrop of one, if not both, forks of the vein by reason of the narrowness of its claim, we fail to perceive upon what principle it could claim the fork of the vein, the outcrop of which had been lost. If the vein on which the Colorado Central location rested became divided as it entered the disputed territory, and the outcrop of one fork crossed into the Aliunde territory, then it followed that the Colorado Central claim had been laid rather obliquely to the course of the outcrop, and in that event we are of the opinion that the defendant lost that fork of the vein which had passed outside of its side lines. In other words, so far as that fork is concerned, the south end line of defendant's Colorado Central claim must be regarded as a line drawn through the point where the outcrop passed through its south side line. There was no error, therefore, in the refusal of the instruction. *Argentine Min. Co. v. Terrible Min. Co.*, 122 U. S. 478, 7 Sup. Ct. Rep. 1356; *Mining Co. v. Tarnet*, 98 U. S. 463; *Iron Silver Min. Co. v. Elgin Mining & Smelting Co.*, 118 U. S. 196-209, 6 Sup. Ct. Rep. 1177.

Two questions of practice are also presented by the plaintiff in error, which remain to be considered. The record shows that after the jury had been instructed and had retired, they asked for further directions as to a certain question of law, and that they were recalled, and further instructed by the court on that point, and none other; in this connection it may be said that the direction so given was merely a repetition, in substance, of a portion of the charge to which counsel for the defendant company had already saved their exception before the jury retired. The record recites that "to the giving of said instruction (i. e., the one in response to the inquiry of the jury) said defendant specially objects and excepts for the reason that the same was given without counsel for defendant being present as well as for the reason that the said instruction was contrary to law." We are not advised by the record, any further than is above stated, of the details of the transaction of which complaint is made, and we think it manifest that the transaction as stated will not justify a reversal of the cause. The rule, we concede, is well established that there ought to be no communication between the judge and jury after the latter have been charged and have retired to consider their ver-

dict, unless the communication takes place in open court, and, if practicable, in the presence of counsel on the respective sides. *Bank v. Mix*, 51 N. Y. 558; *State v. Patterson*, 45 Vt. 308; *O'Connor v. Guthrie*, 11 Iowa, 80; *Chouteau v. Iron-Works*, 94 Mo. 388-400, 7 S. W. Rep. 467; *Stewart v. Cattle Rancho Co.*, 128 U. S. 383-390, 9 Sup. Ct. Rep. 101. But in the present case the communication complained of evidently took place in open court, and, if defendant's counsel were not present, as their exception recites, it may have been due to their own fault, in absenting themselves from the court room when they should have remained in attendance. In the absence of any showing as to the cause of their absence, or as to whether any efforts were made to secure their presence, we are bound to indulge in every presumption in favor of the regularity and propriety of the court's action.

Complaint is also made that the verdict of the jury is too general, and that it does not define the boundaries of the disputed territory east and west in feet and inches, as an engineer might perhaps have done by an actual measurement. We think this objection is likewise untenable. The complaint filed in the circuit court described the disputed premises with all reasonable accuracy and certainty as "so much of said Aliunde Tunnel Lode No. 2 mining claim and premises, as lies beneath the depth of 300 feet beneath the surface of the ground, north of the north side line of said Aliunde Tunnel Lode, carrying said north line down vertically, and from thence on the pitch of said lode northwestwardly, and measuring thence along the line of said Aliunde Tunnel Lode No. 2 a distance of six hundred feet next west of the northeast end line of said claim;" and the jury, by their verdict, found the issues joined for the plaintiff, and further found that the plaintiff was "the owner in fee of the lode and premises described in the complaint, and was entitled to the occupation and possession thereof." In view of these facts, the objection taken to the verdict, on account of its generality, is certainly without merit. In entering final judgment it seems that the circuit court did not award all of the premises to which the plaintiff was entitled by the verdict of the jury, but that is an error of which the defendant company cannot be heard to complain. Upon the whole, therefore, we find no material error in the record, and the judgment of the circuit court is accordingly affirmed.

v.50r.no.11—57

**BAER *et al.* v. ROOKS *et al.*, (DOYLE, Intervener.)***(Circuit Court of Appeals, Eighth Circuit. May 23, 1902.)*

No. 55.

**1. TRIAL—INSTRUCTIONS—CHARGE IN WRITING.**

In civil actions in the Indian Territory the court cannot be required to reduce its general charge to writing. *Railroad Co. v. Campbell*, 49 Fed. Rep. 354, 4 U. S. App. 133, followed.

**2. FRAUDULENT CONVEYANCES—ACTION TO SET ASIDE—INSTRUCTIONS.**

In an action to set aside an alleged fraudulent sale of personal property an instruction that fraud is never presumed, but must be proved, is not reversible error because it fails also to state that fraud, like any other fact, may be proved by circumstantial evidence.

**3. SAME—ASSIGNMENT FOR BENEFIT OF CREDITORS—INSTRUCTIONS.**

In an action to set aside an assignment for the benefit of creditors an instruction that it is the duty of an insolvent debtor to make such an assignment is a statement of an abstract proposition, and is harmless error. *Sanger v. Flow*, 48 Fed. Rep. 152, 4 U. S. App. 32, followed.

**4. ASSIGNMENT FOR BENEFIT OF CREDITORS—FRAUD—KNOWLEDGE OF ASSIGNOR.**

An insolvent debtor may transfer a portion of his property, at full value, to a creditor, in payment of a pre-existing debt, just before making a general assignment to a trustee for the benefit of his creditors; and, to invalidate the assignment for fraud, it must be shown that the trustee was cognizant of or participated in the fraud. *Emerson v. Senter*, 6 Sup. Ct. Rep. 981, 118 U. S. 8, followed.

**5. SAME—PREFERENCE—PARTNERSHIP—INFANTS.**

A person engaged in trade cannot by his own acts make infants of tender years his partners in business, but, if he is indebted to them, he may prefer them in making an assignment for the benefit of his creditors.

**6. SAME—FRAUD—PRIOR ASSIGNMENT.**

In an action to set aside an assignment for the benefit of creditors because the assignor had used a portion of his property in paying a pre-existing debt, it is not material to the issues involved that the assignor had also conveyed his entire property to the same creditor at 80 cents on the dollar, which conveyance had been rescinded upon the advice of counsel, and the parties placed *in statu quo*, before the execution of the assignment.

**7. SAME—FRAUD—BURDEN OF PROOF.**

An instruction that the burden was on the assignee to explain any diminution in the property of the assignor between the date of the conveyance which was rescinded and that of the assignment was rightfully refused; for, although such fact might tend to show fraud, the assignee can only be required to account for the property he actually received.

**8. SAME—FRAUD—DELIVERY OF GOODS TO SECURE NOTE.**

The delivery of goods or value by the maker of a note, about to assign for the benefit of his creditors, to his surety thereon, to enable the latter to pay the note, is not such a fraudulent disposition of the assets as to invalidate the assignment, although the note was not due at the time.

**In Error to the United States Court in the Indian Territory.**

Action by Adolph Baer, Simon Seasongood, and Lewis Bierman, trading as Baer, Seasongood & Co., against C. C. Rooks, William Rooks, and Agnes Rooks, trading as C. C. Rooks & Co., and Edmund H. Doyle, intervener. Verdict and judgment for defendants. Plaintiffs bring error. Affirmed.

The action was commenced by attachment on a stock of goods in the hands of Doyle, to whom defendants had made an assignment for the benefit of creditors; it being alleged that such assignment was fraudulent and void.

Statement by CALDWELL, Circuit Judge:

C. C. Rooks, under the name and style of C. C. Rooks & Co., was engaged in business as a merchant at McAlester, in the Indian Terri-



tory. Rooks represented to some of his creditors that two children he was raising, a boy and a girl, aged respectively 8 and 14 years, were his partners. This alleged partnership need not be further noticed. In February, 1890, Rooks owed between \$23,000 and \$30,000, and had a stock of goods which invoiced at cost and carriage between \$19,000 and \$20,000. At this time the indebtedness of Rooks to J. J. McAlester, including the sums for which McAlester was surety for Rooks, amounted to about \$6,500. On the 27th of February, 1890, Rooks sold his stock of goods to McAlester at 80 cents on the dollar in satisfaction of the \$6,500 due to McAlester, who was to pay Rooks the balance of the purchase price for the goods in three equal payments, in three, six, and nine months. The day or day after this sale was consummated, McAlester was advised by counsel that he would probably have trouble with the other creditors of Rooks, and thereupon the sale was rescinded, and both parties placed back where they stood before negotiations were begun. On the 1st day of March, afterwards, Rooks sold and delivered to McAlester, out of his store, goods enough, invoiced at cost and carriage, to pay McAlester the \$6,500 before mentioned. As soon as the goods sold to McAlester were taken out of the storehouse of Rooks, he executed and delivered a general assignment of all his property subject to execution to E. H. Doyle, as trustee, for the benefit of his creditors, with preferences to certain of his creditors who were named in a schedule annexed. Upon the delivery of the deed of assignment the assignee took possession of the stock of goods remaining in Rooks' storehouse. This deed of assignment was executed before the Arkansas statute on the subject of assignments for the benefit of creditors was put in force in the Indian Territory. On the 4th day of March the plaintiff in error sued out a writ of attachment against Rooks, in the name of C. C. Rooks & Co., for the sum of \$572.59 and for \$30 costs, upon the ground that they had sold, conveyed, or otherwise disposed of their property with the fraudulent intent to cheat, hinder, and delay their creditors. This writ of attachment, by direction of the plaintiffs, was levied by the marshal on the stock which Rooks had assigned to Doyle, as trustee, for the benefit of his creditors. In apt time, Doyle intervened in the suit of plaintiffs against Rooks, and claimed the goods attached, as trustee under the deed of assignment. The plaintiffs answered the intervening petition of the assignee, alleging:

"That the pretended deed of assignment is fraudulent and void as to the creditors of the said firm, because the said C. C. Rooks, J. J. McAlester, and E. H. Doyle, the intervener herein, about the time of the pretended execution of the said deed of assignment, the said C. C. Rooks, J. J. McAlester and E. H. Doyle, with the fraudulent intent to convert and appropriate a large amount of the assets of said firm for the benefit of J. J. McAlester and C. C. Rooks, agreed to and did deliver to the said J. J. McAlester a large amount of the goods and merchandise of said firm, of about the value of \$15,000. That after the execution of the pretended deed of assignment the said C. C. Rooks, J. J. McAlester, and the intervener, E. H. Doyle, with the fraudulent intent to delay, cheat, and hinder the creditors of the said firm, and to convert the same to the use of the said J. J. McAlester, took from the said

stock of goods merchandise of about the value of \$15,000.00, and delivered the same to the said J. J. McAlester, who converted the same to his own use."

The defendant Rooks traversed the affidavit for attachment. The issue on the interplea and the issue on the traverse of the attachment were tried together before a jury, who found both issues against the plaintiffs, who thereupon sued out this writ of error.

*Isaac H. Orr, H. L. Christie, N. B. Mazey, and G. B. Denison*, for plaintiffs in error.

*G. W. Pasco*, for defendants in error.

Before CALDWELL and SANBORN, Circuit Judges, and SHIRAS, District Judge.

CALDWELL, Circuit Judge, (*after stating the facts.*) The first error assigned is that the court refused to instruct the jury in writing before argument. We have already decided that the court is not required to charge in chief in writing. *Railroad Co. v. Campbell*, 4 U. S. App. 133, 49 Fed. Rep. 354. The statement is made in the brief of counsel for plaintiff in error that "the record in this case discloses the fact that the plaintiffs submitted to the court a series of instructions, and requested the court to give or refuse them before the argument;" but this is an error. What the record does show is that, "the evidence being concluded on both sides, the plaintiffs, by their attorneys, requested the court to instruct the jury, in writing, before argument, which the court refused to do, and to which refusal plaintiffs at the time excepted." This request and exception obviously relate to the charge in chief, and not to special requests asked by either side. The remaining errors assigned relate to the instructions given and refused. The court told the jury that "fraud is never presumed, but must be proved," and this was excepted to; and the ground now assigned for the exception is that the court did not in the same connection state that fraud, like any other fact, could be proved by circumstantial evidence. But no suggestion was made to the court at the time, and no request preferred, to that effect. It is the prevailing practice, in cases involving an issue of fraud in fact, for the court to repeat to the jury this trite scrap of judicial phraseology, and it is commonly followed by a statement that fraud, like any other fact, may be proved by circumstantial evidence; but it would be an unwarranted impeachment of the intelligence of the juries of this country to suppose that they do not have a knowledge of these common truths. Every man knows that fraud, no more than murder, trespass, or debt, is presumed against a man, and that fraud, as well as murder, trespass, or a debt, may be proved by circumstances as well as by the positive testimony of an eyewitness. When the court tells a jury that the burden is on a party to prove a given fact, it is not required to enumerate all the various kinds and degrees of evidence by which the fact may be proved, as that it may be proved by paper writing signed by the party, or by the oral evidence of eyewitnesses, or by the admissions of the party, or by circumstances. The jury knows, without being told so in terms,

that every fact and circumstance which the court permits to go in evidence before them is put there for their consideration in the determination of the facts of the case. If a party conceives that the evidence discloses any fact or circumstance which the law regards as a badge of fraud, or *prima facie* evidence of fraud, he may, if the court omits to notice it in its charge, prefer a request for an instruction to that effect.

The court charged the jury that it was the duty of an insolvent debtor to make an assignment of his property for the benefit of his creditors. A similar charge was considered by this court in *Sanger v. Flow*, 4 U. S. App. 32, 48 Fed. Rep. 152, and was held not to be a reversible error.

The court rightly told the jury that if they found the transfer and delivery of the goods to McAlester, in satisfaction of the debt due from Rooks to him, were made before the execution of the deed of assignment, that the validity of the deed was not affected thereby, and that "in order to vitiate the deed of assignment on the grounds of fraud the fraudulent intent must have existed, and the assignment was the means by which the fraud was effected, and must operate to the detriment of the creditors of the assignor, or reserve some benefit to the assignor himself. No subsequent act of the parties can affect or invalidate an assignment made in good faith." The plaintiffs have no reason to complain of this instruction. *Estes v. Gunter*, 122 U. S. 450, 7 Sup. Ct. Rep. 1275; *Hill v. Woodberry*, 4 U. S. App. 68, 49 Fed. Rep. 138. The charge was too favorable to the plaintiffs, in that it does not tell the jury that to render the deed void for fraud the trustee must have been cognizant of or participated in the fraud. *Emerson v. Senter*, 118 U. S. 3, 6 Sup. Ct. Rep. 981.

Rooks could not by his own act make infants of tender years his partners in business; and, if he was indebted to them, he had an undoubted right to prefer them in his assignment, as was done.

Several of the requests for instructions preferred by the plaintiffs related to the sale of the goods by Rooks to McAlester which was, upon the advice of counsel, rescinded, and the parties placed *in statu quo*, some days before the making of the deed of assignment or the suing out of the attachment. These are conceded facts, and the instructions, therefore, based on that annulled and rescinded transaction, were irrelevant to the issues to be tried.

The plaintiffs asked the court to charge that if Rooks paid to McAlester \$5,000 in goods to pay a note for that amount, on which McAlester was surety for Rooks, before the maturity of the note, that would be a fraudulent disposition of the goods on the part of Rooks. The assignor had a right to use his property to pay debts to become due as well as those already due, and he had an undoubted right to protect parties who had become his sureties, whether for debts due or to become due. *Estes v. Gunter*, *supra*.

The plaintiffs asked the court to instruct the jury that it was "incumbent upon the defendant and intervener" to account for any diminution in the stock of goods between the date of their first sale to McAlester,

in February, and the date they were levied upon by the marshal, and, "if they have not done so to your satisfaction, you should find for the plaintiffs." This request has reference to the sale of the goods to McAlester, which was rescinded *in toto* long before the assignment was made or the attachment issued. McAlester had possession of the goods one day under that sale, and then transferred them back to Rooks, who continued to sell and pay debts out of them until the deed of assignment was delivered to the assignee, from whom they were subsequently taken by the marshal. The instruction asserts, in effect, that if there was any diminution in the amount or value of the goods between the time they were sold to McAlester, in February, and the 5th day of March, when they were attached, the burden was on the intervener to account for the diminution, and that, if he failed to do so, his title under the deed of assignment was void. No such burden rested upon the intervener. The intervener is only required to account for the goods he received. He is not required to show, under penalty of a forfeiture of his title under the deed of assignment, what disposition the assignor made of other goods before the assignment was made, or to explain any diminution in the amount of the goods before they came into his possession as trustee under the deed. If there was any considerable diminution in the amount of the goods between the dates mentioned, it might have been a circumstance tending to support the truth of the affidavit for attachment. But, in the form in which it was asked, it was rightly refused, and cannot be made a ground of exception upon either issue.

We have looked very carefully through the record in this case, and see no error of which the plaintiffs can justly complain. The assignor seems to have done no more than to have exercised his undoubted right at common law to appropriate his property to the payment of some of his creditors to the exclusion of others. This right he could exercise before he made the assignment, as he did to some extent, and he could also exercise it by making an assignment giving preferences, as was done. Judgment affirmed.

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HENRY *et al.* v. ROBERTS.

(Circuit Court, D. Maryland. May 16, 1892.)

CONSTITUTIONAL LAW—POLICE POWER—DRIFTED LOGS.

The provisions of the Maryland Code, art. 84, giving to the owner of any shore of the Chesapeake bay and its tributaries, upon whose land logs are cast by wind and tide, a lien upon the logs of 25 cents for each log, and forbidding the owner of the logs from removing them without payment, held to be valid and constitutional legislation within the proper exercise of the police power of the state. Held, that the state legislation was not an unconstitutional and arbitrary interference with private rights; that it was not an attempt to regulate commerce; and that it did not deprive the owner of the logs of his property without due process of law.

At Law. Action of replevin. Heard on demurrer to the special plea. Overruled.

*Morrison, Munnikhuyzen & Bond*, for plaintiffs.

*H. Arthur Stump*, for defendant.

MORRIS, District Judge. This is a replevin suit instituted by the plaintiffs, Henry & Strong, citizens of Pennsylvania, to recover about 8,000 logs from the possession of the defendant, Roberts, a citizen of Maryland, the logs being upon defendant's island, called "Roberts' Island," in the Susquehanna river, in Harford county, Md., and appraised at \$5,706. The defendant has filed a special plea, in which he sets up that in June, 1889, the logs in controversy were cast by wind and tide upon the said island, and remained until November following, when they were taken away by the plaintiffs under the writ of replevin in this case; that by the Maryland acts of 1870 and 1872, and Maryland Code, art. 34, the defendant, at the time of the taking under the writ of replevin, had a lien on the logs to secure compliance with the terms of said acts, and had a right to the possession thereof. The Maryland act of 1870, c. 229, was entitled "An act for the protection of the owners of land bordering upon the Chesapeake bay and its tributaries;" and the act of 1872, c. 258, was entitled "An act for the better protection of landowners bordering on the Chesapeake bay and its tributaries." They have been codified in the Maryland Code as parts of article 34, which treats of estrays, vessels adrift, and drift logs. The pertinent sections are as follows:

"Sec. 12. All persons claiming logs cast by wind and tide upon any shore bordering upon the Chesapeake bay and its tributaries are hereby prohibited from removing the same without the payment to the owner of the said shore the sum of twenty-five cents for each log so removed. Sec. 13. The owner of any shore upon which logs are so cast may advertise such logs by one insertion each week for three successive weeks in some newspaper published in the state of Maryland, of a public notice calling upon the owner of said logs to remove them after the payment of twenty-five cents for each log so removed, and the cost of said advertisement in addition therewith. Sec. 14. If the said logs are not removed after such publication, the owner of any shore may sell such logs to the highest bidder by giving notice of his intention so to do by an additional advertisement for three successive weeks as aforesaid, mentioning the time and place of sale. Sec. 15. Any owner of a shore, so selling, shall be responsible for the excess of such sale over the sum of twenty-five cents for each log sold and the cost of the aforesaid advertisement and sale. Sec. 16. Nothing herein contained shall be construed to deny to the owner of any shore right to an additional compensation for special damages, such as the destruction of fences, the lodging of logs upon cultivated fields, or other similar injuries."

Other provisions of the law enact penalties against any one removing logs without complying with the foregoing provisions and for willfully marking such logs, and that any judgment against the landowner for such logs shall be null and void, unless the claimant has actually paid the landowner the prescribed 25 cents for each log. The plaintiffs have demurred to the defendant's special plea, and urge in support of their demurrer that the Maryland act is unconstitutional and void (1) because it

is an unconstitutional and arbitrary interference with private rights; (2) because it is an attempt by the state to regulate commerce; (3) because it authorizes the taking of private property without due process of law.

The authority of the state to legislate upon this subject is based upon its supposed right to enact regulations with regard to property cast upon the lands bordering upon the navigable waters of the state. The right to regulate highways, both the natural waterways and rivers, as well as roads, is a recognized and comprehensive branch of state sovereignty, usually classed as a part of the police power. Wharves and ferries, and the charges for the use of them, the building of dams and other structures on navigable streams, the manner in which logs and rafts shall be floated and guarded, the preservation of the shores, the construction of embankments and levees, are all subjects of regulation by state legislation under its police power. *Harrigan v. Lumber Co.*, 129 Mass. 580; *Scott v. Willson*, 3 N. H. 321; *Sherlock v. Alling*, 93 U. S. 99; *Craig v. Kline*, 65 Pa. St. 399. It is true that navigable rivers are public highways, but the right which the public has is a right of passage, and not of using the adjoining land as a place for depositing property or storing logs. *Littlefield v. Maxwell*, 31 Me. 134; *State v. Wilson*, 42 Me. 9. Under such circumstances as give rise to the present controversy the land is made use of by the owner of the logs necessarily without previous consent or agreement, and such use is likely to lead to dispute and disorder unless regulated by statute. Such regulation would seem to be a very salutary exercise of the state police power. In other states laws upon this subject have been enacted. In Maine and in Pennsylvania it has been enacted that logs lodged upon littoral lands shall be forfeited to the owners of the land. Although not stated in the pleadings, it was conceded in argument that the logs in controversy had been in the Susquehanna river, in Pennsylvania, and had been carried by a freshet out of that state into Maryland, and it is contended by the plaintiffs that the Maryland statute, in so far as it affects property transported from an adjoining state, is an attempt to regulate interstate commerce. If it be conceded that the facts of the case bring the subject within the principles applicable to interstate commerce, yet reasonable regulations with regard to the charges for the use of the property within the state, although used in connection with interstate commerce, have not been held to be necessarily a matter confided exclusively to congress by the federal constitution. *Packet Co. v. Catlettsburg*, 105 U. S. 559; *Packet Co. v. Keokuk*, 95 U. S. 80. In *Munn v. Illinois*, 94 U. S. 113, a state law was upheld which regulated the warehouse charges on grain brought into Illinois in the course of interstate commerce; and so in the present case, even if it can be true that such commerce may be indirectly affected, it would seem that the state may validly regulate the charges to be allowed for the use of land bordering upon its navigable waters in the absence of private agreement. It was also held in *Munn v. Illinois* that if under any state of facts which might reasonably be supposed to exist the legislation would be justified, it was fair to presume that such facts did exist when the state enacted the remedial statute, and in the

present case, it being, as I think, within the police power of the state to fix a reasonable compensation for the use of littoral lands by logs cast up on the shores, it must be presumed that the actual condition of things required the passing of the law. Indeed, it is common experience that, whenever parties are compelled by necessity to come under obligations to each other without opportunity for previous agreement, the legislative power is obliged to regulate the compensation which may be exacted in order to prevent extortion and abuse.

The last ground of demurrer is based upon the contention that the Maryland act subjects the owner of the logs to the deprivation of his property without due process of law. The objection is taken that the proceedings prescribed by the statute to enable the landowner to sell the logs for the payment of the charges, after notice by publication, without any judicial determination of the amount payable, fails to amount to due process. It seems to me that in the present case it is not necessary to consider this question. If the state has a right to regulate the charges, it has a right to enact that the landowner upon whose land the logs have been cast shall have a lien on them for the prescribed charge, and that he may retain possession until the amount is paid. This is all that is enacted by the first section of the statute. The right to hold possession of a chattel until a charge which is a lien upon it is paid is a most common legal right. What proceedings to enforce such a lien resulting in a sale are sufficient to pass a good title, and to deprive the owner of his property by due process of law, is a separate question. In the present case the defendant has done nothing, so far as appears, to enforce his lien. The logs remained in his possession upon his land from June to November, when the plaintiffs, refusing to pay the charges, took them under this replevin. There has been no attempt to deprive the owner of his property in the logs, and objection to the statutory proceedings for a sale are not proper to be considered in this case.

Another suggestion under this head is that the compensation of 25 cents for each log is such an unreasonably excessive exaction, and that in some cases it would amount to depriving the owner of his property. To this it is sufficient reply that nothing appears in this case tending to show it to be a fact, and every presumption is in favor of the reasonableness of the legislative enactment. The demurrer is overruled.

**RICHMOND & D. R. Co. v. McGEE *et al.***

*(Circuit Court of Appeals, Fourth Circuit. May 26, 1892.)*

No. 2.

**1. BILL OF EXCEPTIONS—SIGNED AFTER TERM.**

No bill of exceptions was presented to the trial judge for signature and signed by him during the term at which the trial was had and judgment rendered, nor within any extension of time for that purpose, either by order or by consent of counsel, but a paper was filed entitled a "Bill of Exceptions." *Held*, that a certificate of the trial judge that "all of the exceptions set out in the assignment of errors, called the 'Bill of Exceptions,' " were duly taken at the trial and noted by him on the minutes, and reduced to writing as the assignment of errors, and allowed by him, was unavailing.

**2. FEDERAL COURTS—STATE PRACTICE—REVIEW BY CIRCUIT COURT OF APPEALS.**

The practice and rules of the state courts do not apply to proceedings taken in the circuit courts of the United States for the purpose of review in the circuit court of appeals.

In Error to the Circuit Court of the United States for the District of South Carolina.

Action by J. L. McGee and W. R. Dillingham against the Richmond & Danville Railroad Company to recover for the loss of live stock through defendant's negligence as a common carrier. Judgment for plaintiffs. Defendant brings error. Affirmed.

*J. S. Cothran and G. G. Wells*, for plaintiff in error.

*Geo. E. Prince*, for defendants in error.

Before FULLER, Circuit Justice, and BOND and GOFF, Circuit Judges.

FULLER, Circuit Justice. This case was tried to a jury at the August term, 1891, of the circuit court of the United States for the district of South Carolina, at Greenville, and a verdict returned in favor of plaintiffs below, defendants in error here, August 7, 1891. August 8th a motion for new trial was made, which was denied August 15th, and on August 20th notice of an appeal was given, an appeal allowed, and the amount of *supersedeas* bond was fixed. The bond was approved September 12, 1891. September 17, 1891, judgment and execution were filed. The case being at law, and not open to appeal, a writ of error was taken out October 10, 1891, with citation, and on the same day there was filed a paper, bearing that date, entitled "Bill of Exceptions," signed by counsel for defendant below. The certificate of the clerk to the transcript is to the effect that "the foregoing is a true and correct copy of the records, proceedings, and of the verdict in the case of *McGee & Dillingham, Plaintiffs*, against the *Richmond & Danville Railroad Company, Defendant*, rendered as aforesaid, together with all the proceedings had in the cause relating to the same." No bill of exceptions, signed by the trial judge, appears in the record. The August term expired during that month, and no order was entered extending the time within which such bill might be prepared and filed, nor was there any consent of counsel giving further time for that purpose. When the case came on for argument in this court, February 3, 1892, the attention of counsel was called to the fact that there was no bill of exceptions, and argument was sus



pended and the case passed. A certificate of the trial judge, dated February 20th, has now been produced, stating that—

"All of the exceptions set out in the assignment of errors, called the 'Bill of Exceptions' in the above-entitled cause, and part of the record, were duly taken on the trial, and were noted by me in the progress of the case, and signed on my minutes. After the trial these exceptions were duly reduced in form to writing, as the assignment of errors, and submitted to me. I allowed the same, but did not sign them, because they were really the assignment of errors. They correspond, however, with the exceptions taken and noted at the trial."

Some correspondence has also been laid before us, which, if treated as properly examinable, does not change the facts.

From the foregoing statement it will be seen that no bill of exceptions was presented to the trial judge for signature, and signed by him during the term at which the trial was had and judgment rendered, nor within any extension of time for that purpose granted by him and entered of record, or consented to by counsel. This being so, the certificate of February 20th is entirely unavailing, even if in itself sufficient if executed in due time. The case comes clearly within *Muller v. Ehlers*, 91 U. S. 249. See, also, *Jones v. Grover & Baker S. M. Co.*, 131 U. S. Appendix, cl.; *U. S. v. Carey*, 110 U. S. 51, 3 Sup. Ct. Rep. 424; *Express Co. v. Malin*, 132 U. S. 531, 10 Sup. Ct. Rep. 166; *Glaspell v. Railroad Co.*, 144 U. S. 211, 12 Sup. Ct. Rep. 593. In *Davis v. Patrick*, 122 U. S. 138, 7 Sup. Ct. Rep. 1102, the delay was attributable to the judge after the party excepting had done all that he could to procure the settlement of and signature to the bill, while here no bill of exceptions was ever presented, nor was the paper relied on as such tendered to the judge until after the time within which he could act had expired. We may observe, further, that the practice and rules of state courts do not apply to proceedings taken in the circuit courts of the United States for the purpose of reviewing in this court the judgments of such circuit courts. *Chateaugay Ore & Iron Co., Petitioner*, 128 U. S. 544, 9 Sup. Ct. Rep. 150. The true rule upon this subject is laid down in *Muller v. Ehlers*, and is expressed, in substance, in rule 36 of the rules of the United States circuit court for the district of South Carolina, which provides for the taking of exceptions on the trial, though the bill of exceptions may be drawn up and settled afterwards; but only "within such times and under such rules as the court, in its discretion, may prescribe at the time." As the errors relied on are only such as could arise on a bill of exceptions, the judgment of the circuit court must be affirmed; and it is so ordered.

Appeal of FIELD *et al.*

(Circuit Court, N. D. Illinois. June 8, 1892.)

## CUSTOMS DUTIES—PROPERTY SUBJECT TO DUTY—SILK VEILS.

Silk goods, which, although made in the manner of laces, and having the substantial characteristics of laces, are not commercially known as "laces," but as "silk nets," "veilings," and "drapery nets," are dutiable under Schedule L, par. 414, of the customs act of 1890, as a manufacture of silk not otherwise provided for, and not as silk laces.

At Law.

N. W. Bliss, for appellants.

Thos. E. Milchrist, U. S. Dist. Atty., for the collector.

BLODGETT, District Judge. This is an appeal from the board of general appraisers under section 15 of the customs administrative act of June 10, 1890. The appellants imported to the port of Chicago silk goods, which the collector classed as silk "laces," and assessed the duty thereon at the rate of 60 per cent. *ad valorem*. Appellants gave the collector notice of their dissatisfaction with his decision in classifying and assessing the duty on said goods, and thereupon the collector transmitted the invoices, papers, and exhibits connected with the entry of such goods for duty to the board of general appraisers at New York city. The board of general appraisers, after an examination and hearing, rendered a decision affirming the action of the collector; and the appellants, being dissatisfied with such decision, applied to this court for a review of the questions of law and fact involved in the decision. The record of the proceedings before the board of general appraisers, together with the evidence and exhibits before them, has been duly returned to this court, and on the application of the appellants further proof has been taken in the manner required by the statute, and the case brought to hearing before the court upon the return of the board of general appraisers, and the additional proofs taken. The contention of the importer is that the goods in question are not known as "silk laces," but are commercially known by the trade as "silk nets," "veilings," and "drapery nets," and are dutiable as a manufacture of silk not otherwise provided for, at 50 per cent. *ad valorem*, under Schedule L, par. 414, of the customs act of October 1, 1890. The board of general appraisers, in its opinion in the case, has gone very fully into the art of lace making, and the difference between the fabrics known as "laces" and "woven fabrics," and their conclusions in the matter are quite clearly expressed in the 2d, 6th, 7th, 8th, and 9th findings of fact, which form part of their opinion, which I quote as follows:

"(2) The merchandise in question consists of plain and a variety of figured silk lace nets and veilings and silk lace drapery nets made on the lace machine, and distinguished by the hexagonal mesh."

"(6) The hexagonal mesh is the essential feature, as it is the distinguishing characteristic of lace, the process of its formation being akin to knitting as it is the antithesis of weaving.

"(7) The presence of the hexagonal mesh in a textile fabric is conclusive of the fact that it is a lace, whereas its absence is equally conclusive of the fact that it is a woven fabric; that is to say, not a lace.

"(8) The claim that the merchandise in controversy is commercially known as 'nets' and 'veilings' and 'drapery nets,' and never as 'lace nets,' 'lace veilings,' 'lace drapery nets,' or as 'laces,' is not, in our opinion, clearly established, and we hence find that it consists of laces."

It will be seen that the test applied by the board of general appraisers to these goods for determining the class to which they belong for the purpose of duty is that they contain the hexagonal mesh, which they find to be the distinguishing characteristic of lace. The conclusion of the board, deduced from the study of the art of lace making, either by hand or machinery, is based largely upon definitions of lace and their differentiation of lace from woven fabrics. The proof in the case from expert persons skilled in the trade and with long and extensive experience in the business is that these goods are not known as "laces," but are commercially known as "nets" and "veilings," and "drapery nets." There is no dispute between the parties but that the goods are a manufacture of silk; nor is there any dispute that they are made upon what is known as a "lace machine;" that is, a machine which nets or knits the meshes and figures upon them. While I have no doubt that these goods respond to the general designation or description of lace, not necessarily because they show the hexagonal mesh, but because they are made in the same manner as most of the machine-made laces, I am also satisfied, as I have before said, from the proof, that these goods are not commercially designated as "laces," but are known to the trade by the name of "silk nets," "veilings," etc.; and, recognizing the rule "that the commercial designation of an article among traders and manufacturers, where such designation is clearly established, fixes its character for the purpose of the tariff laws," I see no escape from the conclusion that these goods should have been classed as dutiable under clause 414 as a manufacture of silk not otherwise specially provided for. This rule has been so long acted upon as to hardly require the citation of authorities in its support. It was clearly laid down in *U. S. v. 200 Chests of Tea*, 9 Wheat. 480, followed in *Barlow v. U. S.*, 7 Pet. 409, and again applied in *Arthur v. Morison*, 96 U. S. 108. In that case goods were imported and assessed for duty as "silk veils." The importer insisted that, although the veils were a manufacture of silk, they were not commercially known as "silk veils," but were commercially known as "crepe veils," and the supreme court, in an elaborate opinion, sustained the contention of the importer, the court saying:

"The question of law thus presented is whether veils which are not commonly called 'silk veils,' but are veils manufactured of silk, and are commercially known as 'crepe veils,' and not otherwise, are liable to a duty of 60 per cent. The argument of the government is that the statute in question is a comprehensive one, intended to include all articles made of silk, or of which silk is the component material of chief value, specifically enumerating in its first branch a variety of subjects on which should be imposed a duty of 60 per cent., and further providing that on all manufactures from that material

not otherwise provided for a duty of 50 per cent. should be levied and collected. Silk veils, it is said, are specifically enumerated as being liable to a duty of 60 per cent., and the articles in question, being veils of which the material is silk, are within the enumerating clause of the statute. If this were all, the argument would be a strong one. But the fact that the veils in question are universally known and recognized among merchants and importers as 'crepe veils,' and not otherwise, and are never called or known as 'silk veils,' is to be taken into account. Although crepe is shown to be a material of silk to which a certain resinous substance has been applied, neither the merchant nor the ordinary buyer understands them to be identical. Neither the merchant who should order a case of crepes and receive one of silk goods, or who should order silk and receive crepe, nor the individual purchaser who should order a dress of silk and receive one of crepe, or should order crepe for mourning and receive silk, would deem that the order had been properly filled. The general understanding concurs in this respect with that of the trader and importer, and must determine the construction to be given to the language of the statute."

It seems to me that the error of the board of general appraisers lies in their conclusion that, because the goods in question are made after the manner of laces, and have the substantial characteristics of laces, therefore they are commercially laces, while I think the weight of proof clearly shows that they are not commercially known as "laces," but as "nets" and "veilings" and "drapery nets." It is due to the board of general appraisers to say that the additional proof taken under the order of this court since the appeal is much more full and convincing as to the commercial designation of these goods than that made by the proof before the commission. For these reasons the decision of the board of general appraisers is reversed, and the collector of the port of Chicago is ordered to reliquidate the entries according to this decision.

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*In re HIGGINS et al.*

(Circuit Court, S. D. New York. January 12, 1892.)

1. CUSTOMS DUTIES—DUTY ON WOOL—SORTING.  
Tariff Act Oct. 1, 1890; construction of paragraphs 883, 885, 886.
2. SAME.  
The "sorting clause" (so called) of paragraph 883, Schedule K, Tariff Act Oct. 1, 1890, (26 U. S. St. p. 567,) applies to wools of all classes.
3. SAME.  
The term "sorting" in paragraph 883 means a changing of the original fleeces, and not a separation of wools as to color.
4. SAME.  
The provision that "the duty on wool which has been sorted shall be twice the duty to which it would be otherwise subject" means "twice the duty to which it would have been subject if it had not been sorted."
5. SAME.  
In applying the "sorting clause" to wools of the third class, which are subject to *ad valorem* duties, the value of the wool in an unsorted condition should be ascertained, and multiplied by twice the rate provided by law for wool of such value. *Arthur v. Pastor*, 109 U. S. 159, 8 Sup. Ct. Rep. 96, followed.

## 6. SAME.

The proviso in paragraph 383 that "wools on which a duty is assessed amounting to three times or more than that which would be assessed if said wool was imported unwashed, such duty shall not be doubled on account of its being sorted," applies to wools of all classes.

## 7. SAME.

Where sorted wool of class 3 is worth over 13 cents per pound, and the duty thereon at 50 per cent. *ad valorem*, under paragraph 386, amounts to more than three times the duty which could have been assessed upon it if it had been imported unwashed, double duty cannot be assessed upon it, under the sorting clause of paragraph 383.

(*Syllabus by the Court.*)

At Law. Appeal by collector from decision of board of United States general appraisers. Affirmed.

In April, 1891, Messrs. Higgins & Co., carpet manufacturers, in the city of New York, imported from Liverpool a quantity of carpet (third-class) wool. Some of these wools were gray, some yellow, and some white. The invoice price of the gray and yellow wools amounted to less than 13 cents per pound, and of the white wool to more than 13 cents per pound. On the entry of the merchandise they paid, as estimated duties, 32 per cent. *ad valorem* on the gray and yellow wools, under paragraph 385, Schedule K, Act Oct. 1, 1890, and on the white wool 50 per cent. *ad valorem*, under paragraph 386 of the same act and schedule. The United States local appraiser returned all these wools as "sorted wools," and thereupon the collector, acting under special instructions of the secretary of the treasury, (Synopsis Treas. Dec. § 11,307,) liquidated the duties at 64 per cent. upon the invoice value of the gray and yellow wools, (paragraphs 385, 383) and 100 per cent. upon the invoice value of the white wool, (paragraphs 386, 383.) Demand was made upon Higgins & Co. for upwards of \$7,000 additional duties, which they paid under protest. The substantial averments of the protest were as follows:

*First.* We protest against the exaction upon the gray and yellow wool contained in said importations of more than 32 per cent. *ad valorem*, and upon the white wool contained in said importations of more than 50 per cent. *ad valorem*, on the ground that being wools of the third class, and valued, the gray and yellow at less, and the white at more, than 13 cents per pound, they are subject only to such rates, and no more, by virtue of paragraphs 385, 386, Schedule K, Act Oct. 1, 1890. *Second.* We further claim that none of our wools have been imported in other than ordinary condition, or changed in character or condition, for the purpose of evading the duty, or reduced in value by the admixture of dirt or any other foreign substance. *Third.* We protest against the application to our wool of the clause in paragraph 383, Schedule K, of said act, which provides that "the duty upon wool of the sheep \* \* \* which has been sorted, or increased in value by the rejection of any part of the original fleece, shall be twice the duty to which it would be otherwise subject," etc., on the ground that said provision applies only to wools of classes 1 and 2, which are subject to specific duties. *Fourth.* We claim that the intent of the lawmakers in enacting the "sorting" clause above quoted is fully satisfied in the case of third-class wools, by the grading of the duties under the *ad valorem* system, as the increase of the rate from 32 per cent. to 50 per cent., and the increase of the values upon which the rate is assessed, makes the wools, after the colors have been separated, pay double the duty

which they would have paid if not separated. *Fifth.* We claim that none of the wools covered by said importation are "sorted," within the meaning of that term as used among merchants and dealers. We claim that the term "sorting," as used in commercial parlance and in the tariff, means a separation of parts of the fleece with reference to their quality and value, while in the case of our wools there has been simply a separation as to color, the white wools having been taken from the gray and yellow wools; and, even if the separation of the wools according to color could be held to be sorting, the result of that process in the case of our gray and yellow wools has been to decrease, and not increase, their value. *Sixth.* If the sorting clause of paragraph 383, above quoted, can be applied to third-class wools, then we claim that our wools are expressly excepted from the application of said clause by the terms of said paragraph, because the yellow wool is skirted wool as imported, and commercially known on and prior to October 1, 1890, and the white wool has already had assessed upon it a duty amounting to three times that which would be assessed if said wool was imported unwashed. *Seventh.* If the above-quoted sorting clause of paragraph 383 should be held applicable to our wools, then we claim that the exaction of 64 per cent. or 100 per cent. upon the invoice prices of our wools is illegal, and that it is the duty of the appraiser to ascertain and report what would be the value of our wools if the white wool had not been separated from the gray and yellow wools, which value, we assert, would be very much less than 13 cents per pound; and that, if the sorting clause can be applied to our wools, it is then your duty to assess 64 per cent. duty on the reduced valuation so ascertained by the appraiser, which duties we claim would be less than the duties at 32 per cent. and 50 per cent. already paid by us. *Eighth.* We claim that where goods are subject to a graded *ad valorem* duty, and the process of separating them has so increased the value of any of them as to advance them from one grade to another, no provision of law for doubling the duty to which they would be otherwise subject can justify you in doubling the rate of duty applicable to the higher grade, and assessing it upon the valuation as increased by the process of separation.

The protest was transmitted to the United States board of general appraisers, pursuant to section 14 of the act of June 10, 1890, (Customs Administrative Act; 26 U. S. St. p. 131,) and a hearing was had before them. It was proven that it had been for many years the custom in the wool markets of Liverpool to separate East India wools of this character according to their color, and that such wools were imported into this country so separated; that these wools had not been changed in their character or condition for the purpose of evading the duty, nor had they been reduced in value by the admixture of dirt or any other foreign substance; that, as to the gray and yellow wools, there had been no separation except as to color; that the white wool had been separated both as to color and quality; that the effect of separating gray and yellow wools from white wools was to reduce their value; that the white wool, as imported, was worth ninepence per pound, whereas, if it had not been sorted, its value would have been sixpence per pound, and, if it were unwashed, its value would be twopence per pound; and that all of said wools were intended to be used, and had in fact been used, to make carpets.

The board of appraisers decided: (1) That separating wools as to color was not "sorting," within the meaning of the law. (2) That the sorting clause applied to all classes of wool. (3) That the gray and yellow

wools were not and the white wool was sorted, within the meaning of the law. (4) That the white wool had already paid (at 50 per cent. on its invoice value) double the duty to which it would have been subject if imported unsorted, and three times the duty to which it would have been subject if imported unwashed. (5) That the decision of the collector should be reversed, and the entry reliquidated. From this decision the collector, under section 15 of the customs administrative act, appealed to the circuit court.

*Edward Mitchell*, U. S. Atty., and *Thomas Greenwood*, Asst. U. S. Atty., for appellant.

*Curie, Smith & Mackie*, (*W. Wickham Smith*, of counsel,) for respondents.

WHEELER, District Judge. The question here arises upon that part of clause 383 of Schedule K of the tariff act of 1890 which provides that the duty upon the wool "which has been sorted, or increased in value by the rejection of any part of the original fleece, shall be twice the duty to which it would be otherwise subject: *provided*, that skirted wools, as now imported, are hereby excepted. Wools on which a duty is assessed amounting to three times or more than that which would be assessed if said wool was imported unwashed, such duty shall not be doubled on account of its being sorted." The importation was of white, yellow, and gray wools, which had been separated by colors, and the value of the white increased and of the yellow and gray lessened. The collector, under some direction, considered the whole to have been sorted, and doubled the duty on its value as sorted. The general appraisers reversed this, and decided that the duty on the white wool should not be doubled, because the single duty amounted to more than three times as much as if it had been imported unwashed; and that the yellow and gray had not been sorted, within the meaning of the law. The duty to which the sorted wool would be otherwise subject would seem clearly to be that to which it would have been subject if unsorted, and not that which would be the duty when sorted. The other construction would make this clause mean that, under these circumstances, the duty should be double what it would be undoubled. If this separation into colors was sorting, it would be a sorting of the whole, as it all was brought; and the duty on the whole, unsorted, would have to be doubled, unless it amounted to more than three times what the duty on the whole, unwashed, would have been. But sorting seems to refer to changing the original fleece. This brings in the proviso that it shall not apply to skirted wools. The fleeces of the yellow and gray wools do not appear to have been sorted in the fleece, and are found not to have been sorted at all. As the duty on the white wool was more than three times what it would have been if the wool had been imported unwashed, that was not to be doubled, and as the yellow and gray had not been sorted, that was not to be, and none was to be, doubled. The decision of the board of general appraisers is therefore affirmed.

v.50r.no.11—58

*Ex re* BOSTON BOOK CO.

(Circuit Court, D. Massachusetts. June 2, 1892.)

No. 3,556.

## CUSTOMS DUTIES—BOOKS.

Under the tariff act of 1890, par. 512, books printed and bound more than 20 years ago are entitled to entry free, notwithstanding that they have been recently rebound.

At Law. Petition for review of a decision by the board of general appraisers.

The Boston Book Company ordered from London a secondhand set of Howell's State Trials, 34 volumes, which were published in successive volumes between the years 1809 and 1828. On arrival of the set (per steamship Scythia, April 13, 1891) the appraiser at the port of Boston found that, while printed more than 20 years ago, it had evidently been recently rebound, and the collector therefore assessed upon it (April 23d) a duty of 25 per cent. upon the value, (£16.10,) under the provision of the present tariff, which requires a book to have been "printed and bound" more than 20 years to be admitted free. This duty, amounting to \$20.50, the Boston Book Company paid under protest on April 29, 1891, and the same day entered an appeal to the board of United States general appraisers against the imposition of this duty. On May 29, 1891, the board of United States general appraisers sustained the decision of the collector of the port of Boston, and so notified the appellant.

*Augustus Russ*, for petitioner.

*Frank D. Allen*, U. S. Atty., for collector.

PUTNAM, Circuit Judge. The treasury department twice ruled—the last time January 29, 1886—that under the tariff act of 1883 books printed more than 20 years, but imported in sheets, were not entitled to free entry. The attorney general, however, advised otherwise September 16, 1886, (18 Op. Attys. Gen. 461.) He reached this conclusion by making "bound or unbound" relate to the preceding word "books." It is my belief that the change in phraseology which appears in the act of October 1, 1890, par. 512, so far as it reaches the present case, should be construed as intended to remove this doubt, and to make certain that the general policy concerning this subject-matter was not extended as the opinion of the attorney general permitted. This was, perhaps, sought to be accomplished by striking out the comma after "unbound," for whatever such striking out might be worth, so as, perhaps, to make that word limit what followed it, and not what preceded. It was reached effectually and certainly by inserting "bound or" after the words "printed and." The present paragraph 512 is therefore to be construed distributively; the words "printed and bound" referring to whatever should be bound to complete it as an article of merchandize, and "printed" and "manufactured" to everything else. I discover no



evidence of any other change of legislative purpose so far as relates to printed books. By a literal construction of the present statute the petitioner's books seem entitled to free entry, because, having once been bound more than 20 years before importation, they comply with its precise terms, notwithstanding they may have been bound again. But it is not necessary to rely on the mere letter, as the considerations stated lead directly and naturally to a rational construction. *Church of Holy Trinity v. U.S.*, 143 U.S. 457, 463, 12 Sup. Ct. Rep. 511. Moreover, rebinding is not binding. The latter is new and original work; while, ordinarily, the former is repairing, and usually omits one or more of the recognized steps in the latter. If the United States claims that they all actually entered into the present case, it had the burden of showing this fact to the board of general appraisers. But, as it is apparent that these books were bound more than 20 years before importation as books of like character are usually bound before being offered for sale, I would regard them as entitled to free entry, even though it also appeared that, in consequence of accident or ordinary use, they had needed and received repairs in all respects equal in extent to new and original binding. I adopt the conclusions of the decision of the treasury department of March 2, 1891, (10,800) and hold that the books are entitled to free entry. The petitioner will prepare the proper order, and, if not agreed to, will submit it to the court for revision. For the present the order will be: Petitioner entitled to relief per order to be entered in compliance with the opinion of the court.

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UNITED STATES v. LAW.

(District Court, W. D. Virginia. April 14, 1892.)

1. **PERJURY—INDICTMENT—TIME.**

In an indictment for perjury, the day on which the perjury was committed must be truly laid, and to lay it on the "—— day of September, 1891," is insufficient.

2. **SAME—AFFIDAVIT.**

In an indictment for perjury, in making an affidavit, it is unnecessary, under Rev. St. § 5396, to set out the affidavit *in hæc verba*.

3. **SAME—AFFIDAVIT—AUTHORITY OF NOTARY.**

Rev. St. § 1773, authorizing notaries public to administer oaths in all cases in which justices of the peace have power to administer them, gives no power to administer an oath in an investigation by the post office department as to the alleged loss of a registered letter, for there is no statute giving justices such power, and hence no indictment for perjury can be based upon false statements in an affidavit made before a notary in such an investigation.

At Law. Indictment of A. B. Law for perjury. Demurrer to indictment sustained.

W. E. Craig, U. S. Atty.

Geo. C. Cabell, for defendant.

PAUL, District Judge. This is an indictment for perjury, based on an affidavit made by the defendant on the 21st day of August, 1891,

before W. D. Haynes, a notary public for Franklin county, in the state of Virginia, said affidavit being to the following effect, to wit:

"State of Virginia, County of Franklin—to wit:

"Before me, W. D. Haynes, a notary public in and for Franklin county, Virginia, personally appeared A. B. Law, and made oath that he registered a letter at Pen Hook, Va., on the 21st August, 1891, directed to G. H. T. Greer, Rocky Mount, Va., and that said letter contained eight hundred dollars in United States currency, as follows: three two hundred dollar notes, two fifty dollar notes, and five twenty dollar notes. A. B. LAW.

"Sworn to and subscribed before me this 28th day of September, 1891.

"W. D. HAYNES, N. P."

The defendant demurs to the indictment on the following grounds:

1. That the day of the alleged commission of the offense is left blank in the indictment, the time alleged being "the ——— day of September, 1891." The court is of opinion that this objection to the indictment is well taken. The doctrine laid down in *Rhodes v. Com.*, 78 Va. 692, is that "in an indictment for perjury the day in which the perjury was committed must be truly laid," and this decision is sustained by the various authorities cited by counsel for the defendant.

2. A second objection to the indictment urged by counsel for the defendant is that the indictment should set out *in hæc verba* the affidavit made by the defendant on which the charge of perjury is based. This, the court thinks, is unnecessary. Section 5396 of the Revised Statutes of the United States provides as follows:

"Sec. 5396. In every presentment or indictment prosecuted against any person for perjury it shall be sufficient to set forth the substance of the offense charged upon the defendant, and by what court, and before whom the oath was taken, averring such court or person to have competent authority to administer the same, together with the proper averment to falsify the matter wherein the perjury is assigned, without setting forth the bill, answer, information, indictment, declaration, or any part of any record or proceeding, either in law or equity, or any affidavit, deposition, or certificate, other than as hereinbefore stated, and without setting forth the commission or authority of the court or person before whom the perjury was committed."

3. The most important objection raised on the demurrer is that the notary public before whom the affidavit on which the indictment is based was taken had no authority to administer the oath to the defendant, and to take the affidavit which, it is alleged in the indictment, was falsely made, and in making which the defendant committed perjury. No principle in the criminal law is more clearly settled than that the false oath must be taken before a court, or an officer authorized to administer such oath. The most general power conferred by the statutes of the United States on a notary public to administer an oath is given by section 1778 of the Revised Statutes, which authorizes this officer to administer an oath in all cases in which, under the laws of the United States, a justice of the peace may do so. The statute is as follows:

"Sec. 1778. In all cases in which, under the laws of the United States, oaths or acknowledgments may now be taken or made before any justice of

the peace of any state or territory, or in the District of Columbia, they may hereafter be also taken or made by or before any notary public duly appointed in any state, district, or territory, or any of the commissioners of the circuit courts, and, when certified under the hand and official seal of such notary or commissioner, shall have the same force and effect as if taken or made by or before such justice of the peace."

This statute limits the authority of a notary public to administer an oath to the cases in which a justice of the peace has the same authority. A diligent and careful examination of the statutes of the United States, and the rules and regulations of the post office department, which by statute have the effect of law, (and he can derive his power from no other source,) fails to furnish us any authority for a justice of the peace to administer such an oath as that taken by the defendant in this case. We must therefore necessarily arrive at the conclusion that the notary public had no authority to take the affidavit in question, and that if it be false it cannot be the ground of a prosecution for perjury. The court thinks that even if the notary public had authority to take the affidavit on which this indictment is based, the said affidavit would be defective, because not certified under the hand and official seal of the notary public, as required by the statute. The view taken by the court that a notary public has no authority to administer an oath in an investigation as to the alleged loss of a registered letter, such as was being conducted in the matter of the case at bar, seems to have been held by the post office department. For in the postal laws and regulations (section 48) it has notified its officers and employes that, in accordance with the provisions of section 183 of the Revised Statutes of the United States, "any officer or clerk of any of the departments lawfully detailed to investigate frauds or attempts to defraud on the government, or any irregularity or misconduct of any officer or agent of the United States, shall have authority to administer an oath to any witness attending to testify or depose in the course of such investigation." The same section of the postal laws and regulations reiterates the provisions of section 298 of the Revised Statutes of the United States, that "any mayor of a city, justice of the peace, or judge of any court of record in the United States, may administer oaths in relation to the examination and settlement of accounts committed to the charge of the sixth auditor," but confers no power to administer an oath in case of an investigation such as was being conducted when the affidavit in question was taken. The post office inspector, if there was one present, doubtless had this power, but the notary had not. The demurrer must be sustained.

UNITED STATES *v.* MARTIN.

(District Court, W. D. Virginia. April 18, 1892.)

## 1. INDICTMENT—VALIDITY—PRIOR REFUSAL TO INDICT.

The fact that a grand jury has ignored an indictment is not a bar to the subsequent finding of a true bill for the same offense.

## 2. POST OFFICE—SEALED OBSCENE LETTER.

Under Rev. St. § 3893, as amended by Act Cong. 1888, 25 St. p. 496, an obscene letter, sealed or unsealed, is nonmailable, the provision that no person shall open any sealed matter not addressed to himself being a sufficient protection to private correspondence. *In re Wahl*, 42 Fed. Rep. 822, followed.

## 3. SAME—OBSCENE LETTER DEFINED.

A letter from a man to an unmarried woman, proposing a clandestine trip to a neighboring town, to return the next morning, he to pay her expenses and five dollars besides, is an obscene letter within the meaning of the act making such matter nonmailable, although it contains no words which are of themselves obscene.

## 4. SAME.

"Obscene," within the meaning of the act, is that which is offensive to chastity and modesty. *U. S. v. Harmon*, 45 Fed. Rep. 414, followed.

At Law. Indictment of George W. Martin for mailing obscene letters in violation of Rev. St. § 3893. Heard on motion to quash and demur. Overruled.

W. E. Craig, U. S. Atty.

Peatross & Harris, for defendant.

PAUL, District Judge. In this case the defendant moves to quash the indictment on the ground that it was found by a grand jury of this court at Lynchburg in March, 1892, after a grand jury of this court at a court held at Danville in November, 1891, had reported the indictment "not a true bill." I do not think this motion can be sustained either by the practice in Virginia or by the doctrine generally held by the American courts. The doctrine in this state and the other American states is that the ignoring of an indictment by one grand jury is no bar to a subsequent grand jury investigating the charge and finding an indictment for the same offense. "If a man be committed for a crime, and no bill be preferred against him, or if it be thrown out by the grand jury, so that he is discharged by proclamation, he is still liable to be indicted, though the sending up a second bill, after an *ignoramus*, is an extreme act of prerogative, subject to the revision of the court. \* \* \*" Whart. Crim. Pl. & Pr. § 446. The defendant also demurs to the indictment on the following grounds: *First*, that the sending of an obscene, lewd, and lascivious letter under seal through the mail is not an offense under section 3893 of the Revised Statutes of the United States, as amended by the act of congress approved September 26, 1888, under which the indictment in this case was drawn; *second*, that the letters on which this indictment is based are not obscene, lewd, and lascivious within the meaning of the statute.

The court will consider these objections in the order in which they are made. Prior to the enactment by congress (September 26, 1888) of the amended act on this subject, the word "letter" was not embraced

within its provisions. The statute (section 3893) provided that every obscene, lewd, or lascivious book, pamphlet, picture, paper, writing, print, or other publication of an indecent character should be nonmailable. On the construction of this statute the decisions of the courts touching a sealed letter of an obscene, lewd, or lascivious character sent through the mails were by no means harmonious. The difference in the decisions in the United States courts arose over the construction of the word "writing." A number of the decisions held that the word "writing" did not embrace private letters. An equal or perhaps greater number of the decisions held that it was the intention of congress to embrace within the meaning of the word "writing" letters of an obscene, lewd, or lascivious character, written by one person to another, as private correspondence. Of the cases the court has examined bearing on this question the following held that the term "writing" did not embrace private letters: *U. S. v. Williams*, 3 Fed. Rep. 484; *U. S. v. Loftis*, 12 Fed. Rep. 671; *U. S. v. Comerford*, 25 Fed. Rep. 902; *U. S. v. Mathias*, 36 Fed. Rep. 892. On the other hand, the following decisions held that private letters were embraced by the statute within the term "writing:" *U. S. v. Morris*, 18 Fed. Rep. 900; *U. S. v. Gaylord*, 17 Fed. Rep. 438; *U. S. v. Hanover*, Id. 444; *U. S. v. Britton*, Id. 731; *U. S. v. Thomas*, 27 Fed. Rep. 682. In this confused and conflicting condition of the decisions of the courts congress undertook, in the amended act of September 26, 1888, to legislate again upon this subject, and in the amended act inserted the word "letter," the omission of which in the former statute had given rise to the contradictory decisions above referred to. Congress, at the time of the passage of the amended act, had before it the history of the former statute and the conflicting decisions of the courts made as to the proper construction of the word "writing" as employed in that act, whether or not this term embraced private letters. A careful reading of the decisions on the original statute convinces the court that the conflict in these decisions grew out of the omission in that statute of the word "letter," and that if this term had been found in the original statute the decisions would have been uniform. It is obvious, the court thinks, that in the amended act of September 26, 1888, it was the purpose of congress to put this question at rest, which it did by the insertion of the word "letter." And this view is strengthened by a recent decision of the supreme court, in which, after adverting to the contrariety of opinions as to whether the word "writing" in the statute before it was amended embraced the word "letter," and, deciding that question in the negative, the court add that "if further argument were needed in support of our view it will be found, we think, in the fact that in an amendment to this statute, passed September 26, 1888, (25 St. p. 496,) for the first time in the history of the postal service the word 'letter' was included in the list of articles made nonmailable by reason of their obscene, lewd, and lascivious, or otherwise improper character." *U. S. v. Chase*, 135 U. S. 255, 10 Sup. Ct. Rep. 756. The conclusion at which the court has arrived is sustained by the opinion of NELSON, J., in *Re Wauhl*, 42 Fed. Rep. 822:

"In my opinion," said the learned judge in the case cited, "since the amendment of September 26, 1888, there can be no reasonable doubt that congress clearly expressed its intention to exclude obscene letters, whether private and sealed or unsealed. It in terms included an obscene letter, without any limitation, and struck out of section 3893 the former clause in reference to letters upon the envelopes of which obscene epithets, etc., were printed or written. It provided for guarding the sanctity and security of private correspondence by a provision that no sealed letter should be opened by any person except the one to whom addressed, but in no doubtful language declares an obscene letter nonmailable. \* \* \* I think no one can follow the legislation from 1872 up to September 26, 1888, without being convinced that congress intended finally to purge the United States mail, and as far as possible prevent it from becoming a vehicle for the transmission of obscene, indecent, and lascivious messages."

A sufficient answer to the position taken by counsel for the defendant in regard to the inviolability of private correspondence, no matter what its character may be, if conducted by sealed letters, is found in the opinion of the supreme court of the United States in *Re Jackson*, 96 U. S. 727, wherein Justice FIELD, speaking for the court, said:

"The power vested in congress to establish post offices and post roads has been practically construed, since the foundation of the government, to authorize not merely the designation of the routes over which the mail shall be carried, and the offices where letters and other documents shall be received to be distributed or forwarded, but the carriage of the mail and all measures necessary to secure its safe and speedy transit and the prompt delivery of its contents. The validity of legislation prescribing what should be carried \* \* \* has never been questioned. The power possessed by congress embraces the regulation of the entire postal system of the country. The right to designate what shall be carried necessarily involves the right to determine what shall be excluded. \* \* \* In excluding various articles from the mail, the object of congress has not been to interfere with the freedom of the press, or with any other rights of the people, but to refuse its facilities for the distribution of matter deemed injurious to the public morals. Also, in the very recent decision of the same court, not yet officially reported, in what are known as the 'lottery cases.' " *Ex parte Rapier*, 12 Sup. Ct. Rep. 374; *Horner v. U. S.*, Id. 407.

The second ground of demurrer is that the letters on which this indictment was found are not obscene, lewd, or lascivious, or of an indecent character, within the meaning of the statute. The letters in question are as follows:

(No. 1.)

"October 12 1891 Mrs. Worley Dear Madame I write to know if you will take a trip to Lynchburg with me thursday. I will pay your expenses and pay you \$5.00 besides. We will leave on day train and return next morning. I am not a stranger to you, but we must keep this a profound Secret. If you will go let me know by Wednesday and I will take the train on this side and you get on in North Danville. Just drop your letter in a box on this side and direct to O. Danville Va. tuesday evening. If you will go I will promise you a nice time Yours fondly."

(No. 2.)

"My Dear Mrs. Worley Your note received You are entirely mistaken in the man. Whilst I have seen you often I have never spoken a half doz. words to you. I have always admired you and have had a great desire to be with

you. and I write again and beg that you take the trip with me to Lynchburg. Say we will start Friday and come back Saturday. I know you will be greatly surprised when you find out who I am but I trust you will be agreeably so. Please write in the morning before ten o'clock and answer me in the affirmative. Now please do this for me and you will contribute so much to my happiness. I know you will never regret it. I am Yours devotedly O."

The court will define very briefly the meaning of the words "obscene, lewd, and lascivious, and of an indecent character," as employed in this statute. A very clear definition of "obscene" is "that which is offensive to chastity and modesty." *U. S. v. Harmon*, 45 Fed. Rep. 414. In *U. S. v. Clarke*, 38 Fed. Rep. 732, THAYER, J., says:

"The word 'obscene' ordinarily means something which is offensive to chastity, something that is foul and filthy, and for that reason is offensive to a pure-minded person."

These definitions were given to the word in question as applied to books, pamphlets, pictures, writings, and other publications which were named in the statute before it was amended; and since the insertion of the word "letter" in the amended statute the same definitions should unquestionably be given to the same word as applied to private letters also. Taking these definitions and applying them to the letters on which this indictment was found, the court cannot see how any other construction can be put upon them than that they are obscene within the meaning of the statute. The expressions used in the letters can leave no doubt as to their lewd and lascivious character. It is difficult to conceive what can be more shocking to the modesty of a chaste and pure-minded woman than the proposition contained in these letters. It is no less than a proposition from a married man to an unmarried woman, proposing a clandestine trip to the city of Lynchburg for a grossly immoral purpose. The motion to quash the indictment and the demurrer are overruled.

## HARMAN v. UNITED STATES.

(Circuit Court, D. Kansas. June 18, 1892.)

### 1. MAILING OBSCENE LETTER—CONSTITUTIONAL LAW.

Rev. St. § 3893, as amended by Act Cong. July 12, 1876, (19 St. p. 90,) prohibiting the mailing of obscene papers, is not in contravention of the first amendment to the federal constitution, providing that the freedom of the press shall not be abridged. *Ex parte Jackson*, 96 U. S. 727, and *Ex parte Rapier*, 12 Sup. Ct. Rep. 374, 143 U. S. 110, followed. 45 Fed. Rep. 414, affirmed.

### 2. SAME—SENTENCE—OMISSION OF HARD LABOR.

Where a person convicted of mailing obscene papers is sent to the penitentiary, a failure to sentence him to hard labor, as required by Rev. St. § 3893, is a fatal error, for which the judgment will be reversed.

In Error to the United States District Court for the District of Kansas.  
Indictment of Moses Harman for mailing obscene papers. Verdict of guilty, and sentence thereon. Reversed.

*David Overmeyer*, for plaintiff in error.  
*J. W. Ady*, U. S. Dist. Atty.

CALDWELL, Circuit Judge. On the 9th day of April, 1888, the plaintiff in error was indicted in the district court for depositing on the 18th day of June, 1886, in a post office, for mailing, an obscene paper, in violation of section 3893 of the Revised Statutes of the United States, as amended by act of congress approved the 12th of July, 1876, (chapter 186, 19 U. S. St. p. 90.) He was tried before a jury, found guilty, and sentenced to "be imprisoned in the Kansas state penitentiary for five years, and that he pay a fine of three hundred dollars;" and thereupon the defendant sued out this writ of error under the act of congress approved March 3, 1879, (chapter 176, 20 U. S. St. p. 354.) The chief contention of the learned counsel for plaintiff in error is that the act of congress on which the indictment is founded "contravenes the first amendment to the constitution of the United States, which provides, among other things, that the freedom of the press shall not be abridged, and is, therefore, unconstitutional and void." If authority can ever silence contention, the constitutionality of this act of congress is no longer open to discussion. *Ex parte Jackson*, 96 U. S. 727; *Ex parte Rapier*, 143 U. S. 110, 12 Sup. Ct. Rep. 374. There is, however, a fatal error in this case on the face of the record. The act of congress provides that persons convicted of its violation "shall be deemed guilty of a misdemeanor, and shall for each and every offense be fined not less than one hundred dollars nor more than five thousand dollars, or imprisonment at hard labor not less than one year nor more than ten years, or both, at the discretion of the court." It will be observed that where the punishment, or any part of it, is imprisonment, it must be "at hard labor." The plaintiff in error was sentenced to "be imprisoned in the Kansas state penitentiary for five years," and hard labor is not made a part of the punishment, as the statute requires shall be done, where imprisonment forms any part of the sentence. When the statute makes hard labor a part of the punishment, it is imperative upon the court to include that in its sentence. *Ex parte Karstendick*, 93 U. S. 396. In the courts of the United States the rule is that a judgment in a criminal case must conform strictly to the statute, and that any variations from its provisions, either in the character or extent of the punishment inflicted, renders the judgment absolutely void. *Ex parte Karstendick*, *supra*; *In re Graham*, 138 U. S. 461, 11 Sup. Ct. Rep. 363; *Ex parte Lange*, 18 Wall. 163; *In re Mills*, 135 U. S. 263, 10 Sup. Ct. Rep. 762; *In re Johnson*, 46 Fed. Rep. 477. A different rule prevails in some of the states, (*In re McDonald*, 74 Wis. 450, 43 N. W. Rep. 148; *People v. Baker*, 89 N. Y. 460;) but the rule on this subject prevailing in a state, whether by statute or judicial decision, has no force in the federal courts administering criminal justice under the constitution and laws of the United States. In those courts the doctrine of the supreme court of the United States on this subject is of paramount authority. It seems probable that, if the plaintiff in error had sought relief from the void sentence after suffering a part of the punishment by



*habeas corpus*, his discharge would have been absolute and final, and he could not have been again sentenced or tried for the offense. *Ex parte Lange*, 18 Wall. 163; *In re Johnson*, 46 Fed. Rep. 477. Assuming, but not deciding, that his discharge on *habeas corpus*, after suffering a part of the punishment under the void sentence, would have precluded the imposition of a legal sentence upon the verdict of guilty, or another trial for the same offense, it does not follow that a reversal of such a sentence on a writ of error sued out by the defendant himself is attended with any such consequences. See *Ex parte Lange*, 18 Wall. 173, 174, and dissenting opinion, pages 197, 198; 1 Bish. Crim. Law, §§ 1023, 1025. But this aspect of the case has not been argued, and no opinion is expressed upon it. If the defendant conceives that a legal sentence cannot now be imposed upon him on the existing verdict of guilty, and that he cannot again be tried for the same offense, he can raise these questions in the trial court. The judgment of the district court of the United States for the district of Kansas is reversed, and the cause remanded to that court with instructions to proceed therein according to law.

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UNITED STATES v. RAGAZZINI.

(Circuit Court, S. D. New York. April 4, 1892.)

**NATURALIZATION—SELLING CERTIFICATE.**

Under Rev. St. § 5424, it is a criminal offense to sell a certificate of naturalization to other than the person to whom it was issued, and it is immaterial that such certificate was fraudulently procured, by misrepresentation to the court, or that it was forged, if *prima facie* and apparently valid.

At Law. Indictment of Guido Ragazzini for selling naturalization papers in violation of Rev. St. § 5424. Verdict of guilty. Heard on motion in arrest of judgment and for new trial. Motion denied.

*Edward Mitchell*, Dist. Atty., and *Mr. Mott*, Asst. Dist. Atty., for the United States.

*Kellogg, Rose & Smith*, for defendant.

BROWN, District Judge. The defendant was indicted and on trial convicted, under section 5424 of the Revised Statutes, for the offense of selling "to a person other than the person for whom it was originally issued, a certificate of citizenship, or certificate showing any person to be admitted a citizen." On the trial it appeared that the certificate referred to in the first count of the indictment was issued by the superior court of this city, a common law court of competent jurisdiction in naturalization proceedings, and was as follows:

"UNITED STATES OF AMERICA, STATE OF NEW YORK

"*E Pluribus Unum.*

"*City and County of New York—ss.:*

"Be it remembered that on the 22nd day of October, in the year of our Lord one thousand eight hundred and ninety-one, Angello Cordello appeared

in the superior court of the city of New York, (the said court being a court of record, having common-law jurisdiction, and a clerk and seal,) and applied to the said court to be admitted to become a citizen of the United States of America, pursuant to the provisions of the several acts of congress of the United States of America for that purpose made and provided. And the said applicant having thereupon produced to the court such evidence, made such declaration and renunciation, and taken such oaths as are by the said acts required,

"Thereupon, it was ordered by the said court, that the said applicant be admitted, and he was accordingly admitted, by the said court to be a citizen of the United States of America.

"In testimony whereof, the seal of the said court is hereunto affixed this 22nd day of October, one thousand eight hundred and ninety-one, and in the one hundred and sixteenth year of our independence.

"[L. s.]

By the Court:

THOMAS BOESE, Clerk."

The certificate alleged in the second count of the indictment to have been sold was in the same form, certifying the admission to citizenship in the same court of Leonado Salvatori on the 22d of October, 1891. On the trial Angello Cordello and Leonado Salvatori were called as witnesses for the defendant, and testified that they never applied for the certificates, never were in the court that issued them, did not authorize any one to get the certificates for them, and did not know the defendant. Angello Adamo, a witness for the prosecution, testified that he knew the defendant, and in October made an arrangement to purchase two certificates of citizenship from him, and agreed to give him eight dollars for the two; that he gave him the names of Leonado Salvatori and Angello Cordello on a slip of paper as the names of the persons for whom he wanted the certificates; and that afterwards, in the afternoon of the same day, the defendant delivered to him the two certificates above referred to, for which he paid the defendant eight dollars.

The counsel for the defendant at the close of the case for the prosecution moved that the jury be directed to find a verdict of not guilty, on the ground that it had not been proved that the certificates sold by the defendant were genuine certificates; and at the end of the case he moved that the jury be directed to find a verdict of not guilty, on the ground that the evidence showed that the certificates had been fraudulently obtained and were void; both of which motions were denied. He also requested the court to charge the jury that to convict the defendant they must find that the certificates were genuine and valid certificates, and that they were legally and properly issued for the persons named therein; each of which requests the court refused, and to each of which exceptions were duly taken. The court charged that the papers, being genuine papers, with the seal of the court upon them, and being issued for the two men named in them, could not be sold to Adamo without bringing the defendant within the law, to which the defendant duly excepted.

There can be no doubt upon the evidence that the certificates in question were procured by fraud and imposition upon the court that issued them, and that they would be canceled by the court upon proof of these facts. The defendant contends that section 5424 of the Revised Stat-

utes covers only the sale of valid certificates; and in support of that contention the case of *People v. Stevens*, 38 Hun, 62, is cited, in which it was held that the feloniously stealing by the defendant of a satisfaction piece of a mortgage before delivery would not sustain an indictment for larceny, because such an undelivered and inoperative satisfaction piece was not the subject of larceny. In the case of *Phelps v. People*, 72 N. Y. 334, it was held that a draft was the subject of larceny, under the express provisions of the state statute. And so the question here is purely one of the intent and construction of the federal statute. That question is to be decided not upon any mere technicality, but with reference to the language of the statute, its several clauses, and the evils it was intended to prevent.

The statute of 1813 (2 St. at Large, c. 42, § 13, p. 809) is referred to as the origin of the existing act, and as evidence that only the sale of valid certificates was intended, like those in that act contemplated and provided for the benefit of seamen. The language of the Revised Statutes, however, is somewhat different and broader than the earlier statute, and is made applicable to any "certificate of citizenship." It makes criminal the selling or disposing of, to "any person other than the person for whom it was originally issued, a certificate of citizenship, or certificate showing any person to be admitted a citizen." Preceding portions of the same section provide similar punishment for personating another person, or appearing in any assumed or fictitious name, or for falsely making, forging, or counterfeiting any oath, notice, affidavit, signature, etc., required or authorized in the course of naturalization; also for uttering, selling, or disposing of as true or genuine any false, forged, antedated, or counterfeited oath, notice, record, paper, etc. The clause last referred to covers the selling of forged certificates. That clause is followed by the clause on which the present indictment is founded. This clause evidently was designed to cover the sale of genuine certificates. It cannot apply to anything else; and it certainly does not lessen the offense that the genuine certificate was fraudulently procured.

Taking the provisions of section 5424 altogether, it seems manifest to me that its intention is to prohibit all selling of naturalization papers, whether genuine or forged, and whether valid or invalid. Both classes alike mean deception, and more or less of public mischief. The evils are the same, whether the papers sold are forged or genuine, when, as in this case, they appear to be regular on their face. The act as a whole shows that the sale of either was intended to be made alike criminal.

The fact that these certificates were fraudulently procured, and that, if the real facts had been known to the court, the certificates could not have been lawfully issued, seems to me immaterial. The certificates were genuine documents. They were issued by the superior court and "issued for" the persons severally named in them, to-wit, Angello Cordello and Leonado Salvatori, and for no one else; and the defendant knew this. They were also certificates that, in the language of the statute "showed" those two persons "to be admitted as citizens." They

were *prima facie* and apparently valid; and they seem to me to come precisely within the letter, the spirit, and the intent of the act. The motion should therefore be denied.

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FULLER v. BEMIS.

(Circuit Court, S. D. New York. June 18, 1892.)

**COPYRIGHT—"DRAMATIC COMPOSITION"—STAGE DANCE.**

A stage dance illustrating the poetry of motion by a series of graceful movements, combined with an attractive arrangement of drapery, lights, and shadows, but telling no story, portraying no character, and depicting no emotion, is not a "dramatic composition," within the meaning of the copyright act.

In Equity. Bill by Marie Louise Fuller against Minnie Renwood Bemis for infringement of copyright. On motion for preliminary injunction. Denied.

The subject of the copyright was a stage dance, which is described in the following copyrighted composition:

"THE SERPENTINE DANCE, BY MARIE LOUISE FULLER.

"*Tableau I.*

"Stage dark. Music. Valse. Dancer enters in the dark, unseen, and stands at back of stage, up center. Lights thrown suddenly from right and left corner, first entrances, on dancer center. Picture: Dress held high above head from the back and front. After the picture the dance begins, dancer still holding dress high above the head. The dancer, with slow, sliding, valse step, moves down towards right corner, the two lights following like a medallion, then, with a backward movement to time of music, and several turns, reaches center again. Then the same down to left corner and back. Then with a round movement from one side to the other, she dances down center to footlights, followed by several whirls or turns which bring dancer back to center. (All this time the dress is held up above the head behind as in the picture in the beginning.) She makes two turns, dropping dress, which the two whirls or turns bring into place. She takes dress up at each side, turns body from side to side, swinging dress from one side low in front to high at back, forming a half umbrella shape over the head, first with one side of dress and then the other. (This movement can be termed the 'Umbrella Movement,' and presents a beautiful stage effect.) The dancer stands at center, catches up dress at each side towards the bottom, holds it high at each side, and moves hands from right to left, imitating a spiral shape, dancing towards footlights. When reaching footlights, changes straight movement of arms, and, keeping same motion, gives a rounding, swerving movement that causes dress to assume the shape of a large flower; the petals being the dress in motion. Then several quick turns up towards back, (dress up on each side,) quick run down stage to the center, and followed by several more whirls, and, twining the skirt over both arms, drops on one knee, holding dress up behind head to form background. (This picture is a very graceful climax and finish to the first tableau of the dance.) Picture. Lights off. Darkness. Lights up, and dancer gone.

"(*Finale* of first tableau.)

*"Tableau II.*

"Stage dark. Music. Valse. Light thrown same as in first tableau, on dancer. Center of stage, up at back. Dancer picks up dress at each side, whirls it over each arm frontwise until it is held plain across the front, and feet are clearly seen, then a dancing step follows, after which the skirt is unwound, and, lifting it up to back and down, the dancer advances towards footlights, lifting the dress up and down sidewise to represent the opening and closing of a huge flower. After reaching center down at footlights, she turns back to audience, and the lights change to another color. Then by turning from right to left, and stooping with each turn, and manipulating skirt from left to right and right to left, she forms a huge lily, turning the body half around at each step; and same time dancing up to center at back, she turns, faces audience, and lifting dress high from left to right and back with an upward movement, and bending body with each half turn, forms a rose as falling to pieces, dancing down center to footlights, returning to back of stage afterwards with several turns, then stands center, still for a moment, holding dress high at each side, then for an inward and outward movement in front the dress forms waves or breakers like one sees in the surf at the seashore. Dancer does this while dancing towards front, then quickens and broadens the motion while dancing backwards to center, then a quick run down stage and back, picking up dress in front and holding it up, bends back to audience so that face can be clearly seen, holding dress up as background. (This whole tableau presents a dazzling and bewildering fanciful picture.) Picture. Lights off. Lights up, and dancer gone.

*"(Finale of second tableau.)"*

*"Tableau III.*

"Stage dark. Music. Light thrown on as in second movement. Dancer seen at center. Dress held up at each side. Picture for a moment. Lights off. Light on at back from upper right and left corners, making a stream of light across stage at back. Dancer stands directly in front of light, throws dress over arms, holding them high, showing figure as in a spider's web. This may be called the 'Spider' or 'Transparent' movement or dance. Dance to right and back to left, then to center in front of light, holding dress in same position. Then stepping back, she dances in the stream of light, manipulating dress, bending low to right and left, making two turns when the back light is taken off and the front light thrown on. Dancer lifts dress high at each side, and makes detour of entire stage, imitating a huge butterfly. After this movement, which is finished up center at back, dancer turns back to audience, and bends back, looking at audience, then up again, turning, throws dress high up in front, forming circles running up and down in front, hiding the dancer, then dancing from left to right and right to left, down front, waving dress to and fro, following with several turns, sinks on stage; the dress falling over and completely hiding the dancer. Picture of dress; dancer apparently gone, disappeared. Lights off. Gas on. Dancer gone.

*"(Finish.)"*

After setting out the proceedings by which the copyright was obtained the bill proceeds:

"And your orator shows that, in and by the aforesaid proceedings, she intended to obtain, hold, and possess, and now holds and possesses by virtue thereof, not only the sole and exclusive right and liberty to print and publish such dramatic composition, but also the sole and exclusive right to act, perform, and represent the said dramatic composition, and cause it to be acted, performed, and represented, on any stage or public place, during the whole period for which the said copyright was obtained."

The bill then states that the said dramatic composition was performed by the orator at Madison Square Theater, New York, with great success, and pecuniary profit to her. It is then further averred:

"That the cause of such success, fame, and profit was the originality and extraordinarily novel nature of the incidents, scenes, and tableaux of said composition, which consists of a series of fantastic, graceful, unique, harmonious, and highly pleasing dances, each of which portrays or represents different characters, and all of which appeal to the sense of the beautiful and the æsthetic emotions. And your orator shows that this composition was entirely novel and unlike any dramatic incident, scene, or tableau known to have been theretofore represented on any stage, or invented by any author, before your orator invented and composed the same in her said composition, and produced and represented the same, as aforesaid. And the said composition was, as soon as produced and represented by your orator, and ever since has been and is now, regarded, whenever it has been witnessed, to be one of the most novel, attractive, and graceful and unique and beautiful incidents and productions ever represented on the public stage; that the playing of the said composition caused the same to become famous in all parts of the United States; and that said composition was repeatedly produced and represented, by and for the advantage of your orator, in many cities of the United States, and everywhere to the great profit and credit of your orator."

The infringement complained of is the production by defendant of this "dramatic composition" upon the public stage, with merely colorable alterations.

*Isaac N. Falk*, for complainant.

"Complainant's creation is a "dramatic composition," within the meaning of Rev. St. § 4952. A drama is generally regarded as being a composition in which the action is not narrated or described, but represented. Drone, Copyr. 587; Wand. Theatres, 431. A pantomime is a "dramatic piece," within the meaning of 3 & 4 Wm. IV. c. 15. *Lee v. Simpson*, 3 C. B. 871, 881. See, also, *Russell v. Smith*, 12 Q. B. 235, 236. "A composition, in the sense in which that word is used in the act of 1856, is a written or literary work invented and set in order. A dramatic composition is such a work in which the narrative is not related, but is represented by dialogue and action. \* \* \* A pantomime is a species of theatrical entertainment in which the whole action is represented by gesticulation, without the use of words. A written work, consisting wholly of directions set in order for conveying the ideas of the author on a stage or public place, by means of characters who represent the narrative wholly by action, is as much a dramatic composition, designed or suited for public representation, as if language or dialogue were used in it to convey some of the ideas. \* \* \* Movement, gesture, and facial expression, which address the eye only, are as much a part of the dramatic composition as is the spoken language, which addresses the ear only; and that part of the written composition which gives direction for the movement and gesture is as much a part of the composition, and protected by the copyright, as is the language prescribed, uttered by the characters. And this is entirely irrespective of the set of the stage, or of the machinery or mechanical appliances, or of what is called, in the language of the stage, scenery, or the work of the scene painter." *Daly v. Palmer*, 6 Blatchf. 264, 268.

*Alexander & Green*, for defendant.

LACOMBE, Circuit Judge. Whatever may be the language of the opinion in *Daly v. Palmer*, 6 Blatchf. 264, the decision is not authority

for the proposition that complainant's performance is a dramatic composition, within the meaning of the copyright act. It is essential to such a composition that it should tell some story. The plot may be simple. It may be but the narrative or representation of a single transaction; but it must repeat or mimic some action, speech, emotion, passion, or character, real or imaginary. And when it does, it is the ideas thus expressed which become subject of copyright. An examination of the description of complainant's dance, as filed for copyright, shows that the end sought for and accomplished was solely the devising of a series of graceful movements, combined with an attractive arrangement of drapery, lights, and shadows, telling no story, portraying no character, depicting no emotion. The merely mechanical movements by which effects are produced on the stage are not subjects of copyright where they convey no ideas whose arrangement makes up a dramatic composition. Surely, those described and practiced here convey, and were devised to convey, to the spectator, no other idea than that a comely woman is illustrating the poetry of motion in a singularly graceful fashion. Such an idea may be pleasing, but it can hardly be called dramatic. Motion for preliminary injunction denied.

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AMERICAN SOLID LEATHER BUTTON CO. v. EMPIRE STATE NAIL CO.

(Circuit Court, S. D. New York April 22, 1892.)

PROCESS PATENT—BILL FOR INFRINGEMENT—DEMURRER.

A bill which sets forth a patent for a "process" of making furniture nails, and then alleges that defendant, "in infringement of the aforesaid letters patent," did wrongfully "make, use, and vend to others to be used, furniture nails embracing the improvement set forth and claimed" in said patent, is demurrable for want of a sufficient allegation of infringement of the process.

In Equity. Suit for infringement of letters patent No. 270,239, issued January 9, 1883, to J. Wilson McCrillis, for an "improvement in the process of manufacturing furniture nails and analogous articles." Heard on demurrer to the bill. Demurrer sustained.

The bill, after alleging the issuance of the patent, averred "that defendant, well knowing the premises and the rights" secured to your orator as aforesaid, but contriving to injure your orator, and to deprive it of the benefits and advantages which might and otherwise would accrue from said inventions, \* \* \* did, \* \* \* in violation of its rights, and in infringement of the aforesaid letters patent No. 270,239, unlawfully and wrongfully, and in defiance of the rights of your orator, make, use, and vend to others to be used, furniture nails embracing \* \* \* the improvement set forth and claimed in the aforesaid letters patent No. 270,239." The bill prays that the defendant may be compelled to account for and pay to your orator the income thus unlawfully derived from the violation of the rights of your orator,

as above, as well as the damages therefor, and be restrained from any further violation of said rights. "Your orator prays that your honors may grant the writ of injunction restraining the defendant \* \* \* from any construction, sale, or use in any manner of \* \* \* furniture nails, \* \* \* in violation of the rights of your orator, as aforesaid, \* \* \* and also that your honors \* \* \* may assess, in addition to the gains and profit, \* \* \* the damages your orator has sustained by reason of said infringement." The bill contains a prayer for all other relief that it may be righteous, in the premises, to administer.

*Witter & Kenyon*, (Alan D. Kenyon, of counsel,) in support of the demurrer.

The patent is for a process of manufacturing furniture nails. Nowhere is it alleged in the bill that the defendant uses or has used this process. The bill simply alleges that defendant has made, used, and sold certain furniture nails. The patent being for a process, and not for a product, the use or sale of the product (furniture nails) is, of course, not an infringement. *Merrill v. Yeomans*, 94 U. S. 568-574; *Ditmar v. Rix*, 1 Fed. Rep. 342.

Nor is the making of furniture nails, even of exactly the same kind as that made by the patented process, unless all the steps of the process are used. *Hammerschlag v. Garrett*, 10 Fed. Rep. 479; *Ditmar v. Rix*, 1 Fed. Rep. 342; *Fermentation Co. v. Maus*, 20 Fed. Rep. 725.

*Rowland Cox*, opposed.

A general charge of infringement is sufficient. *McCoy v. Nelson*, 121 U. S. 486, 7 Sup. Ct. Rep. 1000; *American Bell Tel. Co. v. Southern Tel. Co.*, 34 Fed. Rep. 804. In the latter case, there was a general charge of infringement of a patent "covering both a process and an apparatus." The court overruled the demurrer, citing numerous cases, (which see,) including *McCoy v. Nelson*, *supra*. In *Haven v. Brown*, 6 Fish. Pat. Cas. 414, Mr. Justice SWAYNE states the rule as follows: "The bill merely declares \* \* \* that the patent is for an improvement in bedstead fastenings, and in the same general terms it alleges infringement." He then proceeds to say that "upon the general principles of equity pleading the bill would be bad;" but he overruled the demurrer, adding: "The form of the bill in the present case rests upon a foundation too deep to be disturbed. We therefore feel bound to hold that the demurrer must, on authority, though not on principle, be overruled." In numerous other cases the same doctrine is referred to as one that cannot be disturbed. 3 Rob. Pat. p. 430.

If there were here any doubt, it would be cured by the profert of the patent plus the allegation that it has been infringed.

WALLACE, Circuit Judge. The demurrer is sustained because the bill does not contain any sufficient averment of infringement by the defendant of the process of complainant's patent. Bill may be amended upon payment of costs.



## STEAM GAUGE &amp; LANTERN CO. v. WILLIAMS.

(Circuit Court of Appeals, Second Circuit. July 30, 1893.)

**1. PATENTS FOR INVENTIONS—LIMITATION OF CLAIM—PRIOR ART—HEADLIGHTS.**

Claim 1 of letters patent No. 262,169, issued August 1, 1882, to Edward Wilhelm, for an improved locomotive headlight, covers "a reflector provided with an opening behind the burner, whereby light is emitted backwardly into the headlight case for illuminating signal plates or lenses applied to said case, substantially as described." *Held* that, in view of the pre-existing headlights, the claim must be limited to a reflector having an opening near its apex separate from the burner hole or chimney hole of those devices.

**2. SAME—INFRINGEMENT.**

Claim 2, which covers a combination of "a reflector constructed with an opening behind the burner, and an auxiliary reflector, whereby the light emitted backwardly through such opening is directed towards the signal plates or lenses," must be limited to a combination of the reflector of the first claim, with its improved opening and an auxiliary reflector, and is not infringed by a reflector with any opening behind the burner and an auxiliary reflector. 42 Fed. Rep. 843, affirmed.

Appeal from the Circuit Court of the United States for the Northern District of New York.

In Equity. Bill by the Steam Gauge & Lantern Company against Irvin A. Williams for infringement of patent. Decree dismissing the bill. Complainant appeals. Affirmed.

*Albert H. Walker*, for complainant.

*Edmund Wetmore*, for defendant.

Before LACOMBE and SHIPMAN, Circuit Judges.

SHIPMAN, Circuit Judge. This is an appeal from the decree of the circuit court for the northern district of New York, which dismissed the complainant's bill in equity, founded upon the alleged infringement of letters patent No. 262,169, dated August 1, 1882, to Edward Wilhelm, for an improved locomotive headlight. The invention related to "an improvement in that class of headlights which are provided with signal plates or lenses in the sides of the headlight case," and its object was to illuminate such plates, so that the letters thereon could be easily observed at night. The patentee says in his specification that these plates had been illuminated in various ways, "either by direct light thrown upon the signal plates through openings in the reflector on both sides of the lamp, or by the light which is emitted through the chimney opening of the reflector, and which diffuses itself in the upper portion of the headlight case, and also by light reflected backwardly from the front end of the headlight case." He further says that his invention consisted "in constructing the reflector with an opening at or near its apex behind the lamp, whereby light is emitted backwardly into the headlight case, where it diffuses itself, and may be utilized for illuminating the signal plates or lenses applied to the headlight case; also in providing such case and reflector with an auxiliary reflector, which deflects the light emitted backwardly through the openings in the main reflector, and directs such light upon the signals which are desired to be illuminated." The two claims of the patent are as follows:

"(1) In a headlight, a reflector provided with an opening arranged behind the burner, whereby light is emitted backwardly into the headlight case for illuminating signal plates or lenses applied to said case, substantially as set forth. (2) The combination, with a headlight case, provided with signal plates or lenses, of a reflector constructed with an opening arranged behind the burner, and an auxiliary reflector, whereby the light emitted backwardly through such opening is directed towards the signal plates or lenses, substantially as set forth."

The history of the progress in the method of illuminating signal plates of locomotive headlights, so that the signals can be readily observed at night, is detailed by Judge WALLACE in his opinion in the circuit court, (42 Fed. Rep. 843,) and therefore need not be fully restated here. The summary of facts which is contained in the portion of the specification which has been quoted is sufficient, except, it is important to say, that before 1880 the defendant made or designed a reflector which differed in form from those previously in use, was deeper, and so shaped that the part in rear of the burner was elongated, and the hole for the body of the lamp was considerably enlarged rearwardly. This was done to facilitate access to the lamp for the purpose of trimming and lighting. A headlight with such a reflector was patented December 28, 1880, and, so far as the opening behind the burner is concerned, the headlight which is alleged to infringe was described in that patent. The improvement which was described in the first claim of the patent was the improved opening in the reflector at or near its apex, and distinct from the burner hole or chimney hole of any of the pre-existing devices. The aperture of the claim must be limited to the described opening at or near the apex of the reflector, which had alleged advantages of its own, resulting from its location, or the claim cannot be sustained. The defendant's headlight is not an infringement of the first claim, and the complainant does not now ask for a favorable decree, so far as that claim is concerned. The invention of the second claim is the combination of the headlight case and the reflector of the first claim, with its improved opening and an auxiliary reflector. It cannot be construed to include a reflector with an opening behind the burner and an auxiliary reflector, for the gist of the improvement lay in the location of the aperture; and an improvement which consists merely in the addition of an auxiliary reflector, which should direct the light from an opening, would not rise to the plane of patentable invention. The reflector of the defendant's headlight does not have an opening distinct from its burner hole or chimney hole, and therefore does not infringe either claim. The decree of the circuit court is affirmed.

REMINGTON STANDARD TYPEWRITER MANUF'G CO. v. BAILEY.

(Circuit Court, S. D. New York. June 11, 1892.)

PATENTS FOR INVENTIONS—LIMITATION OF CLAIM—TYPEWRITING MACHINES.

In letters patent No. 170,239, issued November 23, 1875, to Lucien S. Crandall for an improvement in typewriting machines, the specifications show a vibrating platen to give more than one printing center, and type bars with two or more types, and having a forward or backward motion so as to use two adjoining types on each printing center. Claim 3 is for "the combination of the vibrating platen with the swinging compound type bars, provided with types corresponding to each vibration on printing-point of the platen, substantially as specified." *Held*, that the claim covers the combination of the vibrating platen and the type bars with more than one type, and the word "compound" does not confine the claim to bars having both plural types and a double motion.

In Equity. Bill by the Remington Standard Typewriter Manufacturing Company against Frank W. Bailey for infringement of letters patent No. 170,239, issued November 23, 1875, to Lucien S. Crandall for an improvement in typewriting machines. Heard on application for a preliminary injunction. Granted as to claim 3 of the patent.

In the specifications the inventor states that—

"The invention consists mainly in a vibrating platen and paper-feed arranged in connection with a series of type bars, which are provided with more than one type, and operated by oscillating finger levers in such a manner that, according to the backward or forward motion of the same, two adjoining types are printed on a common center, which centers may be increased in proportion to the type by definite vibrations of the platen produced by suitable mechanism."

The claims are as follows:

"(1) A typewriter constructed of a vibrating platen, with a series of swinging compound type bars and oscillating finger levers, substantially in the manner and for the purpose set forth. (2) In a typewriter, a platen or printing cylinder, vibrated in a direction transverse to the lines of printing, by means of mechanism substantially as described, for the purpose of creating additional printing points or centers. (3) The combination of the vibrating platen with the swinging compound type bars, provided with types corresponding to each vibration on printing point of the platen, substantially as specified. (4) The combination of the swinging type bar with the oscillating finger lever, and with mechanism, substantially as described, for imparting a double action to the type bar, so that the same may be thrown a fixed distance in forward or backward direction, and compel two adjoining types to strike the same printing point of the platen, substantially as described."

*H. D. Donnelly*, for complainant.

*Campbell, Hotchkiss & Reiley*, (*Maynardier & Beach*, of counsel,) for defendant.

LACOMBE, Circuit Judge. This is an application for preliminary injunction against infringement of patent No. 170,239, (to Lucien S. Crandall, November 23, 1875,) for improvement in typewriting machines. The third claim of the patent is as follows:

"(3) The combination of the vibrating platen with the swinging compound type bars, provided with types corresponding to each vibration on printing point of the platen, substantially as specified."

The record shows that Crandall was the first to use swinging type bars provided each with more than one type, and a vibrating platen, by whose vibrations the centers or printing points on which the types strike might be increased. The combination of these two novel features in the art of typewriting seems clearly covered by the claim above quoted, unless, as defendant contends, the use of the word "compound" confines the claim to bars, which not only bear a plurality of types, but also, by means of the oscillating finger levers, (elsewhere described in the patent,) are themselves oscillated; thus having a duplex motion. I am of opinion, however, that the word "compound" is used to indicate that the bars bear more than the single type, which was characteristic of all type bars before Crandall made his invention. As thus construed, the third claim is concededly infringed by defendant's machine. The first claim seems to cover a combination of which oscillating finger levers, and therefore oscillating type bars, are elements, and these are not found in defendant's machines. The validity of the second claim for the vibrating platen and mechanism to vibrate it is not sufficiently free from doubt to warrant a preliminary injunction. Were the manufacturers defendants in this suit, it might be, in view of the short time the patent has to run, that preliminary injunction should be refused upon giving proper security; but, as defendant is only a selling agent, complainant may take his order against infringement of the third claim.

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THE IRA B. ELLEMS.

OTIS MANUF'G CO. v. THE IRA B. ELLEMS.

(Circuit Court of Appeals, Fifth Circuit. June 6, 1892.)

No. 21.

1. SHIPPING—LOSS OF CARGO—STIPULATION AGAINST MASTER'S NEGLIGENCE.

Where a vessel is chartered for a cargo of logs, a provision that the cargo is "to be delivered alongside, and held at charterer's risk and expense," is not unreasonable in itself, or invalid as exempting the master from liability for his own negligence; and where a raft of logs was brought alongside at 6 in the evening, and moored by the charterer's agent and employes, the master was bound only to exercise ordinary care to see that it was not carried away during the night. 48 Fed. Rep. 591, affirmed.

2. SAME—LEAVING PORT BEFORE FULL CARGO FURNISHED—MISCONDUCT OF CHARTERER'S AGENT.

The logs having been carried away during the night, the charterer's agent claimed that the master was responsible, said he would furnish no more cargo, and left the ship, threatening to institute legal proceedings. Held sufficient to justify the master in considering that he had all the cargo that would be furnished, and in proceeding upon the voyage.

3. SAME—THREAT OF LEGAL PROCEEDINGS IN FOREIGN PORT.

The vessel being an American vessel, and the charter party having been signed upon the high seas, the customs officers of a foreign port did not constitute the proper forum in which to claim redress, and the threat to institute legal proceedings was of itself sufficient to justify the master in leaving.

4. CHARTER PARTY—CONSTRUCTION—"SHORTAGE."

A charter party for a cargo of timber provided that the charterer was to pay "at the rate of \$6.25 per ton of 40 cubic feet, actual contents delivered. In case of shortage she receives on all short of 400 tons, down to 350 tons, \$3.12½, and for all

less than 350 tons, full rates." *Held*, that the full cargo stipulated for is 400 tons, and the word "shortage" refers to a failure to furnish this amount.  
48 Fed. Rep. 591, affirmed.

Appeal from the Circuit Court of the United States for the Eastern District of Louisiana.

In Admiralty. Libel by the Otis Manufacturing Company against the schooner Ira B. Ellems to require the delivery of cargo. Cross libel by the claimants of the schooner for freight, demurrage, and damages. Decree for claimants. Libellant appeals. Affirmed.

Statement by LOCKE, District Judge:

The libellant in the court below, the appellant here, by its agent, chartered on the 24th of April, 1890, the schooner Ira B. Ellems, then lying at Coatzacoalcos, Mexico, to proceed to Frontera, thence to Tupilco, to load with mahogany and cedar for New Orleans. The charter party provided that—

"The said party of the second part doth engage to provide and furnish to the said vessel a full and complete cargo of mahogany and cedar logs, under and on deck; cargo to be delivered alongside, and held at charterer's risk and expense, and stevedores' charges loading guaranteed not to exceed \$1 per ton, Mexican; and to pay to the party of the first part, or agent, after true and faithful delivery of cargo, for the use of said vessel during the voyage aforesaid, at the rate of (\$6.25) six dollars and twenty-five cents, American currency, per ton of 40 cubic feet, actual contents delivered. In case of a shortage, she receives on all short of 400 tons, down to 350 tons, (\$3.12½) three dollars and twelve and one half cents, American, and for all less than 350 tons, full rates. Charterer will advance necessary money for disbursements, same to be deducted from freight, including cost of insurance and interest. \* \* \* It is also agreed that this charter shall commence and lay days for loading shall be allowed as follows: Commencing from the time the captain reports the vessel to charterer or agent, in writing, as being ready to receive cargo, twenty (20) running days, (Sundays only excepted, in case stevedores refuse to work,) including time taken in changing ports in case it should be necessary, and for discharging quick dispatch. And in case vessel be longer detained, for each and every day's detention by default of said party of the second part, or agent, thirty American silver dollars demurrage per day, day by day, shall be paid by said party of the second part, or agent, to said party of the first part, or agent. Charterer guarantees stevedores not to exceed sixty (60) cents on discharging in New Orleans, and vessel pays no wharfage. The danger of the seas, fire, and navigation of every nature and kind, always mutually excepted."

After the execution of the charter party the vessel proceeded to Frontera, entered and cleared for New Orleans via Tupilco, and went there to load, arriving and reporting to Mr. Scheidell, charterer's agent, as ready for cargo, at 6 in the morning of May 4, 1890. From that time cargo was received as it came off in rafts from time to time, until the 3d of June, when Mr. Scheidell came off to the vessel, as she was lying from one and one-half to two miles off shore in the open roadstead, and said he had one more raft of logs, which he was going to give them that night. Late that afternoon the raft was brought off, arriving there about 6 o'clock, and was made fast astern of the schooner by Mr. Scheidell and the men from the shore employed with him. Both Far-

well, the master, and Murray, the mate, of the schooner, called his attention to the rope and chain, and the way the raft was made fast, but he said it "was good enough," that it was all right. That night all of the logs but two broke away and went adrift. Learning this upon coming off the next morning, Mr. Scheidell insisted that the master of the schooner was responsible, and must settle for them. This the master did not admit, when Scheidell threatened to report him to the judge, and have him summoned to court, at the same time declaring that he was "liable for \$1,000 fine, and that the charter party was no good, because it had no stamps on it." The evidence is that he said that he had no more cargo for the vessel, and refused to accept bills of lading, or make any further settlement, but went ashore. The schooner remained there during the day until about 5 P. M., then left for New Orleans, where she arrived June 16th. Upon his arrival the master demanded payment for 12 days' demurrage, which he claimed was due him for detention, which was paid, and then demanded a payment or deposit of the freight, amounting to \$2,350, before delivering the cargo; whereupon the charterer filed his libel, alleging that the schooner had departed from the port of loading without taking on board a full cargo, contrary to the terms of the charter party, and refused to deliver the cargo then on board. Upon exceptions an amended libel was subsequently filed, alleging that the schooner took into its possession a raft of logs necessary to complete its lading, and by direction of its officers, contrary to the charter, and at its own risk declined to take the same on board, and so placed and located them that in consequence the logs went adrift and were lost, and praying that the schooner be attached for nondelivery of cargo, and the cargo be discharged and delivered to libelant. This was done upon the company's giving a bond in the sum of \$2,600, when the owners of the schooner filed their claim and cross libel, setting up the terms of the charter party, and alleging that the raft of logs, the loss of which had been complained of, was at the risk of the charterer, and lost by fault of its agent; that the schooner had received all the cargo that was furnished and provided by the charterer's agent, and left only after he had refused to furnish any more; and praying payment for the entire freight earned, and demurrage and damages. Upon these pleadings the case was heard, the cross libel sustained, and judgment given for claimants.

*W. S. Benedict*, for libelant.

*O. B. Sansum*, for appellees.

Before McCORMICK, Circuit Judge, and LOCKE and BRUCE, District Judges.

LOCKE, District Judge, (*after stating the facts.*) The libelant in this case has so persistently prosecuted its appeals, this being the third hearing and decree herein, that it would appear that it must have an honest faith in the integrity and justice of its position, so that we shall express our opinions and the reasons for them more at length than the circumstances of the case would otherwise seem to demand.

The first question in this case, and the one upon which all others depend, is, at whose risk was the raft of logs which was lost? Who must be held responsible for it, and upon whom must the loss fall? A common carrier's or shipowner's right and power to determine by contract his responsibilities in the care, custody, and control of cargo have always been admitted, and such contract sustained, when its provisions, by which such limitation is expressed, are reasonable in themselves, and do not undertake to excuse the carrier for his own negligence. *New Jersey Steam Nav. Co. v. Merchants' Bank*, 6 How. 344; *Railroad Co. v. Lockwood*, 17 Wall. 357; *York Co. v. Illinois Cent. R. R.*, 3 Wall. 107. The language of the contract usually determines the conditions and time under which the responsibility of the shipowner is assumed in receiving cargo, and the termination of his risks in discharging. In receiving cargoes by lighter or by raft it is usually declared whether the cargo is to be at the shipper's or shipowner's risk, while alongside. In this case the language would appear to be plain and distinct, and to determine the risk of the cargo while waiting to be taken on board. Was the agreement, "cargo to be delivered alongside, and held at charterer's risk and expense," unreasonable in itself, or, under the circumstances, could it be claimed to protect the master from the result of his own negligence? Had the master insisted that it should be held alongside an unreasonable length of time, or had he declined to take it on board at the earliest reasonable moment, or in any way attempted to shield himself from the results of his own negligence in connection with the property, such fact might be considered in its effect, and such agreement disregarded; but neither of these conditions seems to be the case here. The vessel was but temporarily there. The shipper had permanent business relations, and men presumed to be constantly in his employ; and rafts or logs, if going adrift and driven ashore, or afloat in the vicinity, could more easily and surely be recovered by one party than by the other. The charterer appears to have had on board the vessel as many men in his employ, or employed by his selection and procurement, by whom he could have watched or cared for any cargo alongside, as comprised the crew of the vessel. So the terms of the charter party would not in themselves, as generally applied, seem to be unreasonable. In this particular case the raft did not reach the vessel until about 6 o'clock in the afternoon. It could not be reasonably asked or expected that the logs should be taken on board that night, and, unless it would be protecting the master against the results of his own negligence, they would be at the risk of the shipper. Upon this point the evidence is that the raft was held and treated by shipper's agent as at the risk of his principal. The evidence shows that it was taken alongside and dropped astern by the raftsmen under Scheidell's superintendence; that there was nothing at all in any remark or suggestion of Farwell, the master, or Murray, the mate, in connection with making it fast, that could be construed into assuming the responsibility or care of it, or changing the risk. The circumstances did not seem to demand that ordinary care and diligence would require a watchman. It had been made fast under the personal superintendence of

Scheidell, who declared it was all right, and "good enough." No watchman had been suggested by him. The night was smooth and calm, and there was no increase of wind or change in the condition of things that would seem to demand any greater care on the part of the master.

We do not see any possible construction by which the schooner should be held responsible for the loss of these logs, and upon that point the case turns. It is immaterial, in the determination of this case, whether or not there was any more cargo belonging to libelant there. Scheidell, its agent, to whom the master was directed by the charter party to look for cargo, refused to furnish any more, and informed him definitely and positively that he had no more for him, and left with the threat to have him summoned to court. We consider that the master was justified in considering that he had all the cargo that would be furnished, and that his load was completed, and he had a right to proceed on his voyage. There is no allegation in the pleadings, nor the slightest testimony in the evidence, that Scheidell furnished or offered to furnish, or suggested the probability or possibility of his being able to furnish, more cargo for the schooner; and if it is true, as claimed, that there was more cargo there that could have been furnished, it makes his course more inexcusable, and his conduct more culpable. The leaving of any papers at Tupilco, if any were so left, is entirely immaterial in this case. If the schooner laid herself liable to a fine for leaving without papers or a clearance, under the Mexican law, which does not appear, it has in no way affected the interests of the libelant.

Reviewing the assignment of errors, we do not find that the testimony establishes the violation of the charter party by the master in refusing to receive more cargo. We find no evidence at all showing that he at any time refused to receive cargo, but that everything shows that he was willing to receive it, until informed that libelant's agent had no more for him. In the matter of not caring for cargo moored alongside, we have already considered, and find that he was under no legal obligation to use more than ordinary care in looking out for it, and in not permitting it to go adrift willfully and knowingly, and of this there is no evidence. In the matter of negligence or malice in breaking the dogs in cargo, and permitting same to go adrift, and become a total loss, we fail to find a *scintilla* of evidence supporting any such charge. In the matter of refusing to give or grant proper bills of lading for cargo then on hand, the only evidence, instead of showing that the master refused to give bills of lading, shows conclusively that he repeatedly offered to Scheidell to give him bills of lading for all the cargo received, which Scheidell positively refused to accept. In the charge of departing with his vessel to prevent redress of charterer's agent through the proper customs officers of the port, we can in no way accept libelant's view that the customs officers of a foreign port constitute the proper forum by which the agent of a citizen of the United States might seek redress of an American vessel for noncompliance with the terms of a charter party signed on the high seas, and consider the master fully justified in leaving with his vessel to avoid the seeking of such redress as was threatened. It is also



charged that he was not justified in demanding freight money on cargo unknown. Ordinarily it would be considered unusual to demand payment of freight before the entire or partial discharge of a cargo, and before any opportunity had been had to inspect, measure, or determine it; but in this case there had been a controversy, and it was plainly seen that there was to be a conflict of opinion and a continued demand for the loss of the cargo, the same as had been made by the agent at the place of loading. The vessel was lying at the charterer's wharf and mill, and a discharge would be into the custody, control, and possession of the charterer, which might reasonably raise the question of an abandonment of the freighter's lien, and we consider the master, under the circumstances, was fully justified in the demand for a deposit of freight money. The charterers have suffered nothing from such demand, as no payment or deposit has been made.

The so-called "official records" of protest from the port of departure have been examined, and found to contain nothing that would in the least affect the conclusions reached upon the question of fact, even were they admitted as evidence.

Assignment of errors No. 3 claims that the decree does not allow the deductions from freight money found due, of the expenses paid by the charterer, and not denied under the charter stipulations.

It has been claimed in exhibits filed that these bills of towage, custom house, stevedores', and quarantine expenses had been paid by the libelants, but we have searched in vain for any proof of payment of any such amounts as claimed. The allegations of the payment of such expenses to the amount of \$1,074 was charged in the fourth article of the amended libel, and positively denied in claimant's answer. In Exhibit A put in, but in no way sworn to or made evidence, there appears an item of "Port charges of vessel, paid, \$1,074." The only evidence we find touching this subject in the record is in the testimony of Mr. Henry Otis:

"*Question.* There is an item here of \$1,074 in this Exhibit A. What is that for? *Answer.* Well, I cannot tell you entirely. We have the bills, and we will put them in detail," (and the witness states that he will send them in.)

This is the only testimony that can be found relating to the payment of any of these items. Certain papers purporting to be bills appear copied into the record, but they are entirely unsupported by oath, and can have no validity as evidence. Libelants were under no obligation to pay any of these bills. The agreement of the charter party that charterer would advance necessary funds for disbursement of vessel could only have reference to the disbursements at the port of loading, where it was to be presumed the vessel would be without funds; and nothing but positive evidence of payment would justify the allowance of them, and this we do not find.

There was no allegation in the libel to that effect; but one claim which was put in by libelant, in the nature of damages, was for injury to saws, done in sawing the cargo, on account of a large number of iron rafting dogs found broken off in the logs which were claimed to

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broken by the master of the schooner. The charge of \$500, further than that the und, and the saws damaged, is the statement of states that he was on board the schooner when she that he remained on board "about a week or five stain broke most of the dogs getting the logs aboard, and them aboard." The testimony of the master and that the first raft did not come off until after the vessel ine days, thus contradicting the testimony that any logs ile he was there. Unquestionably the dogs were found in the logs when they came to be sawed, but how they came to remain there is not shown, whether from some former rafting,—as it appears that these were refuse logs, and had been lying waiting a market for several years,—or whether they were broken necessarily, accidentally, or carelessly, or in some other manner. Neither the master nor crew had anything to do with putting the dogs into the logs, and we do not think the evidence is sufficient to find that the master of the schooner willfully, or even negligently, so broke them off as to do the damage charged.

As to the amount of freight due under the charter party, its terms upon which freight must be determined are:

"The party of the second part is to pay to said party of the first part or agent, after true and faithful delivery of the cargo, for the use of said vessel during the voyage aforesaid, at the rate of six dollars and twenty-five cents, American currency, per ton of forty cubic feet, actual contents delivered. In case of a shortage, she receives on all short of 400 tons, down to 350 tons, three and twelve and a half hundredths dollars, (American,) and for all less than 350 tons full rates."

The term "shortage," used in charter party, may be used, and is intended to apply to either short loading or short delivery. In the latter the ship pays a stipulated sum for the amount of cargo received and not delivered; in the former, where the charterer has stipulated for a full cargo, and any agreement is made as to what a full cargo is, the charterer pays and the ship receives, as stipulated damages for noncompliance with the terms of the charter party in not furnishing a full cargo, the amount agreed upon, stipulated for, or proven in evidence. The sentences in this charter party relating to the amount of freight must be read together. The provision relating to shortage must be read in connection with the preceding sentence, and so far modify it as it is applicable. It can only apply to shortage of loading or furnishing cargo as the schooner receives the stipulated sum; and the full cargo, as stipulated for, is declared to be 400 tons. The charter party was practically for a lump sum up to freight for 400 tons, with additional if any more was actually carried, and, in the absence of fault of the owner, was not to be less than \$6.25 per ton for 350 tons, and \$3.12½ for 50 tons. We find no default or noncompliance with the terms of the charter by the master of the schooner, the agent of claimants; and the amount of freight, as determined by that contract, \$2,343.75, less the stevedores' bill, of Tulipco, must be considered as due, and the judgment of the court below must be affirmed, with costs.

THE HARBINGER.<sup>1</sup>

BROWN v. GILL &amp; FISHER, Limited.

(District Court, E. D. Pennsylvania. May 10, 1892.)

## 1. CHARTER PARTY—CONSTRUCTION—"CONVENIENT SPEED."

A charter party made November 5th with a ship at Charleston, S. C., actively engaged in trading, by which she was required to proceed to Philadelphia with all convenient speed, and to be in readiness for cargo after December 31st, with the privilege to the shippers to cancel the charter if she "shall not be ready on or before the 31st of January" following, is complied with if the ship be in readiness by January 31st, although she undertake another voyage, and puts in for ordinary repairs in the interval.

## 2. SAME—READINESS FOR CARGO—SUNDAY.

The tender of a ship to a charterer on the Monday following the Sunday which would be, by the terms of the charter party, the last day for such tender, is in time, in the absence of some controlling custom of the port to the contrary.

## 3. CUSTOM OF PORT.

There is no custom of the port of Philadelphia requiring that, where the last day that a ship could be in readiness falls on Sunday, she should present herself on the previous Saturday.

## 4. SAME—EVIDENCE.

A custom is not shown to be established at the port, where the testimony of the witnesses who aver that the custom exists is met by an almost equal number of witnesses with equal facilities of knowing, who testify to never having heard of such custom.

In Admiralty. Libel by John L. Brown, owner of the steamship Harbinger, against Gill & Fisher, limited, to recover for breach of contract of charter party. Decree for libelant.

*Flunders & Pugh*, for libelant.

*Richard C. McMurtree*, for respondents.

BUTLER, District Judge. The respondents chartered the British steamship Harbinger on November 5, 1891, to carry a cargo of grain from Philadelphia to Cork, for orders, at the rate of four shillings and nine pence a quarter. The charter contains the provisions usual in such instruments. Fifteen lay days are allowed for loading,—not to commence running before the 1st of January, 1892. It is stipulated that the ship shall proceed "with all convenient speed to Philadelphia," and load; and that if she "shall not be ready to load on or before the 31st" of that month the charterers may refuse her. She was at Charleston when chartered, and on the 23d of November, after loading a cargo of cotton, started for Bremerhaven, where she arrived about the 17th of December. Seven days thereafter, having discharged the cotton, she went to the river Tyne, England, for repairs, (required by usual wear,) reaching there in two days, and remaining ten or twelve, until the work was done. She then started for Philadelphia, getting here on the 31st of January, which was Sunday. She found the customhouse closed, and was unable to secure the usual certificates of readiness for cargo, on that day; but she nevertheless tendered her-

<sup>1</sup> Reported by Mark Wilks Collet, Esq., of the Philadelphia bar.

self to the respondents in the afternoon. Next morning she entered, procured the certificates and again tendered herself; but was refused, and notified that the charter was canceled.

The defense urged is twofold: *First*, that the libelant failed to observe the stipulation to proceed with all convenient speed to Philadelphia; and, *second*, that the ship was not ready to load on or before the 31st of January.

In passing upon the first point, it is necessary to ascertain what duty (in this respect) the contract imposed. In ascertaining this the clause referred to must not be detached and read alone, but the entire charter taken, and considered in the light of surrounding circumstances. While it is provided that the ship being tight, and having liberty to take an outward cargo for the owner's benefit, shall "proceed with all convenient speed to Philadelphia \* \* \* and there load," it is clear that the literal sense of this language does not express the intention of the parties. The cargo was not to be ready until nearly two months thereafter; the lay days, as we have seen, were not to commence before the 1st of January, 1892. If therefore she was to proceed directly "with all convenient speed to Philadelphia" she must lie there in idleness for six weeks or more. Of course the parties did not intend this. What then did they intend? She was at Charleston, and, as the charter states, was engaged in "trading." She was to carry a cargo of grain from Philadelphia not earlier than the 1st of January and not later than the last. In other words, she was chartered for a January shipment, from that port. She was not required therefore "to proceed with all convenient speed" directly from Charleston to Philadelphia. It was contemplated that she would continue trading elsewhere, during the months of November and December, and then proceed to Philadelphia with "all convenient speed" consistent with the circumstances contemplated. The contract was made for her benefit as well as for the respondents. During the intervening months she must carry such cargo as can be obtained. She cannot choose her voyages, but must accept such as offer. If these carry her so far off that she cannot reach Philadelphia until late in January the respondents cannot complain. If she shall not reach there until the time stipulated for loading has passed, she forfeits her charter. Such, in my judgment, is the proper interpretation of the contract.

In this view of the libelant's obligations, the first point of the defense fails. As we have seen the ship took cotton abroad from Charleston; and appears to have returned as speedily as could be expected. She was delayed for necessary repairs. She was not blamable for taking the cargo to Bremerhaven. It does not appear that there was any needless delay in loading, or unloading, in making the repairs, or in going or returning. Doubtless she could (with unusual effort) have made greater speed; but the charter required "convenient speed" only, and this she made. It is unnecessary to inquire, in this view of the facts, whether the stipulation respecting speed, constitutes a condition precedent.

Then as respects the second point,—was she ready to load within the time specified? The effect of her tender on Sunday need not be consid-

ered. Her readiness next morning is admitted; and it is indisputable that this was in time, according to the general rule of law applicable to such cases. *Campbell v. Society*, 4 Bosw. 298; *Salter v. Burt*, 20 Wend. 205; *Avery v. Stewart*, 2 Conn. 69; *Chaffee v. Railroad Co.*, 146 Mass. 224, [16 N. E. Rep. 34.] The 31st being *dies non* she was entitled to Monday; unless the custom of this port required her to be ready on the preceding Saturday. There is no room to doubt that the existence of such a custom would control the charter,—that the parties would be regarded as dealing with it in mind, and be required to conform to it. But to exercise such an influence the custom must be uniform and so long continued as to be notorious. As said in *Coxe v. Heisley*, 19 Pa. St. 247, a local usage if it be ancient, uniform, notorious and reasonable, may enter into and become part of a contract which is to be executed at the place where the usage prevails." All these elements are essential constituents of a binding custom.

The respondents set up such a custom, respecting shipments at this port; and have produced some evidence on the subject. The evidence is insufficient, however, to sustain their position. Nearly an equal number of witnesses, with equal opportunities of knowledge, are produced on the other side, who say no such custom exists,—that they never even heard of it. On both sides the witnesses are men of high character, and entirely worthy of credit. They testify according to their respective understandings. It appears that the Commercial Exchange of Philadelphia has provided by rule (which binds its members only) for the performance of mercantile contracts on Saturday when the time named therein for performance occurs on Sunday; and in consequence a partial usage of this nature, respecting such contracts, exists. This may have led to the understanding stated by the respondents' witnesses. It is clear, however, that the custom, set up respecting shipments at this port, is not proved. It is incredible that a uniform, long-established, notorious custom,—of which every one dealing here in respect to such shipments is presumed to have knowledge, and is consequently bound by,—should exist, and the libellant's witnesses,—shippers, ship brokers, and others, be ignorant of it. It is manifest that the respondents (who from their experience as shippers should have known of the custom if it exists) had never heard of it before this suit was brought, for instead of setting it up in their answer, the defense there stated, rests on different grounds. The answer, indeed, substantially admits that the tender on Sunday would have been in time if it had been accompanied by the usual certificates of readiness.

The libel is sustained and a decree may be prepared accordingly.

## THE NOW THEN.

## HERRESHOFF MANUF'G Co. v. THE NOW THEN.

(District Court, D. Delaware. June 2, 1892.)

No. 437.

## 1. MARITIME LIENS—SUPPLIES—FOREIGN PORT—ORDER OF OWNER.

When supplies are furnished to a vessel in a foreign port by order of her master a lien is implied, but for work done by order of the owner no lien will be held to exist unless proved by the agreement of the parties.

## 2. SAME—OWNER'S CREDIT.

On the evidence in this case, held, that the supplies furnished by libelant at Bristol, R. I., to the yacht Now Then, whose home port was Wilmington, Del., by order of the owner of the yacht, were furnished on the personal credit of such owner, and not on the credit of the yacht, and no lien was created thereby.

In Admiralty. Libel to enforce lien for supplies. Libel dismissed.

*Henry Whitney Bates*, for libelant.

*Willard Saulsbury*, for respondent.

WALES, District Judge. This is a proceeding *in rem* to enforce the payment of an alleged lien against the steam yacht Now Then for repairs and materials made and furnished to the vessel by the libelants at its works in Bristol, R. I., the home port of the yacht being Wilmington, Del. The owner of the yacht and the respondent in this case is Mrs. Rosalie B. Addicks, who resides at Claymont, in this district.

Although much other matter has been introduced, the decisive question in the case as presented on the pleadings and evidence is whether the repairs to the yacht were made on the credit of the vessel or on the personal credit of the owner's husband, Mr. J. E. Addicks. About the 26th of June, 1889, Mr. Addicks bought the yacht from the libelant for the cash price of \$15,000, and by his direction the bill of sale was made to his wife, and the yacht was delivered to her at Nahant, Mass. After the delivery, and early in the following month of July, the boiler of the yacht gave out, and the vessel was sent by Mr. Addicks to the libelant, at Bristol, with orders from him to have the necessary repairs made. When a bill for the repairs was sent to Mr. Addicks he refused to pay it, on the ground that Mr. John B. Herreshoff, the president of the libelant company, had warranted the boiler for one year, and that it was the duty of the company to keep it in good order for that period without additional charge. After this the libelant continued to do additional work on the yacht by the orders of Mr. Addicks, who punctually paid for it, with the exception of a small balance, which is included in the present claim; but he has uniformly refused to pay for the boiler repairs. Much testimony was taken in relation to the nature of the warranty, which was claimed on one side and positively denied on the other; and also as to the condition of the yacht's boiler at the time of the sale, but, as already remarked, the controlling question here is whether the libelant has established its right to a lien. So far as concerns the present

case, the law which gives a lien to the shipbuilder or material man may be stated in the language of the supreme court, in *The Lulu*, 10 Wall. 197:

"If necessary repairs and materials are made and furnished to a vessel in a port other than her home port, the *prima facie* presumption is that they were made and furnished on the credit of the vessel, unless the contrary appears from the evidence in the case."

This is stating the rule most favorably for the libelant, since it has been held by admiralty judges whose opinions are entitled to the highest respect that credit is presumed to be given to the vessel only when the repairs are made in a foreign port on the orders of the master; but that, when the repairs are made on the orders of the owner, the presumption of credit to the vessel does not arise, and in that case a lien will not exist except by the express contract of the parties. In *The Mary Morgan*, 28 Fed. Rep. 196, it was decided that, the repairs having been made and supplies furnished under a contract with the owner, the presumption was that the credit was given to him personally; and, in the absence of the proof of an express lien, none will be given. In *The Francis*, 21 Fed. Rep. 715, it was held that a known owner obtaining supplies on his personal order in a foreign port, not being master, deals presumptively on his personal credit only, and no lien will be implied unless the libelant satisfies the court, from the negotiations or circumstances, that there was a common understanding or intention to bind the ship. The reasons assigned for the distinction, between the cases where the work is done on the order of the master and when it is done on the order of the owner, is that the master is supposed to be without funds or personal credit, and the repairs, if made at all, must be presumed to be made on the credit of the ship, unless there be evidence to the contrary; but where the work is done on the order of the owner, who is supposed to have credit, the presumption is reversed, and a lien will not be recognized except it has been made under an express contract. In other words, when the work is done by the order of the master a lien is implied, but for work done by order of the owner no lien will exist unless proved by the agreement of the parties. It is not necessary, however, to enter upon a discussion of these rules, because upon the application of either one of them to the facts of this case I am satisfied that the libelant is not entitled to a lien against the Now Then. Mr. Addicks had paid for the yacht, and given it to his wife, and when it needed repairs he sent it to the libelant with his personal orders to have them made, and specifying what should be done. He was reputed to be a rich man, able to pay his debts, and there was no thought on the part of the libelant that it would require a lien on the vessel to secure payment for its work. Mr. J. B. Herreshoff testifies that he knew nothing about the question of credit,—whether it was given to Mr. Addicks, personally, or to the yacht. Mr. Young, the secretary of the libelant company, when questioned on the subject, speaks very vaguely, as appears from the following portions of his testimony:

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"*Question.* Tell me whether the repairs were made upon the credit of the vessel or upon the credit of Mr. Addicks. *Answer.* They were made upon the credit of Mr. Addicks. *Q.* And not on the credit of the vessel? *A.* The bill was rendered to Mr. Addicks. *Q.* To whom do you look for the payment of the bill,—Mr. Addicks or the vessel? *A.* We look to the vessel for the payment of the bill, through Mr. Addicks, as agent for the vessel."

On cross-examination this witness says:

"*Question.* These repairs and charges were made against Mr. Addicks, as I understand, were they not? *Answer.* They were. *Q.* And it was on his order and directions you made the repairs? *A.* Yes, sir. *Q.* And you looked to him, I understand you, for the payment of these bills which were contracted for as you have stated? Is that correct? *A.* We looked to the vessel through him as an agent of the vessel. We cannot do otherwise."

The inference to be drawn from such testimony, supplemented as it is by evidence of the dealings and transactions between the libellant and Mr. Addicks, removes the presumption of a lien, and convinces me that the libellant had no idea or intention of looking to any other quarter for payment for the repairs on the *Now Then* than to Mr. Addicks; that it never relied on the yacht as security for payment, but depended solely on the personal responsibility of Mr. Addicks as the husband and agent of the owner; that it is now too late for it to attempt to set up a lien, and it must therefore seek to recover its claim by a libel *in personam*, or by an action at law. A decree will be entered dismissing the libel, with costs.

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### THE TREGURNO.

RUSSELL *et al.* v. THE TREGURNO.

(*District Court, S. D. Florida. January, 1892.*)

#### SALVAGE—COMPENSATION.

The steamer *T.*, bound from Galveston to Liverpool, went aground on the Florida coast about 25 miles north of Cape Florida, December 5th, and was without assistance until the morning of the 8th, when two small vessels reached her. They at once got an anchor and heavy chain into deep water, but before they could make fast night came on, with a heavy storm, during which the *T.* was driven fast upon the rocky bottom. Other vessels arrived until the 10th, when there were 15 vessels, of 489 tons, and 200 men; also the wrecking schooner *Cora*, from Key West, with steam pumps and other appliances. The whole force was engaged 25 days in taking out the cargo of cotton and carrying it to Key West, 158 miles, a revenue cutter assisting therein by towing some of the vessels two trips. They thus saved 8,105 bales, the largest part dry. There was no anchorage nearer than 25 miles, and several times the salvaging vessels were driven there by bad weather. Two of them were damaged while taking off cargo in the heavy seas. Finally a wrecking vessel arrived from New York, and, though her services were not absolutely necessary, they were accepted, and the *T.* was got off and taken to Key West. She was appraised at \$90,000, and her cargo at \$115,000. *Held*, that 25 per cent. would be proper compensation for the whole service, but in view of the aid rendered by the revenue cutter and by the New York vessel, for which the latter was compensated by the claimants, there should be allowed but 22½ per cent.

In Admiralty. Libel by A. Russell and others against the British steamship *Tregurno* and cargo to recover for salvage services. Decree for libellants.



*L. W. Belhel*, for libelants.

*Jeff. B. Browne*, for claimants.

LOCKE, District Judge. This vessel from Galveston, bound for Liverpool, went ashore on the Florida coast, about 25 miles to the northward of Cape Florida, on the night of the 5th of December last. She had been ashore on the Bahama banks, and thrown overboard about 2,000 bales of cotton, a lot of copper, and lost her small anchors and hawsers in getting afloat, and was leaking some when she went ashore. She was at a distance from any assistance, and received no aid until two of the smaller vessels reached her on the morning of the 8th. They had with them but 14 men, and went to work as soon as their assistance was accepted, getting out an anchor and heavy chain into deep water; but, before they were able to get it to the ship and make it fast, night came on, and the weather and sea became so bad they were obliged to buoy the end and leave it. That night the wind and sea were very heavy. The crew of the steamer did not consider it safe to remain on board, but went ashore onto the beach. During the night the salvors could do nothing but remain on board. The steamer swung around onto the beach, and beat into and upon the hard rocky beach until, in the morning, but 8 feet of water was under her stern, 10 amidships, and 12 forward, and she had sprung a leak, so that there was about as much water inside her as outside, with 6½ feet of water on the engine room. The weather continued bad, so that nothing could be done towards connecting the chain with the vessel or lightening the vessel of cargo, but the salvors went to work breaking out cotton, and hoisting it upon the deck, so as to be ready for discharging as soon as vessels could come for it. On the 9th three more wrecking schooners arrived, and on the morning of the 10th others, so that there were an aggregate of 15 vessels, of 489 tons and nearly 200 men. The weather continued bad until the morning of the 10th, when they carried out a wire cable, connected it with the chain, and brought it to the windlass. In the mean time the wrecking schooner *Cora* had arrived with steam pumps, boilers, and other steam appliances. The steamer had no appliances by which manual labor could be made available, no windlass breaks or capstan bars, and it was only when steam power could be used that anything could be done towards heaving any strains on the anchor. The engine room and engines of the steamship were under water, and the only appliances that could be made available were those of the *Cora*. The salvors continued discharging cargo and pumping with their steam pumps. They had to bring the cotton to Key West, a distance of 158 miles. They got out what they could of the cargo dry, but much of it was wet. They took out in all 3,105 bales of cotton, of which 2,266 were dry, and the rest from under water. The weather was bad much of the time during the service, and for several days it was impossible to come to the vessel for cargo. There was no anchorage or protection for the salvors' vessels nearer than Cape Florida, nearly 25 miles distant, where they had to take refuge several times. The water deepened rapidly from the beach

where the steamer was lying, and she was exposed to the full sweep and force of the sea. In order to facilitate the discharging of the vessel, the salvors landed about a thousand bales of cotton at Cape Florida, and after the vessel had been got afloat, and brought to Key West, that was also brought and delivered to the master here. The salvors were engaged for 25 days in the service, every day of which they were at work. They say that all nights except two they worked until 12 o'clock at night, and those two nights until 10 o'clock. 1,631 bales were hoisted by hand; the rest were hoisted by the steam of their boilers. They carried out another anchor, and continued to keep their pumps going until the water was below the ship's engines. After the libelants had been at work 13 days, the wrecking steamer J. D. Jones, sent out by those interested in the property, arrived from New York, and offered her services. The vessel had been about pumped out, and moved from her bed, and would without doubt have come off the next tide, but the libelants deemed it safe to accept all the assistance offered, so permitted the J. D. Jones to lay out another heavy anchor, and take a line from the steamship. They also put a large steam pump from her on board the Tregurno, to be ready in event of an unexpected leak. They finally floated the Tregurno, and brought her to Key West. Upon an examination she was found not to have been materially damaged, although her bottom was somewhat dented. Many rivets were broken out, and the seams were leaking in places. The property has been appraised by appraisers appointed by the court,—the vessel at \$90,000, and the cargo at \$115,446.

This was unquestionably a salvage service of considerable merit. The property was in a condition of peril; the vessel liable at any severe weather to be so broken and injured as to be worthless; and the cargo, even if saved from going adrift, to be so scattered along the beach as to be considered but little less than a total loss. The master was utterly powerless to relieve or assist the property in his charge, and there was no aid that could be procured, except the salvors, nearer than Norfolk or New York. The property of the salvors was exposed to dangers very much greater than of ordinary commerce and navigation. Two of their vessels, while alongside endeavoring to take cargo, were damaged by the heavy sea and bales of heavy wet cotton. The labor was severe, unremitting, and long continued.

The salvors were, with a few exceptions, regular licensed wrecking vessels of this district, whose duty it is at any time to go to the assistance of property in distress, and are dependent in a great degree upon earnings from such services. They have rendered valuable aid to the property, and are entitled to a liberal compensation. In defense of the salvage claim, or in mitigation of it, it has been urged that the first set of salvors—those who first arrived—were remiss in their duty in not laying out a heavy anchor, and making the ship fast by heavy strains, to prevent her driving further ashore that night, which necessitated so much subsequent labor and damage. The salvors are bound to do, in the line of salvage service, all their powers and the means within their control can possibly enable them to do, and whenever, from lack of en-

ergy, activity, or effort, they leave undone anything which they might have done, it will be considered in diminution of salvage; but in this case I am fully satisfied that it was not within the power of the few salvors there the first day to have connected the heavy anchor and chain which they carried out with the vessel before the weather became so bad that it was impossible. The master does not show by his testimony that it could have been done, and the statements of the salvors, and the entire circumstances at the time, satisfy me. I am also satisfied that after the first night the vessel was not driven any further ashore or aground on account of any discharging of cargo, and that there was neither loss of time nor damage to property on account of not carrying out a hawser, making fast to the cable, and heaving chains before it was done. I am therefore convinced that the salvors did as well as the means at their control would permit, and there can be no reduction from the merits of what they really did do for their inability to accomplish more.

It is also urged that several of the salving vessels while engaged in this service, and while on their way to or from Key West with cargo from this vessel, rendered aid to the steamships *Erl King* and *Manin*, which were ashore at the same time. This appears from the evidence to be true to a certain extent. It does not appear how many of such vessels rendered such service, or how long they were engaged, nor does it appear that such number was sufficiently great to interfere with or delay the work in this case. If, at most, it prolonged the service a day or two, there was no damage to the property, nor injury to the interests in this case. Unless those other vessels, when found in distress, had ample assistance, it was the duty of the vessels engaged in this service to render them all the aid within their power, and, unless it is shown that they neglected property in this case to its injury, there is no reason that it should diminish their compensation.

The services of the revenue cutter *McLain* were secured for two trips in assisting in towing some of the schooners to and from the steamship. Although no amount can be allowed for this vessel, she being the property of the government, the expense of coal and other supplies must be paid, and her officers and crew are entitled to a compensation, although at a much less rate than the regular salvors. The wrecking steamer *J. D. Jones* was employed by those interested in the property, and will be compensated by them, and her services are not to be paid for from any salvage given in this case. In determining the amount that may reasonably be allowed for this service, there are a few peculiar circumstances which influence the decision. Numerous cases have been referred to by counsel in the case, both from this district and from the district of Virginia. We find comparatively few cases in this district where the circumstances resemble those of this. The character of the bottom and the exposure to the sea from deep water usually requires immediate aid, and wherever the vessel has been saved it has been by an immediate lightening of cargo and floating by means of anchors. Seldom has one so far aground and so filled with water been rescued. In

most of those cases the property was in greater danger from immediate damage than this, but saved with much less labor and less time; and, although the rate per cent. given has, where both vessel and cargo have been saved, been much less than I consider may be fairly given in this case, the amounts of the individual shares have been much greater, when the time occupied is taken into consideration.

The cases of *The Kimberley*, reported in 40 Fed. Rep. 290, cited by the claimants, and of *The Sandringham*, 10 Fed. Rep. 562, and *The Egypt*, 17 Fed. Rep. 359, resemble this case more in the peculiar circumstances than the general class of cases in this district. Those cases, all decided in the eastern district of Virginia, were for the salvage of iron steamships and their cargoes upon an uninhabited coast, at some distance from assistance, where the cargo had to be discharged, the water pumped out, and the vessel hauled off by anchors. Each of those vessels lay upon a sandy bottom; this one, on a rocky one. In *The Kimberley* the cargo had to be transported 60 miles to port, in *The Sandringham* 30 miles, and in *The Egypt* about 40 miles; in this case, it was 158 miles. In those cases assistance was within those distances; but in this, very nearly all of the aid came from Key West, 158 miles. In those cases the shoals outside and around the vessels necessitated taking off the cargoes, or much of them, in the surf boats, but at the same time prevented the full force of the sea from reaching the vessels, as it did in this case. Here the full force of the sea reached the vessel ashore, on account of the nearer approach of deep water, and, there being no anchorage, rendered the position of the salvors' vessels one of greater peril. Here, as in *The Sandringham*, the steamship's crew left at the first appearance of rough weather, and the master, having no idea his vessel would be saved, sent them to Key West to be forwarded to England.

It is a question whether in this case the time occupied and labor performed in taking the cargo the greater distance to port, does not fully equal that attending the boating of the cargoes off in those cases. In the case of *The Sandringham*, where the salvors were engaged about a week and took out 1,049 bales of cotton, the court gave one fourth of the value, which was \$193,000. In *The Egypt* the salvors were engaged 8 days, discharged between 1,100 and 1,200 bales of cotton, and the court gave one fifth upon an agreed estimation of \$250,000, in addition to \$4,256.55, which amount had been expended by the wreckers. In *The Kimberley*, where the labor was more protracted and severe, the court gave an award of 20 per cent. upon a value of \$490,000 as a bonus or gratuity, in addition to an amount expended and *per diem* compensation for the vessels and appliances of the salvors, amounting to \$46,000, or a total salvage compensation of \$144,000, or about 29 per cent. upon the total valuation. An appeal having been taken, the case was compromised for a compensation of \$100,000. In the case of *The City of Worcester*, 42 Fed. Rep. 913, where the vessel was on the rocks near the entrance to New London harbor, and valuable services were rendered by patching and repairing holes in the bottom, getting her afloat, and taking her to New York, \$31,753.52 was given on a valuation of \$237,500.

In this case the property has been appraised, by a board of appraisers appointed by the court, at \$205,496, such appraisal objected to, and such objection fully heard by evidence and argument, and, although some doubts have been thrown upon the absolute correctness of the appraisal, nothing has been offered showing that a more satisfactory valuation could be arrived at without handling, sampling, and classifying each bale of cotton. This is deemed an unnecessary expense, and, while the valuation may be too high, it is possible that it is too low, and the report of valuation will be accepted as sufficiently near the true value to justify the determination of salvage.

Had there been no aid or service rendered but what was represented and entitled to salvage under the libel, I should not consider 25 per cent. of the net value of the property saved as unreasonably large, and should make that award; but the value of service of the revenue cutter McLain, as well as of those of the wrecking steamer the J. D. Jones, must accrue to the benefit of the property, and not of the wreckers, and must reduce the amount of the salvage to that extent; and it is considered that 22½ per cent. of the net value, found by deducting from the appraised value the costs, expenses, and charges for the care, custody, and control of the property, and the costs of the suit from the appraised value, would be a fair award; and it is so ordered.

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THE EL DORADO.

JOHNSON *et al.* v. THE EL DORADO.

(District Court, S. D. Florida. April 23, 1892.)

1. SALVORS—WHO ARE—ADDITIONAL ASSISTANCE.

The steamship E., of 2,500 tons, bound from New York to New Orleans, with a valuable cargo, struck a rock on the Bahama banks, partly filled, and was soon after grounded near Bimini, in 82 feet of water. The wrecking schooner C., of 80 tons, with proper pumps and appliances and 23 men, went to her assistance from Key West, accompanied by a revenue cutter. A diver with a diving suit worked continuously in stopping the leak, while the rest of the crew were engaged in removing submerged cargo in order to get the suction pipes into the hold, the cargo being placed on the C. After five days' work other wrecking vessels arrived from New York. The following night the C.'s rudder was carried away in a squall, and as she was then heavily laden, and as the revenue cutter, which was about to leave, offered to tow her to Key West, her master decided to go that day, against the objection of the master and agent of the E., who desired the saved cargo to be transferred to one of the New York vessels, and offered to guaranty the owners of the C. against her loss. An additional reason for desiring the protection of the revenue cutter was that there had been threats of seizure for wrecking in what were claimed to be British waters. The C. left with the E. her pumps and most of her crew. The E. was finally floated, taken to Newport News, and there libeled by the owners and crew of the C., who also brought this libel against the cargo carried to Key West. *Held*, that libelants were original salvors, notwithstanding that the services of the vessels from New York were finally efficacious in saving the vessel and most of the cargo.

**2. SAME—MISCONDUCT OF SALVORS.**

Under the circumstances it was not improper to carry the saved cargo to Key West, as it was not improbable that the *E.* and the rest of her cargo would be entirely lost, and as there was no offer to guaranty the salvage, especially in view of the needed protection of the revenue cutter.

**3. SAME—COMPENSATION.**

Salvage could only be awarded with respect to the cargo brought to Key West, and the fact that, while engaged in saving it, the salvors were also rendering valuable services to the steamer and the rest of the cargo, for which proper compensation would presumably be awarded in the proceeding against them, taken together with the fact that the vessel was finally saved, are reasons which should operate to reduce the salvage below the usual percentage allowed in the district for diving up cargo; and therefore 25 per cent. should be considered a proper allowance.

**4. SAME—VALUE OF RES—STIPULATION.**

Where the claimant, in order to get possession of the cargo after the filing of the libel, stipulated with libelants that its value should be considered as \$18,000, he was estopped from afterwards disputing this amount, or proving that the cargo sold for less after transportation to New York; but as the stipulation was in place of an appraisal, and as it is the practice of the district to deduct from the appraised value all charges and expenses incident to the custody of the property, such deductions should be allowed from the stipulated value.

In Admiralty. Libel by B. W. Johnson and others against a portion of the cargo of the steamer *El Dorado*. Decree for libelants.

*Jeff. B. Browne*, for libelants.

*G. Bowne Patterson*, for claimants.

LOCKE, District Judge. This steamship, of about 2,500 tons net tonnage, laden with a valuable cargo, bound from New York to New Orleans, struck an unknown and uncharted rock not far from the Great Isaacs, on the Bahama banks, on the night of the 4th of August, 1891. She was soon found to be leaking badly, and was run ashore on a sandy bottom not far from Bimini. The leak was in one of the forward compartments, so that she had settled very much by the head, her bows resting for about 30 feet on the sandy bottom in 32 feet of water, while the rest of her length was afloat, drawing at her stern but about 18 feet; but she was water-logged, and had a heavy list to port. While in this condition the wreckers from Bimini and the other Bahama islands came on board, and were permitted to discharge cargo from between decks and take it ashore; but they had no appliances for stopping leaks or relieving the vessel in any other way, and the master, employing one of the Bahama boats, sent his first officer to Key West for aid. Mr. Philbrick, the agent of the owners of the steamship line, made application to the libelants owner and master of the wrecking schooner *Cora* for assistance. She was a licensed wrecker, a schooner of about 80 tons, fitted up with four steam pumps and boiler, a diving suit and apparatus, an experienced diver, anchors, hawsers, and other wrecking appliances, and was used only for salvage purposes, but was then lying with a ship keeper and master on board.

In a short time they had selected from the experienced Key West wreckers and naked divers a crew of 22 men; and signified their willingness to proceed to the stranded ship, but suggested that, as the *Cora* was a sailing vessel, it would save much time if the services of the revenue

cutter McLain could be procured; she being the only steam vessel in the harbor. Both the owner of the Cora and Mr. Philbrick made application to the collector of customs for the revenue cutter to take the Cora in tow, which was granted. The libelants in the Cora, in tow of the McLain, reached the El Dorado, Sunday, the 9th of August, and immediately went to work. Johnson, the principal libelant and submarine diver, went under the bottom, while the others went to work getting out and setting up the pumps. Johnson found the port side of the steamship uninjured, but on the starboard side he found extensive damage,—seams, cracks, and holes, more or less open, for the distance of about 28 feet. These he went to work repairing, and continued patching, plugging, wedging, and calking with wedges, plates, patches, and rolls of blankets; working under water more or less every day until Thursday afternoon, when, in adjusting a large canvas patch over the holes which he had stopped, he discovered another large hole further aft, which he was unable to repair that day. In the mean time the other libelants had been at work rigging up and using their four steam pumps, and breaking out and getting up the cargo from the hatches of the first and second compartments, in order to get the suction pipes down into the hold. The water came inside the hatches to the coamings, so that everything that was taken out was taken out from under water, and, after a short time, from water several feet in depth, by naked or skin divers. When the pumps first got to work they apparently lowered the water, but subsequently they found it impossible to pump the ship out until all the holes were stopped, and after working some time, concluding that there were no holes in the first compartment, but were all in the second, they removed their pumps in the first hold, and went to work in that, hoping to free that, and to float the vessel; but it was found that the doors between the two compartments were not tight, but sprung open by the pressure of the water, so they attempted to work out the cargo so as to reach and tighten them. They worked this way from early daylight until late every night, diving up, hoisting out, and putting on board the Cora the cargo from these holds, until the night of Friday, the 14th, when she was filled with all she could carry. On that day the wrecking steamer the I. J. Merritt arrived from New York with more pumps, divers, and other appliances. Libelant Johnson was nearly worn out with having been under water so much for the last five days, and the divers from the Merritt continued the work which he had commenced. The night of the 15th the vessel, being exposed to the wind by her stern being raised high in the air, was struck by a severe squall, and, although they had anchors and hawsers laid out from the mast heads, and the revenue cutter towing to keep her on an even keel, went over on her beam ends, and commenced to fill; when, in order to bring her upon an even keel, it was necessary to flood the fire room, engine room, and the holds fore and aft. Her crew left her, and most of the master's personal effects were taken off; the chief libelant and Capt. Byrne being about all that remained on board that night. The next

morning the steamship New York, of the same line, arrived from New York for the purpose of rendering such assistance as she might be able. The Cora in the mean time had carried away her rudder head in a squall, and was to some extent disabled, and was loaded with as much cargo as she could receive. The captain of the revenue cutter decided on returning to Key West, and offered to take her in tow to that port, and Williams, owner of the Cora and one of the libelants, accepted the offer. Capt. Byrne, of the El Dorado, and Mr. Morse, superintendent of the line, then on board of the New York, objected, and desired them to put the cargo from the Cora on board the New York, and remain to lighten the cargo from the El Dorado to that vessel; but Williams, fearing for the safety of his vessel in her disabled condition in event of a hurricane, which might be expected at any time at that season of the year, and desiring the protection of the revenue cutter from the fact that threats of seizing her for wrecking in what were claimed to be British waters had been made, declined to remain. An offer was made by Mr. Morse to repair the rudder head, and to insure the safety of the vessel, but libelants did not consider such guaranty would be of any validity, and they declined to accept it, and remain, without the protection of the cutter; and brought the cargo then on board to Key West, where it was delivered to Mr. Philbrick, agent for the claimant, and afterwards libeled for salvage. Ten of the wreckers, among them the chief libelant, the submarine diver, and most of the naked divers belonging to the Cora, remained on board the El Dorado, and assisted in continuing the repairing, pumping, and finally floating the ship, and taking her to Newport News, where, after efforts to come to a settlement, the ship was libeled by the libelants herein. The rest of the cargo, which has been taken out of the vessel and taken to New York, was libeled there, and these two suits are yet pending.

The only question in this case is, what salvage, if any, is due from the cargo saved and brought to Key West on the Cora? But the allegations of the pleadings and the testimony has so covered the entire service rendered the ship and cargo generally that the difficulty is to determine just where the service, benefit, and value for the general interest ceases, and that of the special interest of this cargo begins. The property was in peril from marine disaster; it was certain of total loss without some such service as was rendered. This was prompt, and, as far as time allowed, efficient, and without doubt, had the Merritt remained away another day or two at the furthest, Johnson would have been able to complete the patching of the remaining hole, and in time to have freed the ship. I am satisfied that the greater part of the repairing and stopping leaks had been done before the arrival of that steamer, and I think the libelants can be very properly considered the original salvors, with probably sufficient means to complete the service, and I cannot accept the position that the services of the steamer Merritt were alone valuable. The wrecking appliances, schooner, pumps, divers' suits, and armor had been fitted out at a good deal of expense by the chief libelants, and were



kept only for wrecking and salvage purposes. This district had long been without the modern means of saving property, and it had been frequently intimated from the bench that if more capable means were provided it would be for the interest of commerce, and frequently enable the wreckers to earn more liberal salvages, which commerce could well afford to pay; and in an opinion in the case of *The Slobodna*, 35 Fed. Rep. 537,—a case in which had the wreckers had steam pumps the ship would have been saved,—I mention with much regret that it did not appear that the modern wrecking appliances could be profitably introduced into this district on account of the extent of reef line to be watched and the character of the bottom, from which vessels required immediate relief. Since that the libelants have procured, at much expense and trouble, appliances which have done good work in saving property which would have been lost, and which, if not as complete as those of some larger wrecking companies of other districts, are certainly entitled to encouragement. It is true that neither the services rendered by the libelants nor by the steamer Merritt to the steamship *El Dorado* and the rest of the cargo, after her arrival, can have any weight in the question pending in this case, as the property for which salvage is claimed had been saved, dived up, and taken on board the *Cora* before the arrival of that vessel; but the pleadings, arguments, and evidence, attempting to show that the libelants rendered no aid to the property, appear to demand an expression of opinion upon that point.

But coming to the property libeled herein, I am satisfied that it was necessary that it should be taken out, both to lighten the ship forward, and to enable the suction pipes to be put down into the hold. It is plainly shown that, after the *Cora* left, more of it was taken out and taken to Nassau. The master was helpless to accomplish this by his crew, and, although the answer alleges that there were a superabundance of men and vessels of the Bahama wreckers employed by the master to lighten all the cargo of the steamship to North Bimini, yet the future history of the cargo, so lightened, as given in evidence, shows that it was finally transported to Nassau, and thence to New York, after paying a liberal salvage.

The saving and taking out of this cargo, whether considered in respect to saving it, or in respect to its connection with the saving of the vessel and the rest of the cargo, could only be performed as a salvage service and for a salvage compensation. It was not within the power of the master to procure aid to perform it in any other way, whether it went to Bimini and Nassau, and paid salvage there, or on board the *Cora* as a storeship. The master had put his vessel into as comparatively a safe place as possible, yet the peril was great, and the prospect of a final saving of the entire property small. A vessel situated as this one was, leaking badly, with her stem resting upon the bottom, in 6½ fathoms of water, and her stern elevated and exposed to the force of the wind and an open sea for 12 points of the compass, at the season of the year when a West India cyclone might at any time be expected, is in such a condition as to make

a service rendered to any particle of property, either vessel or cargo, a valuable one.

But it is contended on behalf of the claimant that the bringing of the cargo to this port of Key West, and asking compensation here, was wrongful, injurious to the property, and involving the expense of freight to New York, so that the libelants have forfeited any salvage which they might have earned from it. Would the facts and circumstances under which the Cora returned to Key West with this cargo demand such severe and extreme penalty? I do not think the evidence shows bad faith sufficient to justify such decree. We can only judge of the purposes and intentions or the integrity of one's actions in the past by the then present conditions and circumstances, and not by the light of future events then unforeseen. At the time the question whether the Cora should return to Key West or not was pending the El Dorado was sunk, —lying upon the bottom, with the water coming up on the lee side for some distance over the upper deck. Capt. Byrne says in his testimony that "the prospect was that the steamer might become a total loss." The steamers New York and Merritt, as well as a number of Bahama vessels, one as large as the Cora, and an abundance of men, were present to render what aid was necessary. She took away neither her pumps, her submarine diver, nor her skin divers, nor in reality anything that could be needed in the future preservation of the property; her presence with that of the men that left in her could have rendered no further aid than did those remaining, and the fact is that she returned to the service as soon as she could be repaired.

In examining the argument made by the claimant that the cargo was taken to a port inconvenient and expensive for the owners of the property, the rights and interests of both parties, and not of the claimant only, should be considered. It is a well-established principle of salvage law that while the salvor is not justified in unnecessarily and unreasonably taking a ship or goods to a port inconvenient to the owners, (*The Eleanora Charlotta*, 1 Hagg. Adm. 156,) yet the master has no right to insist that the ship or property shall proceed or be taken to a distant port, inconvenient for the salvors, without first satisfying their demands, (*The Houthandel*, 1 Spinks, 25;) and, if the master insists, the salvors are justified in going so far as to resist his attempt, take control of the ship, and take it to a convenient port, and place it in the custody of the law, (*The Nicolai Heinrich*, 17 Jur. 329; 22 Eng. Law & Eq. 615; *The La Bruce*, [decided in this district by Judge WEBB, 1837,] 1 Adm. Rec. 84; *Marv. Wreck. & Salv.* 150.)

When the master and Mr. Morse offered to guaranty the safety of the Cora they made no offer to guaranty any salvage on what had been taken out, and was then in safety on board the Cora. The Cora was disabled, and unable to take care of herself in bad weather. There had been threats of seizing her. The revenue cutter, whose presence, so far, had been a protection to her, was about to leave, and was willing to tow her to Key West for repairs. In this case, under the then existing circum-

stances, which port would seem to be the most inconvenient and unreasonable, the rights of both parties considered,—taking the cargo to Key West for adjudication of salvage, or compelling libelants to surrender possession, and resort to the courts of New York for their proper compensation? The owners of the property were unknown, it had been separated from the ship by the marine disaster, and, in event of its further loss, neither owner nor master of the El Dorado could be held for salvage on it. Both claimant and underwriters had their resident agents at Key West ready to look out for and protect their interests. The destination of the vessel and of the cargo was not New York, but New Orleans, a port much nearer Key West, and it appears that it was undetermined at that time whether the ship, if saved, would continue her voyage or not. There was no certainty at the time that anything more would be saved to which the libelants could look for any salvage compensation they had earned, and they had a perfect right to look to this property itself.

They were engaged at and came from Key West to render the service, and that was the district most conveniently reached, and the nearest to which damaged cargo could be taken. Could it have been foreseen at that time that the El Dorado and cargo would be saved and taken to New York, and the libelants compelled to follow and institute suits there, without doubt they would have preferred two suits to three, and been perfectly willing that this cargo should have accompanied the other; but the delivery of this cargo in question to another steamer would have necessitated following it by the libelants with an action *in rem* into whosoever hands it came. I consider that, viewing the condition of affairs as they stood on the 16th of August, libelants were sufficiently justified in bringing the cargo of the Cora to Key West to prevent the forfeiture of any salvage they had earned in saving it. They had a lien on it which they had a right to enforce; it was in their possession, and could not be restored to the El Dorado or her master; and I do not consider that the questions, risks, and inconveniences apparently necessarily involved in delivering it to another vessel, required or demanded such action so as to entail the penalty of forfeiture for not so doing.

Determining this is deciding but one question of the case,—the right of libelants to salvage; the amount of the salvage is a more difficult and delicate one. How shall the value of the services rendered the balance of the property in taking this out be separated from the value rendered this cargo alone, and the latter only considered? In this case the merchandise was all taken from under water, rendered foul by potash and tobacco, by diving to different depths, from 5 to 10 feet. The labor was disagreeable in the extreme, and carried on with all the energy, skill, and ability demanded. There are, though, two grounds upon which it might appear reasonable that the ordinary rates in this district given for diving up cargo from a vessel should be departed from in this case: (1) The vessel was finally saved, thereby showing that the danger to the property was not as imminent as where the vessel is lost. (2) The libelants in this case were rendering valuable aid to the vessel and rest of the cargo,

and it is presumed were earning other salvage at the same time. How far should these questions affect the salvage in this case, if at all?

This cargo, or the greater part of it, which was taken out from the square of the hatches, was not only in certain danger of total loss unless removed, but its presence and position was imperiling the entire property. It would have been utterly impossible to save the ship but by taking it out, even had it been necessary to jettison it. In the case of the British steamship *Mississippi*, on Fowey Rocks, in 1874, (10 Adm. Rep. 595,) where the cargo was taken out by diving, and the vessel afterwards saved by other salvors, as well as in the case of *The Amisia*, (1872,) Id. 249, where the circumstances were the same, I had an opportunity to carefully examine this question, and considered that, where it was absolutely necessary that the cargo should be removed for the preservation of the vessel, the property was in as great danger as where the vessel is finally lost, or, rather, the need of assistance is just as urgent. I do not consider that the fact that the vessel was finally saved in this case should have any more weight than it did in those, or in the case of the cargo that went from the ship to Nassau.

The other ground, that the libelants were earning other salvage at the same time, presents a more difficult question for consideration. A fair, reasonable, and just compensation, and an equitable bonus or gratuity, is all that can in justice be given, in any case of property saved from marine disaster; and where a service is rendered to property of a large value, a small rate per cent. will pay more generously than a larger rate upon a smaller amount. It now appears from this case as tried that a valuable service was rendered this vessel and the entire cargo, and it is to be presumed that there will be awarded a fair and just salvage for such service from such property, but how far should such presumption influence an award in this case? There is nothing in this case to inform the court of the value of the entire property, so that it could be estimated about what would be a fair rate upon it, nor can this court decide how, when those other cases come on to be tried, they may appear, or what may be the decisions of those courts. The claimant herein is contesting such claims for salvage, and by his allegations denies the value of these services, and alleges that no substantial service was rendered until the arrival of the *Merritt*. Had decrees been given in these pending cases, this court could very justly consider such awards in determining this case, as the courts of the other districts can properly consider any award made in this case; but, in the absence of any such decrees, I do not consider that it is equitable or just to deprive the salvors in this case of anything they have actually earned from the property libeled, in anticipation of any future decrees from another court against other property.

Considering this case, then, in relation to the property libeled only, what would be a fair and just compensation? The numerous cases cited in the case of *The Slobodna*, 35 Fed. Rep. 537, show what have been the usual rates for diving up and saving cargo in this district for many years. Taking cotton in bales as a basis, the rates have usually

been 25 per cent. on that saved dry, 40 per cent. upon that saved from water, but without diving, and 50 per cent., or sometimes even higher, for that saved by diving, according to the peculiar circumstances of the case and the depth of the water, and I have never found that such rates have compensated the salvors too generously for the time and labor and services rendered. In other cases of merchandise than cotton, the rates have, at times, varied according to the bulk, value, or character of it, sometimes being more and again being less. This merchandise was of more value than cotton, and a somewhat less rate than is usually given on that would appear to be fair, even if the libelants had no interest in the rest of the property in peril. In the case of *The Tregurno*, (recently decided in this court,) 50 Fed. Rep. 946, where a steamer was driven high onto a rocky beach, was leaking, full of water, and had to have nearly all of her cargo taken out before she could be floated, in the light of numerous cases decided in this district, and *The Sandringham*, 10 Fed. Rep. 562; *The Egypt*, 17 Fed. Rep. 359; *The Kimberley*, 40 Fed. Rep. 289; *The City of Worcester*, 42 Fed. Rep. 913; and other cases, —I considered 25 per cent. not an unreasonably large salvage upon the entire ship and cargo; and, had the libelants done nothing but save the merchandise herein libeled, the same rate given in *The Tregurno* (25 per cent.) would not be deemed unreasonable. This is less than was voluntarily paid the Bahama wreckers for similar services, and will individually give the salvors but about \$80 per share, which is not deemed too large, simply as wages, when the time occupied and the character of the work is considered. On that cargo which went to Nassau there was paid from 30 to 35 per cent., and this Chief Justice YELVERTON in the case of *Braymen v. The El Dorado*, in the vice admiralty court at Nassau, January 28, 1892, characterizes as being "most grievously underpaid." Certainly, had this cargo gone the same way, it could have had no better fate or incurred less expense.

In order to procure possession of this property after it was libeled, a stipulation and agreement was entered into by libelants and claimant that the value of the property should be considered \$18,000, and that that value should be accepted in lieu of an appraisement. The claimant in his answer now denies that the property was worth \$18,000, and alleges that it was taken to New York, and there sold for less than that amount, and offers to introduce evidence of the sales, proceeds, and expenses. It has frequently been the practice of this court, when satisfied that an error has been made in the appraisement, and the property is still in its custody, even after judgment, to open the decree for a rehearing upon the value, and receive further evidence upon that point; but where parties, by agents well versed in this class of property, after a careful examination of it, agree upon, and stipulate for, a certain amount for the purpose of getting possession of it, take it beyond the knowledge or control of the court or the other party at interest, and dispose of it *ex parte*, I consider it would be a most unsafe practice to adopt to permit them to come in, and, by asking, set aside their agreement. If force

and validity is ever to be given to an agreement, it seems that it should be in this case, and I must hold that claimant is stopped from questioning the value of the property. But that stipulation is that that value shall be taken in lieu of an appraisalment, and as the value of the property at that time. It has been the established practice of this district, where a percentage of value is given, to ascertain the net value by deducting from the appraisalment all expenses which have been incurred in the care and custody of the property up to the time of so determining its value, and this seems but fair in this case. It is therefore ordered that there be deducted from \$18,000 all of the expenses of labor, warfage, and storage, etc., incurred in the preservation of this property previous to the 31st day of August, that being the date of the agreement, together with the costs and expenses of this suit, and the libelants receive 25 per cent. of the net amount thus found, and the matter be referred to the clerk, as commissioner, to ascertain the costs, charges, and expenses, and make the computations.

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